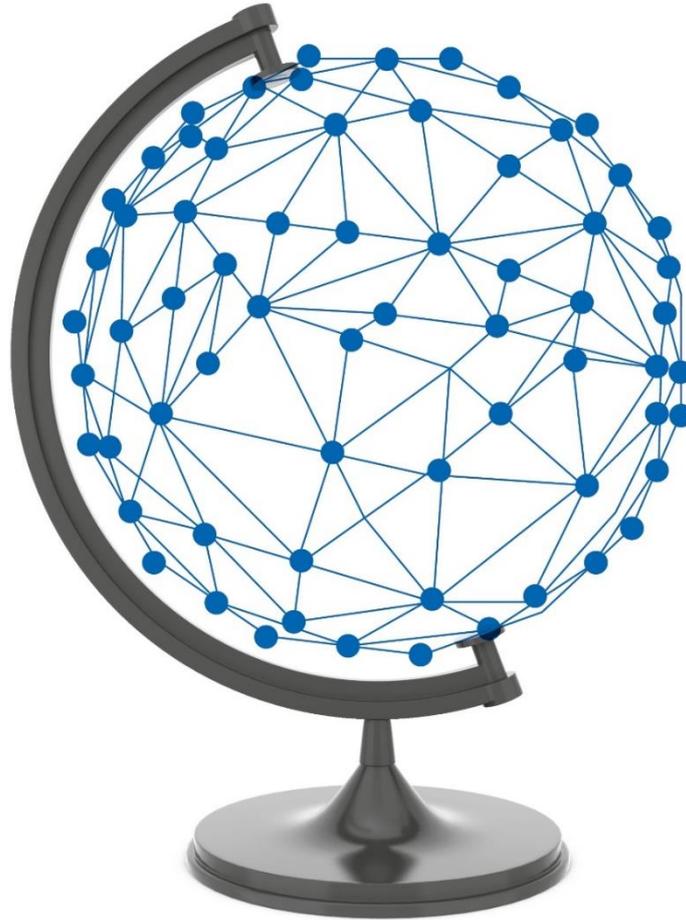


## Commercially connected UK commercial law updates



### Key developments

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# Introduction

Welcome to the Eversheds Sutherland UK monthly commercial law update.

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## Commercial – general

Development	Summary	Impact
Good faith before the Court of Appeal	<p>The Court of Appeal considered another case on contractual good faith at the end of last month so it is worth bearing in mind that <b>good faith will not be used as a tool to “rewrite” the agreement.</b></p> <p>Given the recent “avalanche of cases” (as one Lord Justice described it) <b>our disputes and commercial teams have produced this <a href="#">guide</a> on What you need to know about Good Faith in Contracts which considers implied duties, express duties, decision makers and different jurisdictions.</b></p>	
When is a binding contract created – High Court considers	<p>In <i>Fenchurch Advisory Partners LLP v AA Limited [2023] EWHC 108 (Comm)</i> one of the questions the Court had to determine was <b>whether a binding contract had been created where terms of engagement had been presented and were being negotiated (with work completed) but no terms had been signed?</b></p> <p><b>On the facts the Court found no binding contract as it was obvious that the parties envisaged a signed agreement containing all terms and not all terms had been agreed.</b> The Court then looked at whether an implied contract arose in respect of the work that had been undertaken. Whilst implied contracts can arise from conduct they should not lightly be implied (<i>citing Chitty on Contracts 34<sup>th</sup> Ed</i>) and again in this case, on the facts, <b>it was clear the parties were seeking to negotiate terms and the claimant took a risk in starting work in anticipation of an agreed contract. It was therefore not appropriate to imply a contract</b> however, the claimant did succeed on its unjust enrichment claim (for the work it had undertaken).</p>	



Immediate impact



Short-term impact



On the horizon



The case reminds us that:

- **if both parties are clearly in negotiation on terms then a contract will not come into existence as it is missing the key element of intent to create legal relations**
- **work done in advance of final contract terms being agreed is truly "at risk"**
- **if work needs to commence early and both parties agree that this should be the case this should be ideally captured in a short form contract to avoid future ambiguity or dispute.**

Lessons from case law

We have drawn out the following points from case law before the Courts over the past month:



- **a novation by conduct could be interpreted as a "form of dealing" and so a clause which stated not to "assign, transfer ... or deal in any other manner with any of its rights and obligations under this Agreement.. without prior consent" could cover novation.** In this case prior written consent was not obtained to the novation so the incoming party sought to argue it was not liable for paying commission to the continuing party. The Court of Appeal found **the continuing party could waive the prior consent requirement and give consent after the "dealing" occurred** [Musst Holdings Ltd v Astra Asset Management UK Ltd \[2023\] EWCA Civ 128](#). **Take away - whilst course of dealing can cover novation it is better to express it in the original contract. Should a novation occur it is best to capture the agreed position on liabilities in a novation agreement between the parties.**
- **witnessing a deed - the High Court considered the meaning of the phrase "in the presence of a witness who attests the signature" in a case which looked at whether a guarantee had been validly executed to be a deed.** The Court confirmed
  - **the witness had to observe the document being signed**
  - **there was no requirement to use specific words in attestation - "witnessed by" under the signatures to the document was sufficient.**
- **termination - if seeking to terminate a contract, it is important to consider all the grounds which give rise to the right to terminate and cite these in the termination notice. If this is not done there is a risk it will be difficult to recover its losses suffered**
- **force majeure/default - the High Court has followed the Court of Appeal's reasoning in MUR Shipping (reported in our [November](#) bulletin) finding that a clause in a contract which provided for co-operation on payment in the event one party was subject to sanctions was valid and could be followed even if to follow it the sanctioned party would not be able to use / access the funding following deposit - summary judgement**
- **contracting process - battle of the forms - a delivery note does not amount to a counter offer in a case where the purchase order from one party was followed by a delivery note which was signed on receipt of the goods and referred to supplier "terms".** The goods were not of satisfactory quality or fit for purpose (express terms of



Immediate impact



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On the horizon



the purchase order). ***BDW Trading Ltd v Lantoom Ltd***  
**[2023] EWHC 183**

Consultation on payment practices launched

As part of the Government's payment and cash flow review, this month BEIS published its [consultation](#) to amend the Reporting on Payment Practices and Performance Regulations 2017 and the Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017. Open until 28 April 2023 **the consultation seeks to understand how the existing regime can be strengthened to improve the payment practices of UK businesses.**



Of particular focus is whether the current Regulations should be extended beyond 6 April 2024 and whether further amendment is required in relation to:

- reporting the total value of payments not paid within agreed terms rather than just volume reporting
- including payment practices in directors reports
- supply chain finance, reporting disputed invoices, retention payments

Feedback on the costs to business of compliance is also sought.

**This will be of interest to large companies who are required to report their payment data under the regulations and suppliers (of any size) who deal with these reporting businesses.**

Call for views on Small Business Commissioner role

Also as part of the Governments payment and cash flow review, **the Department for Business and Trade ("DBT") are seeking views and evidence on its [statutory review of the role of Small Business Commissioner \("SBC"\)](#).**



Open until 28 April, **the review will focus on the effectiveness of the SBC and the impact of their work – whether payment practices are improving and the knowledge small business has of this resource.**

The SBC is an arm's length body of the DBT and was launched in December 2017 to support small business in payment disputes with larger customers. It is able to investigate complaints it receives on poor payment practice and has power to publish and report on such complaints.

The outcome of this review will be published as part of the wider payment and cash flow review referred to above.

Europe consults on payment rules

It is not just the UK reviewing its payment practices with the **European Commission opening its [call for evidence and public consultation as it considers revising EU payment rules so small and medium-sized enterprises \(SMEs\) are promptly paid.](#)** Whilst the Late Payments Directive has improved delays in payments the Commission cites that still more than 60% of EU businesses are not paid on time with SMEs the most affected. Feedback is welcomed until 17 March.



Government consults on draft Motor Vehicle Block Exemption Order 2023

In [October](#) we reported that the CMA had recommended that the Motor Vehicle Block Exemption (MVBE) be replaced by a UK Motor Vehicle Block Exemption Order (UK MVBE) when it expires at the end of May this year.



**A [consultation](#) is currently open until 1 March on the Government's proposed draft MVBE which reflects the CMA October recommendations.** The new order will enter into force on 1 June this year and apply until 31 May 2029. The CMA will be publishing accompanying guidance.



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House of Lords focus on the creative industries

The House Of Lords Communications and Digital Committee has published a report "**At risk: our creative future**". Recognising that "creative industries rank among the world's fastest growing sectors" it highlights the Government's current approach as "complacent" which "risks jeopardising commercial potential". Amongst the priority areas for attention are:



- Government commitment to supporting the sector financially (with further investment and tax reliefs) and in education (looking at the creative subjects and apprenticeship availability) and in employment (is AI threatening job security?)
- **Protect IP: The Intellectual Property Office must change its proposed approach to text and data mining to avoid undercutting creative industries business models. The Government should also commit to maintaining and promoting the UK's IP standards in trade deals.**

The latter point is of particular interest given we were expecting a change in regime so that text and content created by others could be "scraped" and used for commercial gain without payment to the original creator. However following the Lords Committee report and weeks of speculation **it was stated in Parliament** by the Minister for Science, Research and Innovation, **that the proposed general exception to copyright and database infringement for text and data mining ("TDM") will not be proceeding** recognising further consultation is required.

Government and CMA respond to inquiry into state aid and post Brexit competition policy

Last **October** we reported that the BEIS Committee had published the results of its **inquiry into state aid and post Brexit competition policy** and made a number of recommendations on:



- the CMA's role in monitoring and compliance;
- the Government supporting public authorities compliance with the Subsidy Control Act; and
- a push for the introduction of the Digital Markets, Competition and Consumer Bill.

The CMA and Government have now **responded** to this report as follows:

- **the CMA welcomes the scrutiny and is raising awareness of its work and how it can support people, business and the economy**
- **the CMA sets out how its Board operates and the process for setting strategic priorities and reporting on these**
- **guidance has been provided to public authorities on the Subsidy Control Bill** (as reported in our **November 2022** and **January 2023** bulletins)
- **confirmation that the Digital Markets, Competition and Consumer Bill will be introduced in this parliamentary session**

CMA publishes draft guidance on R&D block exemptions for comment

The CMA is consulting on draft guidance on the application of Chapter 1 of the Competition Act 1998 to horizontal agreements – this includes coverage of the R&D block exemption which came into force on 1 Jan 2023. The guidance is to help businesses assess whether they come within scope of the exemptions. Draft guidance and consultation are available [here](#).



Government assesses the Procurement Bill as ECHR compliant

The Cabinet Office has published a **policy paper** looking at issues arising under the European Convention on Human Rights (ECHR) which relate to the Procurement Bill.



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On the horizon



**The paper focusses on the debarment and exclusion of bidders in procurement processes and contains the Government's assessment of how the Procurement Bill will remain compliant with the principles of ECHR citing public interest and ability for Supplier appeal.**

Welsh Government publishes procurement route planner

The Welsh Government have [published guidance and templates for public sector bodies buying goods and services which are low value \(<£25k\), low risk and non-repetitive.](#)

The procurement route planner is designed to provide a step by step guide to procurements in this category to standardise procurement processes whilst highlighting minimum legal and policy obligations.



New PMCPA social media guidance for UK pharmaceutical companies

Our IP team have published this [article](#) on our website regarding new social media guidance for UK pharmaceutical companies.

**Pharmaceutical companies should ensure that their activities and social media policies adhere to the ABPI Code and all other applicable codes, laws and regulations.**



***If you missed our Commercially Connected Shorts weekly updates this month we highlighted the following developments:***

Implied terms in contracts debated by Supreme Court

Last [month](#) we reminded ourselves of the test for implying terms into contracts: A term will only be implied into a contract if it is reasonable and equitable, it is necessary to give business efficacy to the contract or is so obvious that it goes without saying, it is capable of clear expression and it doesn't contradict any of the express terms of the contract (Marks & Spencer v BNP Paribas).

A recent judgement from the Supreme Court provides additional commentary on implying terms based on the parties intentions and implying terms in law. It is of interest due to the **3:2 split in judicial decision meaning that the scope for further debate on these aspects of implied terms continues.**

**The key takeaways from this case are:**

- **leaving terms to be implied can be complex (particularly where no previous custom or course of dealing or written terms). A reminder that terms will not be implied just because they are reasonable if they contradict express terms set out in the contract**
- **if part of the contract is conditional, be as clear as possible on the triggers for any conditions to be met and work through the scenario of what the parties expect if conditions aren't satisfied.**
- **if there are conditions around payment (as in this case) consider whether a party will seek alternative recompense for its part of the contract or has a calculated risk been taken in reaching the arrangement? Would s15 of the Sale of Goods and Services Act 1982 apply? (S15 implies a term that the party contracting with the supplier for services will pay a reasonable charge where consideration for the service is not determined by the contract). Work through the scenarios and capture the outcomes in the contract if possible**
- **whilst oral contracts are a valid form of contract they require detailed examination of the facts and understanding of the parties in the event of dispute - it is far better to capture the arrangements clearly in writing**





The case revolved around whether any “introduction fee” was payable under an oral contract between a property seller (the respondent) and the claimant (who was not in the business of estate agency) when the property was sold for less than the value agreed which would trigger the introduction fee.

The first instance judge held that the claimant was not entitled to any payment as the value which triggered payment of the fee had not been met and there was no term in the contract to specify what would be due if the property was sold for less. The Court of Appeal allowed the appeal and held that the claimant was entitled to reasonable remuneration for his services (and made the award). On appeal by the respondent the award was not contested but the Supreme Court was asked to consider matters of unjust enrichment or relief on the basis of an implied term which arose from the case. By majority, the Supreme Court decided the express terms precluded any implied term claim of reasonable remuneration.

Focussing in on the discussion on implied terms the **three majority Judges found:**

- on the facts it was **“not possible to say that there is any particular fee to which the parties would clearly have agreed, or which is so obvious that it goes without saying and it is not necessary to imply such a term to give the agreement business efficacy or coherence”**
- as **the oral contract was a one off arrangement it was not a “contract for services” and did not require a term implied by law regarding payment (as in under s15 SOGSA) as it already had terms of payment in it**

Whereas, the **two dissenting Judges considered:**

- the **terms of the oral agreement reached between the parties did not negative the claimant’s right (pursuant to a term of the contract implied by law) to be paid a reasonable sum for the valuable service that he supplied** in bringing about the sale
- **the contract did not exclude, and was consistent with, a term implied by law giving the claimant reasonable remuneration for his services**

*Barton & Ors v Morris & Anor [2023] UKSC 3*

Clarity is key for drafting Law and Jurisdiction clauses

We are sometimes asked about the **drafting of Applicable Law and Jurisdiction clauses when dealing with contracts with parties based in different jurisdictions**. Last [August](#) we reported on a case before the commercial court which considered just this question. **The Judge found that the following clause presented a choice of jurisdiction:**



“APPLICABLE LAW AND JURISDICTION:

In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied,

Under liability jurisdiction will be extended to worldwide excluding USA and Canada.”

**This decision was appealed and earlier this month a majority in the Court of Appeal (2:1) held that the clause did not confer a choice but that the local court took priority with England and Wales acting as a fall-back if the local court chose not to engage.** Factors influencing the Judges allowing the appeal were:

- the reference to law and jurisdiction for the country where the policy was issued and only jurisdiction in the England and Wales drafting suggested that the local law and courts should be the first port of call



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- the use of the word “otherwise” in the drafting conveyed a fall-back for England and Wales

#### What can we learn from this case?

- the Judges criticised the poor drafting and it was interesting that **they looked at the clause from a “first impression” standpoint** (note two Judges reached different conclusions with this approach)
- much **debate focussed on the word “otherwise” and whether this was interpreted as “or” or “alternatively” or its use was more appropriate to introduce a fall back if the local option was not available** (again difference of opinion between the dissenting Judge and those allowing the appeal)
- **given the conflicting opinions of the Judges here make sure you:**
  - **are clear which choice of law will apply in your multi party international contracts. Should there be a true choice or an order of preference? Discuss this with your clients as you agree the contract**
  - **are clear on jurisdiction and separate it out from the applicable law drafting. Again reflect whether there is one jurisdiction, a choice or an order of preference**
  - **get a second pair of eyes on your drafting to challenge any ambiguity or words which could be interpreted in different ways**
  - not relevant in this case but whilst on this topic, **remember that greater protection is offered to consumers in this area who in the EU benefit from local laws over the supplier’s choice of law (not offering this could mean the clause is interpreted as unfair)**

*Al Mana Lifestyle Trading LLC and others v United Fidelity Insurance Company PSC and others [2023] EWCA Civ 61*

For a litigation round up of jurisdiction issues before the Courts see this [update](#).

Practical guidance on avoiding business cartels

The CMA has published a new [guide for employers on how to avoid breaking competition law](#). The guide focuses on recognising illegal behaviour, how to avoid it and how to report it. This comes as the CMA report that businesses found in breach could be subject to fines of up to 10% of their annual worldwide turnover and individuals risking fines, imprisonment and disqualification.



#### The guidance focuses on:

- **no poaching agreements – where 2 or more businesses agree not to poach / hire the other’s employees**
- **wage fixing agreements – when 2 or more businesses agree to fix employees pay and other benefits**
- **information sharing – sharing sensitive information about employee terms and conditions**

**The guide is short and easy to digest and includes some recommended steps to avoid anti-competitive behaviour in labour markets – useful for in-house counsel, boards and HR teams.** See also this [briefing](#) and this [article](#) from our Competition team on the topic.

Corporate Governance - what should businesses be

Each year the **Investment Association publishes its shareholder priorities for the year**. Through their institutional voting research service (IVIS) (a provider of corporate governance research) they



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focussing on this year?

**outline the expectations that investors have of FTSE companies and report on company best practice.**

Building on the priorities established in 2020 and **relevant for UK listed companies their focus areas for the year ahead are:**

- climate change –
  - biodiversity is a strong focus and **companies are encouraged to report against the Taskforce on Nature related Financial Disclosures (TNFD)** to assess nature related risks and opportunities
  - **IVIS will continue to highlight all commercial companies that do not make disclosures against all four pillars of Taskforce on Climate related Financial Disclosures (TCFD).**
  - continue to **monitor whether companies have made a statement that the directors had considered the relevance of climate and transition risks associated with the transition to net-zero, when preparing and signing off on the company accounts**
- diversity –
  - gender – **in addition to focussing on targets for women being represented at board level it is interested to see if a top down approach to diversity is reflected in the wider workforce and will look at gender pay gap data to inform this**
  - ethnicity – **continue to push for ethnic diversity at board level - top 100 FTSE companies to meet the Parker Review target of one director from an ethnic minority group and top 250 FTSE to achieve Parker Review targets by 2024**
- audit quality - **auditors should consider the FRC's Professional Judgement Guidance in supporting greater consistency on the judgements made on an audit**
- stakeholder voice - **companies should continue positive stakeholder engagement by extending the focus on engagement to the impact of the cost-of-living crisis on employees, customers and suppliers**

This [briefing](#) by our Corporate team provides further details.

Links

[Visit our Commercial hub](#)

[Visit our Coronavirus hub](#)



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On the horizon



# ESG

Development	Summary	Impact
<p>Carbon neutral and net zero claims subject to greater scrutiny</p>	<p><b>The Committee of Advertising Practice (CAP) has published updated guidance on carbon neutral and net zero claims in advertising.</b> Advertisers are advised to:</p> <ul style="list-style-type: none"> <li>• Explain the basis of claims: particularly when using terms such as “carbon neutral” or “net zero”</li> <li>• Provide accurate information about emissions: in particular to make it clear whether emissions are being actively reduced or whether claims are based on offsetting</li> <li>• Realistic strategy ambitions: any claims about achieving net-zero or carbon neutrality should be founded on a verifiable and realistic strategy, with real intention of implementation</li> <li>• Claims based on offsetting must be evidenced</li> <li>• Any information that qualifies a claim must be prominent: to ensure that it can be taken into account by consumers before making a purchasing decision</li> </ul> <p><b>The ASA intends to monitor the use and impact of its updated guidance for the next 6 months, in particular by assessing how environmental claims are substantiated by advertisers. This may result in the CAP providing further guidance on acceptable evidence to substantiate advertising claims if the ASA determines that this is required.</b></p>	



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On the horizon



Guidance for public sector on managing modern slavery risk

The Cabinet Office has published **guidance to Government departments and the NHS to ensure modern slavery risks are identified and managed in government supply chains**. Other public sector contracting authorities may also choose to follow the recommended approach.



**PPN 02/23 will apply to existing contracts and new procurement from 1 April 2023. To identify and manage risks departments must use the guidance "Tackling Modern Slavery in Government Supply Chains"** and

- should note the **risks now include sectors of concern such as cotton, PPE and polysilicon**
- should note there is **a new requirement for supply chain information to be provided at the selection stage of new procurements designated as "high risk"**
- should note the **additional guidance on enhanced due diligence and exclusion grounds**

**If you work in or with the public sector now is the time to sense check existing contracts and update future procurement plans. Suppliers to government should expect greater scrutiny in future procurements and be prepared for possible scrutiny in current projects.**

Government announces changes to managing waste

The English and Welsh governments have updated their [proposals](#) to **tackle crime and poor performance in the waste sector**.



**Loopholes in existing rules which criminals have been taking advantage of will be closed and there is a pledge to eliminate waste crime by 2043.**

Matters covering the use of depolluted end of life vehicle parts, the treatment of tyres and recovery of scrap metal will now require an environmental permit with other waste exemptions tightened through the introduction of greater record keeping and limits on multiple exemptions on one site. Councils will also receive funding to help manage fly tipping.

Policy on Air Pollution updated

The Government **updated their approach to managing air pollution** this month through the publication of the [revised National Air Pollution Control Programme](#) (NAPCP). **Measures are likely to include:**



- **cleaner stoves and guidance on domestic burning**
- **reduction in ammonia emissions in agriculture**
- **zero emission vehicles to help manage GHG emissions**
- **standards for industry to adhere to regarding emissions**
- **net zero and decarbonising the UK economy**

FRC updates 2021 Statement of Intent on ESG

**The Financial Reporting Council (FRC) has published an updated [statement of intent](#) on environmental, social and governance challenges.**



The FRC published its first Statement of Intent on ESG in 2021 which identified underlying issues with the production, audit and assurance, distribution, consumption, supervision and regulation of ESG information

The 2023 Statement summarises the initiatives that the FRC has undertaken in the UK and internationally since 2021 to assist and support its stakeholders and to drive best practice in high-quality and comparable ESG reporting and disclosure. This includes thematic, guidance and examples of best practice. The FRC has also been supporting international efforts towards a common international



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On the horizon



framework for sustainability disclosures, which is led by the International Sustainability Standards Board (ISSB).

The 2023 Statement also **highlights the FRC’s key areas of focus regarding ESG reporting during 2023 which include projects and thematics on -**

- **ESG Data - how and where to find it and use it effectively**
- **Materiality disclosures – what should be considered when determining what are material issues?**
- **Support for FRS102 Preparers**
- **Further updates on the Guidance on the Strategic Report**
- **TCFD disclosures and climate reporting: thematic report focused on metrics and targets for four key industries**
- **What are the ESG reporting requirements of the Corporate Governance Code? The FRC will be undertaking a review of the Code during 2023**
- **The link between investors and ESG reporting**

With thanks to Sarah Turner for this update.

CMA role in climate change

At the end of last month the **Competition and Markets Authority indicated how it would support climate change and seek to ensure competition law did not stand in the way of environmental sustainability initiatives**. This [article](#) by our competition team considers the proposal.



***If you missed our Commercially Connected Shorts weekly updates this month we highlighted the following developments:***

Government set targets for Environmental Improvement

As promised [last month](#), the Government has [published](#) its Environmental Improvement Plan 2023 which contains the first revision of the 25 Year Environment Plan setting out progress to date and specific targets and commitments across 10 goals. It also [reported](#) that by **meeting its statutory targets it is improving the environment and by November environmental protection and enhancement will be “embedded into the design and development of new policy across Government”**.



The overriding goal, to halt the decline in biodiversity through thriving plants and wildlife (to which the other goals feed), includes the following commitments:

- 70 new wildlife projects and a species survival fund to protect rare species;
- **incentives for farmers** to adopt nature-friendly practices be it restoration of hedgerows, reduction in ammonia emissions, use of natural pest control;
- update the green finance strategy with a goal to **raise at least £500m per year of private finance for nature recovery by 2027**
- protect 30% of land and sea for nature through nature recovery and protected marine environments.
- **cutting air pollution** by reducing limits for domestic appliances in Smoke Control Areas and challenging Councils to tackle “hotspots” through guidance and funding
- **clean and plentiful water** through the upgrade of 160 wastewater treatments works by 2027, roll out of water efficiency labelling on appliances and a 50% reduction in leaks by 2050



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On the horizon



- **manage exposure to chemical and pesticides** through a new Chemicals Strategy
- **improving resource efficiency** by:
  - introducing **packaging extended producer responsibility from 2024** (see last month's bulletin)
  - introducing **deposit return schemes from 2025** for plastic and metal drinks containers
  - implementing **consistent recycling** between different Councils
  - **banning single use plastics** from October 2023
  - implementing **due diligence requirements to tackle illegal deforestation in supply chains**
- update on **climate change progress** and plans for net zero
- publish five year strategy to **build the UK's climate resilience**
- deliver the investment plan to improve coastal and flood defences
- enhance biosecurity through delivery of five-year action plan starting this year
- commitment to **public access to green space or water within 15 minute walk from homes**

The launch of the plan is also accompanied by:

- the [Outcome Indicator Framework](#) which describes environmental change that relates to the 10 goals in the 25 Year Environment Plan.
- the publication of the [Environmental Principles Policy Statement](#)
- the Significant Improvement Test review report

Many of these will be familiar from initiatives already under way and reported upon over the past year. Unsurprisingly the measures cover a broad spectrum of sectors and industry so will impact us all and require us to change the way we operate. We will keep track of the initiatives launched to help meet these commitments.

**Alongside the EIP, the regulations which set new long term environmental targets for England have come into force.**

**They cover the targets for biodiversity on land; biodiversity at sea; water quality and availability; resource efficiency and waste; and woodland cover and detail how these will be measured.**

Europe's Green Deal Industrial Plan reveals further legislative changes, funding and opportunity

The European Commission has presented its plans to put "Europe's net zero industry in the lead" with its [Green Deal Industrial Plan](#).



Based on four pillars, **the plan aims "to provide a more supportive environment for the scaling up of the EU's manufacturing capacity for the net zero technologies and product required to meet Europe's ambitious climate targets"**. Here's what to expect:

- A **simpler regulatory framework with a Net-Zero Industry Act "to underpin industrial manufacturing of key technologies"**, a **Critical Raw Materials Act** to "provide the EU security of supply, processing and recycling, while ensuring high environmental standards and continuing research and innovation" and reform of the electricity market design
- **Faster access to investment and financing** will see [possible amendments to the subsidy control regime](#). They will also facilitate the use of existing EU funds for financing clean tech innovation, manufacturing and deployment.
- **Developing skills** for a "people centred green transition" with Net-Zero Industry Academies being established



Immediate impact



Short-term impact



On the horizon



- **Open trade for resilient supply chains** - developing the network of Free Trade Agreements and creating a Critical Raw Materials Club and Clean Tech/Net-Zero Industrial Partnerships

These proposals are to be discussed at a Special European Council meeting with further legislative proposals being considered at a European Council summit on 23/24 March.

Links

[Visit our ESG hub](#)



Immediate impact



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On the horizon



# EU relations

Development	Summary	Impact
Update on the Retained EU Law (Revocation and Reform) Bill	<p>We have been following the progress of the Retained EU Law (Revocation and Reform) Bill since it arrived at the House of Lords for consideration in January. <b>At the beginning of the month the Bill had its second reading and the House of Lords Regulatory Reform Committee released its report which recommends the removal of five clauses which contain inappropriate delegations of power.</b></p> <p><b>In practical terms this means they recommend:</b></p> <ul style="list-style-type: none"><li>• <b>each specific piece of retained EU law (REUL) should continue to have effect on and after the sunset date unless the Bill contains express provision for that specific piece of legislation to be revoked from that date</b></li><li>• <b>powers to amend or restate retained EU legislation should rest with Parliament not ministers. To suggest otherwise is contrary to commitments in the EU Withdrawal Act 2018</b></li></ul> <p>This came following the second iteration of the <a href="#">retained EU law dashboard</a> which now lists 3745 pieces of legislation.</p> <p>The Bill is now scheduled to start the committee stage in the HoL later this week and this follows the release of a second HoL Committee report from the Constitution Committee which:</p>	



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On the horizon



- **recommends further scrutiny on the proposals to delegate power to Ministers**
- **highlights a shared concern of the earlier HoL Committee that the sub-delegation of power “potentially erodes democratic accountability”**
- **recommends that the Bill is amended to “require UK ministers to consult the relevant devolved administrations before making regulations that affect areas of devolved competence”**
- **highlights “the House may wish to ask the Government how it intends to mitigate the legal uncertainty caused by the Bill”**
- **highlights “the House may wish to seek specific assurances from the Government about the action it proposes to take to ensure that the UK upholds its obligations in international law in the context of the automatic sunseting”.**

We still await a definitive list of the legislation which would be subject to the sunset provisions of the Bill at the end of this year and Government assures us (following the second reading) that work on this is already underway and they recognise the need to pass a swathe of legislation before the end of year.

Have your say on EU Foreign Subsidies Regulation

Last [month](#) we reported that the EU Foreign Subsidies Regulation will apply from 12 July 2023. A [consultation](#) is currently open until 6 March for stakeholders to give feedback on its implementation, all responses are taken into account in shaping the final Regulation.



Links

[Visit our Brexit hub](#)



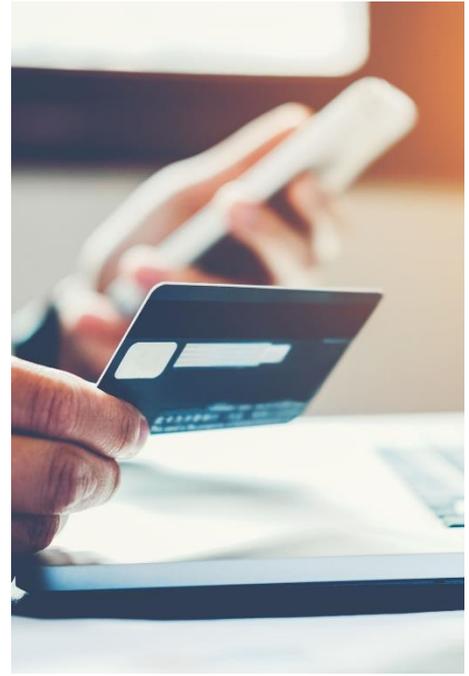
Immediate impact



Short-term impact



On the horizon



# Consumer law

Development	Summary	Impact
<p>Government is asked for comment on the EU approach to product safety and liability</p>	<p>The UK’s cross parliamentary European Scrutiny Committee (ESC) has been <b>keeping an eye on the progress of the EU’s General Product Safety Regulation and EU product liability regime for defective products</b> (see update below). In its latest <a href="#">report</a> it considers:</p> <ul style="list-style-type: none"> <li>the EU General Product Safety Regulation – <b>action is required to understand the UK Government’s views on this legislation now that the EU text has been agreed “in principle” given that this will apply in Northern Ireland and affect the wider UK market for goods</b></li> <li>the EU product liability regime for defective products – as the strict liability regime for defective products will apply in Northern Ireland <b>Government views are being sought on the implications for consumers in Northern Ireland and the impact on UK business who supply into the EU</b></li> </ul> <p>In relation to this legislation, the ESC query, in particular, <b>how a dual regulatory approach would work in practice and how issues of divergence in approach (between EU and UK) would be resolved?</b> Letters have been sent raising these concerns to the Minister for Small Business and responses are requested by 8 March.</p>	
<p>ASA warns against misleading adverts on</p>	<p>The ASA has taken the opportunity to <a href="#">speak out</a> against <b>advertisers who promote alternative heating irresponsibly in times where the price of household bills is at a high</b>. Speaking out after</p>	



Immediate impact



Short-term impact



On the horizon



managing the cost of living

[banning four ads for mini plug in heaters](#) the ASA said it was important for **advertisers to be “sensitive to consumer money worries” and “ads should not be misleading”**. The claims made were in respect of mini plug in heaters which would “quickly and efficiently heat a room” when the Energy Saving Trust reported that gas was cheaper than electricity and so a room heated by a radiator would be more efficient than a plug in device.

“Green” claims on household essentials to be scrutinised

The Competition and Markets Authority (CMA) has [announced](#) it will be **expanding its work on greenwashing to looking at products in the fast moving consumer goods sector (FMCG) to see if they are being marketed accurately**. The CMAs review will check whether companies are compliant with consumer protection laws and so **“now is a good time for businesses to review their practices to ensure they’re operating within the law”**.

The CMA’s [Green Claims Code](#) can help with this audit. If the CMA investigation uncovers unfounded green claims it will consider enforcement action.

The FMCG sector attracts attention as the CMA report that in the last year consumer spend on household essentials such as food, drink, cleaning and homecare products exceeds £130 billion.



ASA publishes top tips for product warranties and guarantees

**Top tips for wording guarantees or warranties offered with product purchases** have been [published](#) by the ASA. These include:

- **being clear on what you mean when citing “guarantee”**
- **don’t “guarantee” performance which can’t be proven**
- **don’t confuse “lowest price guarantee” with “lowest price guaranteed” – they mean different things**
- **make consumers aware of any limitations of the guarantee / warranty offered**
- **honour the guarantee if offered**



EC reports on manipulative consumer practices by retailers

**The European Commission has published data from its screening of retail websites to identify manipulative practices**. 148 of the 399 online shops were found to contain “dark patterns” which might push consumers into making decisions not in their best interests. The following practices were identified:

- **fake countdown timers** showing deadlines to purchase products
- **hiding important consumer information** such as delivery costs; subscription; the availability of cheaper options
- **directing customers** towards subscriptions or more expensive products

The traders concerned will be contacted to rectify the position but **the message to retailers is to be open and transparent with consumers on your offering or risk compliance notices**.



Illicit trade in counterfeit goods hits SMEs

**The EUIPO and the OECD have published a joint report on the risks of illicit trade in counterfeits to small and medium sized firms**. The report shows that **IPR infringement is a major risk to the profitability and survival of SMEs, particularly for those that suffer patent infringement**. SMEs whose IP has been infringed have a 34% lower chance of survival than those that don’t. The most frequently targeted fake products are electrical machinery and electronics, clothing, perfumery and cosmetics, toys and games. The majority of fakes come from China and Hong Kong by mail. 40% of SMEs don’t monitor markets for counterfeit goods and 11% of those whose IP has been infringed do not enforce their rights, primarily because enforcement is perceived as too complex, lengthy and costly.





***If you missed our Commercially Connected Shorts weekly updates this month we highlighted the following developments:***

Recommendations from EESC on two Liability Directives

**The European Economic and Social Committee (EESC) acts in an advisory capacity to the European Parliament, Council and Commission. One of their missions is to help ensure policy and legislation tie in with economic, social and civic circumstances on the ground hence its recommendations can help shape the legislation enacted.**



At the end of last month, the EESC published its [Opinion on the AI Liability Directive](#) (which will make it easier for claimants to claim compensation if they have suffered damage as a result of an AI product/system operating in a discriminatory manner).

They recommend:

- a uniform scheme to be applied across member states to prevent divergent interpretations
- clear definitions to support this
- setting up ADR networks to make access to claims easier for victims
- for the Commission to monitor insurance for AI products and whether this should be mandatory
- a review of the directive 3 years after it enters into force

The following week the EESC published its [Opinion](#) on the revised **Product Liability Directive** (which allows a means for consumers to obtain compensation as a result of a defective product).

Key points include:

- highlighting defective product claims as among the fastest growing claims in the EU hence a review of the legislative approach is welcomed
- the balance of consumer protection and promoting technological innovation for manufacturers needs to be supported and maintained
- legal certainty across states and a simple regime will be key to it being implemented successfully
- aligning proposals to existing EU legislation (of which there is a lot of) so there is clarity

**The Opinions highlight the areas of each Directive where the EESC consider further thought or adjustment is required in order to be effective. This will be of interest to those supplying products into the EU who will need to comply with the new laws once enacted.**

Links

[Visit our Consumer hub](#)



Immediate impact



Short-term impact



On the horizon



# Cyber security

Development	Summary	Impact
The new NIS Directive	<p>In our <a href="#">last bulletin</a> we reported that Directive (EU) 2022/2555 (“<b>NIS2</b>”) came into force on 16 January 2023 to replace Directive (EU) 2016/1148.</p> <p>The European Union Agency for Cybersecurity (“<b>ENISA</b>”) believes that <b>NIS2 will be for the betterment of cyber security in the EU</b>. The following are examples of improvements:</p> <ul style="list-style-type: none"><li>• <b>broadening the scope of suppliers and providers caught by its ambit (including ‘data centre services’)</b></li><li>• <b>increasing the alignment of reporting obligations and security requirements;</b></li><li>• <b>creating the Cyber Crisis Liaison Organisation Network (“CyCLONe”); and</b></li><li>• <b>utilising knowledge across Member States by improving collaboration</b></li></ul> <p>EU Member States should take note that they have 21 months in which to include NIS2 into their national legislative framework.</p>	

***If you missed our Commercially Connected Shorts weekly updates this month we highlighted the following developments:***



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On the horizon



Cyber threats are the focus of two new government consultations

The Government has been busy with cyber related consultations with the Home Office launching their **consultation on their review of the Computer Misuse Act 1990** and the DCMS launching a **call for views on software resilience and security**.



**To address the growing threat of cyber-crime the government seek views on three proposals for legislation which would bolster the Computer Misuse Act:**

- “the development of a **new power to allow law enforcement agencies to take control of domains and internet protocol (IP) addresses** where these are being used by criminals to support a wide range of criminality, including fraud and computer misuse”
- “a **power to allow a law enforcement agency to require the preservation of computer data** in order to allow that law enforcement agency to determine whether the data would be needed in an investigation”
- “whether a **power should be created that would allow action to be taken against a person possessing or using data obtained by another person through a CMA offence**”

The consultation is open until 6 April 2023.

The DCMS call for views is part of the **government’s aim “to ensure the government and industry stay ahead of the [cyber] threat and has the building blocks in place for a secure digital economy”**. **Understanding how to address software risks and help create a more resilient digital environment** is the next step to achieve this aim.

The call for views **covers all software which might be used in a business setting** whether on premise or cloud based and “focuses on software risks across the breadth of the software lifecycle - that is, the full range of processes involved in the development, distribution, use and maintenance of software packages and associated systems up until, and including, the time at which it is no longer used or maintained”.

The **call for views is in three parts** focussing on:

- **cyber risks associated with software** – government wants to understand the impact of these risks on organisational resilience
- **steps organisations take or could take to manage software risks**
- **how government can support and or incentivise UK companies to better address software security risk**

The call is open until 1 May 2023 and a government response expected in summer 2023.

Links

[Visit our Data Privacy and Cyber hub](#)



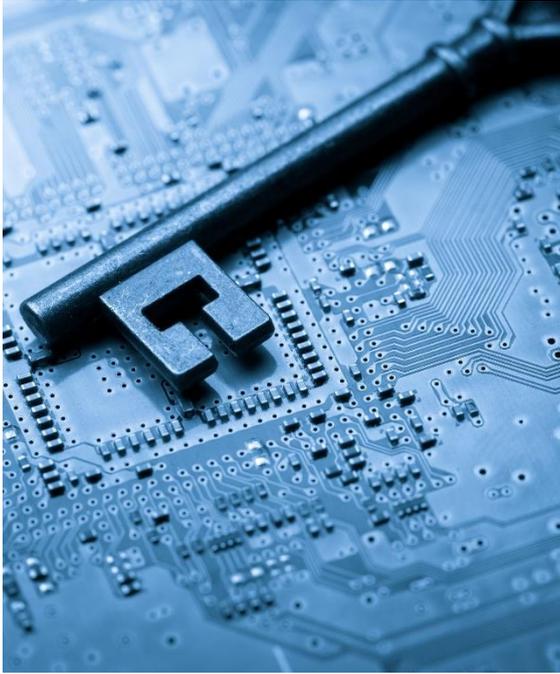
Immediate impact



Short-term impact



On the horizon



# Data protection and privacy

Development	Summary	Impact
The Digital Euro in 2023	<p>Cash of course is the most “privacy-friendly” means of payment in our increasingly digitalised world. <b>Recently, the European Central Bank (“ECB”) has been asked by the European Data Protection Board to include safeguards and features similar to those found in cash to the future digital euro.</b></p> <p>In 2021, an investigation phase was launched by the ECB for the development of the digital euro which sees this as a complement to cash rather than a replacement. Transaction confidentiality has been found to be the most important requirement of the future digital euro to have success in competing in an already crowded payments market.</p> <p>Last October, the EDPB issued a statement inviting the ECB to consider its approach on three focal points:</p> <ul style="list-style-type: none"><li>• the possibility of using the digital euro my way of an offline electronic wallet, without internet connection</li><li>• by way of avoiding generalised transaction tracing, a privacy threshold will be granted for online and offline use (below this threshold, transaction data would not be traced by the Eurosystem or intermediaries)</li><li>• a specific legal regime for the digital euro will be introduced in EU law to provide a fair balance between</li></ul>	



Immediate impact



Short-term impact



On the horizon



privacy, data protection and the combat against money laundering and terrorist financing.

**It has been said that 2023 will be a significant year for the digital euro project. The aim is to have a legislative proposal from the European Commission by the summer, which leaves a mere 5-6 months to plan and design a digital euro that appreciates privacy from the beginning.**

Regulation of communication service providers by the ICO

On 20 January 2023, the Information Commissioner's Office ("ICO") made a statement on **the obligations of public electronic communications service providers ("CSPs")**. This was done under Regulation 5A of the Privacy and Electronic Communications Regulations 2003 ("PECR").



In brief, the ICO had said it was going to relax the reporting requirements for CSPs as this was too onerous and was creating a disproportionate volume of reports, when considered alongside the likely resulting risk. However, shortly after, this statement was taken down and reviewed as a result of a desire to offer more transparency in regard to CSPs. **The ICO has a three-year strategic plan, known as the ICO25, which aims to lessen the burden and costs of requirements to comply with data protection.**

In accordance with Regulation 5A PECR, **CSPs must notify the ICO within 24 hours of finding out about a personal data breach. If this is not complied with, the CSP can receive a penalty of £1,000 from the ICO. Essentially, this requirement to notify the ICO is in place of the reporting obligations required by UK GDPR.**

New FOI resources to support public authorities

As part of their ICO25 plan commitments, the Information Commissioner's Office ("ICO"), has announced **a number of new initiatives and support systems that they have introduced to improve their Freedom of Information services available for public authorities.**



**A new 'Upstream Regulation team' has been set up with the aim of promoting "good practice", a specific duty listed within the Freedom of Information Act 2000 ("FOIA").** To achieve this aim, the team have been working to examine what public authorities need help with and how the team can support. Independent research has been conducted and a survey has been undertaken with responses gathered from public bodies. Internally, input has also been gathered from the ICO's casework and stakeholder engagements.

**The ICO have also released a suite of documents to assist public bodies in complying with FOI requests and meeting the response timescales.** These resources include an FOI self-assessment toolkit allowing you to "assess your current FOI performance" and consider where improvements can be made. A link to the resources can be found [here](#).

Additionally, **Practice Recommendations have also been issued and can be viewed on the ICO's website [here](#).** Practice Recommendations set out the ICO's view on whether public authorities have complied with their obligations under FOIA, and often set out the steps that should have been taken for the authority to conform. **These recommendations therefore provide good steps and examples for public bodies to follow when ensuring they are acting in compliance with the Act.**





Finally, the **ICO also encourage publication of information that is safe to disclose and that is in the public interest** and they have released a publication scheme report (linked [here](#)). This report includes "recommendations to help support public bodies comply with this area".

**This additional support and guidance materials from the ICO is welcomed and will assist public bodies to ensure they are complying with their responsibilities under FOIA.**

ICO decision provides guidance on Facial Recognition Technology in schools

The question of **how to validly identify and secure transactions within schools has been a challenge for some time**. In a recent decision, the Information Commissioners Office ("ICO") has published a letter (link [here](#)) explaining its views on the use of Facial Recognition Technology (FRT) in schools.



**Whilst the ICO has not discouraged schools from embracing new technology, it has set out clear guidance to follow regarding the data protection considerations and compliance which must be considered alongside the use of such technologies.** Recognising that, particular challenges exist in the following areas:

- **ensuring a valid lawful reason for processing:** given the processing of biometric data, this will most often be consent, but this must be obtained from the parent (if under 12) and from the child (if 12 or over) and must be explicit to meet data protection standards
- **ensuring fairness and transparency:** privacy notices must be fully informed and must be written using "age appropriate language", in an "intelligible and easily accessible form". This is often easier said than done in practice
- **data minimisation:** the processing undertaken needs to be limited to what is necessary to achieve those identified lawful processing purposes. This needs to be assessed and recorded to help shield against future complaints and claims

**It is hard not to see the wider guidance here as a homage to our old friend, the Data Protection Impact Assessment ("DPIA").** Done properly, a DPIA would ensure a proper assessment of lawful basis, fairness, transparency and data minimisation as a single source of truth. **Whilst certainly not universally viewed with great warmth in the sector, this is another reminder that early detailed thinking and a clear, contemporaneous audit trail are the most powerful shields to have in this area to regulatory enquiry, enforcement and complaint.**

Viewed another way, **you could read this guidance as making it pretty clear that if you have such systems in place (or indeed are undertaking high risk processing in other areas) without a good DPIA, you are very much leaving yourself open to challenge if complaints are received.**

To find out more, you can read our firm Briefing on this topic, linked here: [ICO decision provides guidance on Facial Recognition Technology in- Publications - Eversheds Sutherland \(eversheds-sutherland.com\)](#).





The Government's 2022 to 2025 roadmap for Digital and Data – Transforming for a Digital Future

Back in June 2022, the UK government released their **2022 to 2025 Roadmap for Digital and Data, Transforming for a Digital Future**. The roadmap reflects the government's plan to "transform digital public services, deliver world-class digital technology and systems and attract and retain the best in digital talent".



The aim is to utilise technology and data to enable the government to operate efficiently and whilst progress has been made in the last decade, ambitious goals have been set and more work needs to be done. The press release recognises that in many ways the government lags behind, where "services are often slow, difficult to use and expensive to deliver".

The government committed to investing an additional £8 billion in digital, data and technology transformation by 2025, and by this date, the hope is that the government will:

- exceed public expectations;
- equip civil servants for a digital future; and
- enhance government efficiency and security.

This goal is split against six cross-government missions and progress will be reviewed and reported upon every 6 months.

**Within the most recent 6 month update, released on 6 February 2023, the Government announced they have made the following developments:**

- a single definition of 'great' government service has been created as a baseline
- Government Digital Service (One Login) is progressing and plans for onboarding central government services are in the process of being agreed
- a prototype for the first Data Marketplace "cross-government catalogue" has been created
- core responsibilities and roles for data governance have been mapped out within a data ownership model
- opportunities have been initiated to improve efficiencies and encourage reuse of technology
- almost 2,200 new colleagues have joined the Digital, Data and Technology function and
- issues and barriers to progressing digital transformations are being addressed

New data protection law in Oman

With the aim of bringing Oman's legislative regime more in line with global data protection laws, the Royal Decree No. 6 of 2022 Promulgating the law on the Protection of Personal Data ("Data Protection Law") was issued on 9 February 2022 by the HRH Sultan Haytham. A few days later on 13 February 2022, the Data Protection Law was published in the Official Gazette No. 1429. **The new Data Protection Law will come into force next year on 13 February 2024.**



The Ministry of Transport, Communications and Information Technology is the regulatory authority responsible for the enforcement and effect of the Data Protection Law and will be expected to issue executive regulations in relation to it.



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On the horizon



As a result, Chapter 7 of the Electronic Transactions Law is to be repealed and replaced by the new Data Protection Law. **To name a few, the new Data Protection Law provides for the following:**

- **the right to access personal data**
- **the right to erasure and**
- **the right to not be subject to processing without consent.**

Increased compliance with AI

**With the growing presence of AI-based decision making in the EU and the United States, data privacy laws are being implemented to protect employees' personal data used by businesses through automated decision-making processes. This includes increased transparency on the use of individuals' data and consent options.**



By way of example, New York's Local Law 144 will regulate how organisations use automated employment decisions tools, in contrast with the Consumer Privacy Act in California (the CCPA), recently amended by the California Privacy Rights Act (CPRA), which expands data privacy law. This will offer protection to job applicants and employees, in addition to dealings between businesses and independent contractors. Businesses will need to make certain they are compliant with AI and data privacy regulations in the future.

Links

[Visit our Data Privacy and Cyber hub](#)  
[Visit our Schrems II hub](#)



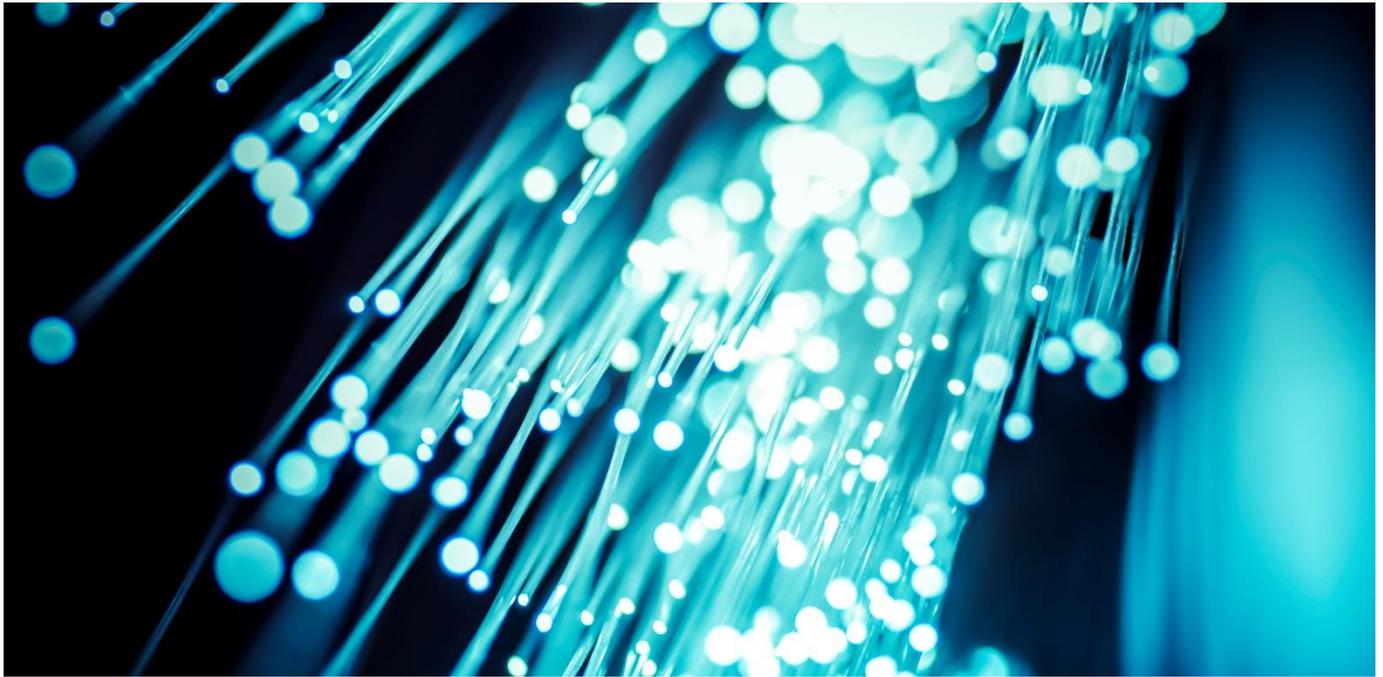
Immediate impact



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# Technology law

Development	Summary	Impact
Government strategy for UK semi-conductor industry awaited	<p>Back in <a href="#">December</a> we reported that the BEIS House of Commons Committee had <a href="#">published</a> a <b>report on the UK semiconductor industry</b>, with recommendations to the UK Government. This focused on supply chain disruption and the role of geopolitical factors in potential future disruption. It recommended that the UK should work more closely with allies including the EU and US to ensure security of supply.</p> <p><b>The Committee has now published a further report on the Government's response to the first report.</b> This <b>highlights the Government's lack of progress in this area</b>, in particular because the Government has still failed to publish its semiconductor strategy which was due in autumn 2022 and it has put off responding to several of the substantive recommendations in the first report by saying that these will be covered in its strategy. <b>The Government has stated that its strategy (which it proposes to publish as soon as possible) will focus on the objectives of growing the UK semiconductor sector, safeguarding the UK against supply chain disruption and securing the UK against the security risks associated with semiconductor technologies. The Committee has requested an updated report from Government once the strategy is published.</b></p> <p>Meanwhile in Europe, <b>the European Parliament has set its position on the chips industry with a <a href="#">release</a> which indicates</b></p>	



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**that MEPs are ready to look at new laws with the European Council to boost the EU chips industry.**

The "Chips Act" aims to "bolster technological capacity and innovation in EU Chips" and the Chips Joint Undertaking aims to "increase investments" for developing innovation and production in Europe.

Updates on the  
Digital Services Act

The European Commission has published [guidance on the Digital Services Act requirement for online social media and market place platforms to publish user numbers by 17 February 2023 and six monthly thereafter.](#)



Our **October** bulletin highlighted that online social media and market place platforms would be required to publish the number of average monthly service recipients so that the Commission could classify such platforms as "Very Large Online Platforms" (VLOP) or Very Large Online Search Engines (VLOSE) (with over 45m average active monthly service recipients). These VLOPs VLOSEs will be subject to greater regulation under the DSA.

Whilst eventually there will be legislation setting out how to calculate user numbers this is not envisaged until 2024 and therefore the Commission has drafted guidance based on frequently asked questions it has received. This will no doubt be updated as further FAQs are posed.

**Key points:**

- **average monthly participant is calculated with reference to the previous 6 month average**
- **"active" recipients are those who "actively" engage with the platform – ie: view; listen; submit - but not arrive by mistake**
- **providers of online platforms allowing consumers to conclude distance contracts with traders will count as being "active" – relevant for sites which act as intermediaries as well as offer their own products/services**
- **third party advertisers count as "active" recipients**
- **numbers and calculation method should be published online so the data is publicly available and shared with the Commission's dedicated mailbox**
- **double counting should be avoided where possible**

As the above requirement became operational the Commission published a draft implementing regulation for [consultation](#). The implementing regulation will apply in respect of investigation and enforcement activity carried out by the Commission against VLOPs and VLOSEs. The consultation is open until 16 March 2023 with Commission adoption planned later this year.

UK digital identity and attributes trust framework guidance published

The [trust framework](#) is a set of developing rules and standards designed "to establish trust in digital identity products in the UK". Any organisation who wants to participate must be certified and the [guidance](#) sets out the certification process and covers:



- what to do before starting the certification process
- working with a certification body
- the assessment process
- ongoing assessments.

European Commission to grow its understanding of DLT

**The European Commission has launched a regulatory sandbox for innovative use cases involving distributed ledger technology (DLT).** Sandboxes allow companies to test their products in a safe confidential environment whilst engaging with regulators on compliance. **A two way process, the company gains from understanding the legal and policy landscape for its**



Immediate impact



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On the horizon



**project and the regulators gain a greater understanding on what the relevant DLT can offer and help shape best practice.**

The sandbox will run for 3 years and support 20 projects per annum. It is funded by the EU as part of their digital ambitions. Chosen projects are selected through an expression of interest process.

EUIPO discussion paper explores the relationship of IP and new tech

**The EUIPO has published the second edition of the IP Infringement and Enforcement – Tech Watch Discussion Paper.** The first edition in 2020 covered blockchain, AI, robotics, 3D printing, nanotech and spatial computing. This [2023 Paper](#) reviews those technologies and adds in Internet of Things, 5G/6G mobile networking, NFTs, cryptocurrency investigative forensic tools and quantum computing. **The paper considers how these techs can be used to assist IP protection and, conversely, how they can be used by IP infringers to assist in production of counterfeits, in IP-related cyber fraud, etc. The paper also considers the impact of in-scope tech on environmental protection, sustainable development and climate change.**



***If you missed our Commercially Connected Shorts weekly updates this month we highlighted the following developments:***

The regulatory framework for crypto assets moves a step closer with policy statements and a further Treasury consultation

This month the Government published **two updates on its approach to regulating cryptoassets:**

- a **policy statement** on the **regulation of financial promotions**
- its **consultation and call for evidence** on the **UK’s future financial services regulatory regime for cryptoassets**

Following the policy statement, the FCA took the opportunity [this week](#) to **remind crypto asset firms (whether based in the UK or abroad) that their marketing to UK consumers must be compliant and they must start to prepare for the financial promotion regime.** Failure to comply is a criminal offence and the FCA will take action against those in breach.

The next phase of regulation is heralded by the HMT consultation (open until 30 April) which sets out the **government’s ambition to take proactive steps to harness the opportunities of new financial technologies so that the UK is home to the most open, well-regulated and technologically advanced capital markets in the world.** It is hoped that regulation in this area will provide clarity to consumers and businesses alike as the government seeks to achieve a regime which encourages innovation but risks are managed.

The **government intends to regulate this field in a way which is consistent with traditional finance and the consultation forms phase 2 in its approach** and builds on the existing regime already in place which includes an anti-money laundering and counter terrorist finance (AML/CTF) registration process for crypto firms and its current plans to legislate for financial promotions and stable coins.

**Key proposals in the phase 2 consultation include focus on the trading and investment of crypto assets, areas which pose a higher degree of consumer risk and balancing this with supporting UK growth. Government will also use the consultation to inform future policy development.**

[Read our latest article](#) on this topic by our FS team which **summarises the key proposals for consultation** and contact them if you wish to contribute to our submission on the proposals.



Digital pound – what you need to know

**The “digital pound” was in the financial headlines this month** following a statement in the House of Commons, the launch of a Bank of England and HM Treasury **consultation entitled “The**



Immediate impact



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On the horizon



**digital pound: a new form of money for households and businesses?"** and a speech by BoE Deputy Governor at UK Finance.

**The digital pound, if adopted, will be the UK's central bank digital currency (CBDC), a state run currency with a legal status broadly equivalent to physical cash. As of yet, there is no final decision on whether there will be a digital pound but this [bulletin](#) by our financial services team contains all you need to know on the current thinking and possible timeline for introduction.**

Court of Appeal  
comment on fiduciary  
duties for blockchain  
developers

The Court of Appeal have found that England is the right place to hear a **cryptocurrency dispute involving a breach of fiduciary duty claim** being brought by a Seychelles company associated with an Australian individual resident in the UK (who claims to be the inventor of Bitcoin) **against bitcoin software developers** (all resident out of the jurisdiction) **who it is claimed failed to implement a software 'patch' to safeguard his assets.**



By way of reminder, **"a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty."** (from the leading case of *Bristol and West Building Society v Mothew* [1998] Ch1 at 18A-C)

The **Court found that there was a serious issue to be tried (should blockchain developers owe fiduciary duties)** and the following factors were relevant in allowing the appeal and case to progress:

- **"The developers of a given network are a sufficiently well-defined group to be capable of being subject to fiduciary duties"** – developers might argue that no-one has "control" as the blockchain system is de-centralised and the developers are a "fluid" group. This is likely to be one of the key considerations in the forthcoming case.
- **"Viewed objectively the developers have undertaken a role which involves making discretionary decisions and exercising power for and on behalf of other people" – discretionary decisions are common to those in a fiduciary duty role**
- **"Property owned has been entrusted to the care of the developers" – there is a legitimate expectation from owners that bugs in the software will be fixed when drawn to the developer's attention**
- **"It may... include a duty to act to introduce code so that an owner's bitcoin can be transferred to safety in the circumstances alleged by the claimant"**

**The ultimate outcome of this case could lead to an extension of the common law on fiduciary duties.** The judgement also makes interesting reading for its summary on the history of bitcoin and the operation of cryptocurrency and its recognition on the Law Commissions current work on digital asset classification. We will keep an eye on future developments in this case but see [here](#) for our FSDI team's take on it.

*Tulip Trading Limited (A Seychelles Company) v Bitcoin Association for BSV & Others* [2023] EWCA Civ 83





Links

Visit our Technology hub



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