Welcome to the Regulatory Outlook, providing you with high-level summaries of important forthcoming regulatory developments to help you navigate the fast-moving business compliance landscape in the UK.

Developments to keep an eye out for include:

- Procurement Bill, Online Safety Bill and Economic Crime and Corporate Transparency Bill receive Royal Assent
- CMA publishes new Green Agreements Guidance on sustainability collaborations

October 2023
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Advertising and marketing
ASA publishes final report on Intermediary and Platform Principles Pilot

The Advertising Standards Authority (ASA) has published a final report covering its Intermediary and Platform Principles Pilot. The pilot was introduced by the ASA in June 2022 in cooperation with a group of some of the largest companies in the digital advertising sector, and ran until June 2023.

The pilot was designed as an attempt to strengthen the cooperation between the ASA and the participants in supporting the ASA’s online regulation and promoting the public’s and advertisers’ awareness of the ASA system. Six voluntary principles (alongside the guidance) supported the pilot, and participating companies agreed to provide information to the ASA to demonstrate how they implemented those principles applicable to the services they offer.

The ASA says that it has been greatly encouraged by participating companies’ overall commitment to the principles and willingness to cooperate. The ASA outlined examples of good practice and highlighted areas for ongoing consideration in terms of the implementation of one or more principles by participating companies. Overall, the ASA’s assessment of the pilot is positive.

Next steps include a review of all information gathered through the pilot by the ASA, the industry and other stakeholders to evaluate any gaps in the ASA’s ability to secure advertisers’ compliance with the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing online, and how they can be addressed. The review will also take place in the context of the government's Online Advertising Programme.

Report of the influence of NFTs and blockchain: advertising aspects

The House of Commons Culture, Media and Sport Committee in its recent report has considered the influence of non-fungible tokens (NFTs) and blockchain on various sectors, such as the arts, culture and professional sports. Among other things, the report dedicated attention to the impact of these new technologies on the advertising sector.

The report refers to the government’s response to the Online Advertising Programme and welcomes the intention to introduce statutory regulation for online advertising. The Committee recommends that the ministerial-led taskforce announced in the government’s response explicitly considers the marketing of NFTs and other cryptoassets to tackle the problem of misleading and fraudulent ads in this sector. The Committee emphasises that any new regime must compel the whole advertising industry to take appropriate steps to mitigate risks to consumers related to ads for NFTs.

See Consumer section for more information on the report.

New rules on marketing cryptoassets to UK consumers now in force

See Fintech, Digital Assets, Payments and Consumer Credit section
Artificial Intelligence
Artificial Intelligence

Update on AI Act progress

The third round of trilogue negotiations between the EU Commission, Council and Parliament on the detail of the AI Act took place on 2 and 3 October. One of the Parliamentary rapporteurs on the legislation has shared that agreement has been reached on important issues including “requirements for high-risk AI systems, sandboxes, market surveillance and enforcement, penalties and fines”. The architecture for the classification of high-risk AI systems has been agreed – we understand that there will be a carve-out for AI that falls within the high-risk categories but does not pose a significant risk to safety or to fundamental rights. In addition, negotiating parties “have started to converge on a common vision on foundation models and governance.”

The fourth round of trilogue negotiations took place on 24 October. Reports indicate that most of the areas discussed remain unresolved. These included whether users of “high-risk” AI should conduct a fundamental rights impact assessment; whether to add protections and consultation rights for workers where AI is being deployed in their workplace; and provisions concerning the sustainability of AI. Other key provisions still to be agreed include the scope and detail of the categories of prohibited AI and high risk AI, and how to regulate foundation models and generative AI.

The current Spanish presidency of the Council is driving for political agreement on the AI Act before the end of the year. If that cannot be achieved, trilogue discussions will need to conclude by mid-February in order that the compromise text is ready for consideration (and adoption) at the Parliament's last plenary session in April 2024. This is a hard deadline as elections for a new Parliament are scheduled for 6 to 9 June 2024.

Update on the AI Liability Directive

There does not appear to have been much activity around the EU Commission's proposed AI liability directive, with attention and energy focused on the far more complex AI Act. The proposed directive is still being considered by the Council and Parliament, with no sign yet that they are close to starting trilogues. One small sign of progress is the opinion of the European Data Protection Authority on the draft.

UK AI Safety summit: government reveals programme

The UK Department for Science, Innovation and Technology (DSIT) has published a programme for the AI Safety Summit taking place on 1 and 2 November 2023.

On the first day, delegates will discuss the challenges posed by frontier AI in relation to its misuse, unpredictable advances, losing control of it and societal risks such as election disruption and exacerbating global inequalities. Delegates will discuss how different groups could address these risks, including developers, national policymakers, the international community and the scientific community.

On the second day, the prime minister will hold a meeting with a small group of governments, AI companies and experts on steps to mitigate AI risks and ensure that AI is used "as a force for good." Meanwhile the UK technology minister will agree next steps with her international counterparts.

EU Commission recommends Member States to carry out risk assessments on AI

The European Commission has identified AI as one of four technologies to be subject to its planned outbound investment screening regime. As explained in our Insight, the new regime will support EU economic security by ensuring that EU companies' capital, expertise and knowledge are not used to enhance the military and intelligence capabilities of businesses in countries that are systemic rivals. "Dual use" technologies are the focus, where technology developed for commercial purposes can also be used for military applications.

The Commission has put forward ten critical technology areas, and identified four (including AI) as presenting the most sensitive and immediate risks related to technology security and technology leakage. The other three areas are advanced semiconductors technologies, quantum technologies and biotechnologies.

The Commission states that "AI (software), high-performance computing, cloud and edge computing, and data analytics have a wide range of dual-use applications and are crucial in particular for processing large amounts of data and making decisions or predictions based on this data-driven analysis. These technologies have huge transformative potential in this regard."
Artificial Intelligence

The full EU economic strategy, including plans for outbound investment screening, needs to be agreed by the Member States and the Commission. This is expected to be a controversial topic as views differ widely around the EU, but the Commission hopes to publish the new strategy by the end of 2023.

G7 proposal for guiding principles on generative AI and EU Commission's consultation

The G7 countries’ officials have negotiated a draft set of eleven Guiding principles for organisations developing advanced AI systems for final discussion and adoption by their digital ministers.

The principles cover generative AI and foundation models and aim to address the risks and challenges posed by these emerging technologies. They build on the existing OECD AI Principles and aim to apply to all actors in the AI ecosystem involved in the design, development, deployment and use of advanced AI systems.

The principles do not include any monitoring mechanism but the draft paper includes a commitment to develop proposals for monitoring tools and mechanisms.

Almost immediately, the European Commission launched a rapid one week consultation on the principles, to inform how it responds to the draft. On monitoring, the Commission's consultation asks whether respondents think this should be done by an internationally trusted organisation, national organisations, self-assessment or not at all.

The Commission’s consultation closed on Friday 20 October 2023. The G7 principles are expected to be formally approved by the G7 digital ministers in the next few weeks, ahead of their next meeting in late November.

Separately, the G7 countries are also developing a voluntary code of conduct for organisations developing advanced AI which will build on the eleven principles.

Updated version of the EU model contractual AI clauses for the public sector

The European Commission has published an updated version of the EU model contractual AI clauses first released in April 2023. These standard clauses were drafted for public organisations wishing to procure an AI system developed by an external supplier. They are relevant for compliance with the upcoming AI Act but since it is still being negotiated, public organisations may use these clauses on a voluntary basis.

The final clauses have been launched as a "pilot" version and the Commission encourages stakeholders to test them in their procurement of AI and to provide feedback on their use. These model clauses exclude obligations under other applicable rules, for example, the General Data Protection Regulation (GDPR).

The Commission has published two versions of the clauses: one for systems classified as "high risk" under the proposed AI Act and a second for non-high risk AI applications.

UNESCO and the EU Commission launch a project to support regulatory oversight of AI

UNESCO, the European Commission and the Dutch Authority for Digital Infrastructure have launched a project to work together to develop "optimal institutional design" for AI supervision. The project, entitled "Supervising AI by Competent Authorities", will address issues related to AI supervision and ensuring the compliance of AI systems with the requirements of the upcoming EU AI Act and with UNESCO's Recommendation on the Ethics of AI (adopted in November 2021).

UNESCO will, among other things:

- produce a comprehensive report on the state of play and existing practices of AI supervision in Europe and beyond;
- develop a series of case studies on AI supervision and best practices for dealing with specific issues on AI supervision, with related training; and
- assist competent authorities in implementing the recommendations.

The Dutch authority will facilitate cooperation with UNESCO by other EU competent authorities, give feedback on UNESCO’s work and promote adoption of the outcomes of the project both within the Netherlands and across the EU.

French CNIL consults on 'how-to sheets' for AI development
Artificial Intelligence

The French data protection authority, la Commission nationale de l'informatique et des libertés (CNIL), has developed AI "how-to sheets" in response to industry requests for advice on data protection compliance in relation to generative AI systems. CNIL's how-to sheets aim to provide AI developers with concrete and practical answers on how to comply with the GDPR when developing AI and creating training datasets including personal data. The scope is limited to the development of AI systems which involve processing of personal data subject to the GDPR.

CNIL is consulting on its how-to sheets until 16 November 2023. After the consultation, it aims to publish the final version in early 2024.

UK and US commit to combat AI-generated images of child abuse

The UK and US have released a joint statement expressing mutual commitment to combat the spread of child sexual abuse images generated by AI. In a statement the countries pledged to collaborate further "to drive innovation and invest in solutions to mitigate the risks of generative AI."

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Bribery, fraud and anti-money laundering
Bribery, fraud and anti-money laundering

Economic Crime and Corporate Transparency Act

The Economic Crime and Corporate Transparency Act received Royal Assent on 26 October 2023, introducing greater powers which will allow authorities to prevent fraud, tackle corruption and deal with economic crime.

See our Insight for further information.

Government launches Independent Review of Disclosure and Fraud Offences

On 12 October 2023, the Home Office launched an independent review into disclosure and fraud, with the aim of speeding up criminal investigations and increasing the number of prosecutions.

The government committed to launching an independent review into the operation of the disclosure regime and the challenges of investigating and prosecuting fraud offences in the digital age in its Fraud Strategy, published in May 2023.

The Chair of the Review, Jonathan Fisher KC, will report with recommendations on how to reform the disclosure regime in the summer of 2024, and give wider recommendations on fraud offences by spring 2025. See the terms of reference for the review.

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Competition
Foreign Subsidies Regulation notification regime now in force

The Foreign Subsidies Regulation (FSR), which came into force on 12 January 2023, aims to redress the distortive effect on competition in the EU caused by companies in receipt of substantial foreign subsidies within the EU internal market. The new mandatory notification regime, which will apply to companies who benefit from material state subsidies, came into effect on 12 October 2023.

The changes introduced by the FSR have been implemented in two stages:

- **New powers of investigation:** As we reported in an earlier Insight, on 12 July 2023, the European Commission gained extensive new powers to investigate suspected instances of companies benefiting from foreign subsidies.
- **New mandatory notification regime:** With effect from 12 October 2023, a new mandatory notification regime will require qualifying transactions or public tenders in the EU that are entered into by companies in receipt of substantial non-EU government subsidies or state support to be notified to and cleared by the European Commission.

Qualifying M&A transactions (concentrations) that are signed on or after 12 October 2023 must be notified to and cleared by the European Commission prior to completion where:

- At least one of the merging parties, the target or the joint venture must have group-wide turnover of at least €500 million in the European Union; and
- The total combined value of all foreign financial contributions received by the parties exceeds €50 million in the previous three years.

For companies intending to participate in public tender processes within the EU, there is a requirement to notify the European Commission prior to concluding a contract under a public tender where:

- The estimated overall contract value is at least €250 million (or, if the contract is divided into lots, the value of the lot(s) that the tenderer competes for exceeds €125 million); and
- The tenderer received foreign financial contributions of at least €4 million per third country over the previous three years.

Companies in receipt of foreign subsidies that are already active in the EU or are intending to enter the EU market through acquisition or tender need to determine if they may fall within the ambit of the FSR mandatory notification regime.

If not already done, a careful assessment and evaluation is needed to determine the value of any non-EU subsidies received in the last three years. For more, read our Insight.

CMA publishes new Green Agreements Guidance on sustainability collaborations

On 12 October 2023, the Competition and Markets Authority (CMA) published its final version of the long-awaited Green Agreements Guidance, providing guidance to businesses on how to comply with competition law when engaging in collaborations with competitors on environmental topics.

We have been following this developing area closely and have previously provided insight into the CMA’s consultation and on the approach taken by the European Commission and the Netherlands’ Authority for Consumers and Markets.

The guidance follows essentially the same structure as the draft guidance, although it has been extended to provide further guidance, clarifications and examples in certain areas. It covers four broad themes. These are:

- environmental collaborations unlikely to raise competition concerns;
- environmental collaborations likely to be caught under competition law;
- a general exemption for environmental sustainability agreements; and
- a more permissive approach for "climate change agreements".
The guidance also covers the CMA’s "open door policy" in relation to environmental sustainability agreements where it is open to providing informal guidance to companies ahead of the implementation of agreements and has indicated that it will not undertake enforcement action against agreements which it has given the greenlight to under this policy.

The publication of this guidance represents an important step for companies wishing to collaborate with competitors on achieving environmental sustainability objectives. The imperative for companies to set and achieve sustainability objectives is only going to grow in the coming years and, as such, this is an important topic that all businesses need to be familiar with. For more, see our Insight.

CMA publishes Cloud Market Investigation

On 17 October 2023, the CMA published its issues statement in its market investigation into the supply of public cloud infrastructure services in the UK. This follows on from Ofcom's market study into this sector, which concluded with a market investigation reference to the CMA. The CMA also notes that its recent report into AI foundation models identified cloud services as a cornerstone of recent technological innovations. As a result, it will also consider the impact of AI in this market.

Having reviewed Ofcom's findings, the CMA is proposing to focus the investigation on four groups of high-level hypotheses (theories of harm) based on both the structure of the market(s) that it will investigate and the conduct of relevant firms within these or other related markets. These are:

- Theory of harm 1: Technical barriers make switching and multi-cloud harder and limit competition between cloud service providers.
- Theory of harm 2: Egress fees harm competition by creating barriers to switching and multi-cloud leading to cloud service providers entrenching their position.
- Theory of harm 3: Committed spend discounts raise barriers to entry and expansion for smaller cloud service providers by incentivising customers to concentrate their business with one provider.
- Theory of harm 4: Software licensing practices by cloud service providers restrict customer choice and prevent effective competitors.

Given the increasingly widespread use of cloud computing across almost all business sectors, this market investigation is likely to be relevant to and have consequences for a significant range of businesses. It will be important for the majority of companies to remain aware of this market investigation and keep on top of developments in this space. See the press release.

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Consumer law
Online Safety Act receives Royal Assent

On 26 October 2023, the UK government's long-awaited Online Safety Act received Royal Assent. See our Insight to find out more about what services are in scope, what obligations the Act imposes on in-scope platforms, what powers will Ofcom have as the online safety regulator, and more.

CMA publishes response to the government's consultation on consumer-related matters

The UK Competition and Markets Authority (CMA) has published its response to the Department for Business and Trade's consultation on proposed amendments to UK consumer law. The consultation closed on 15 October 2023. (See our Insight for background.)

Highlights from the CMA's response are summarised below.

The CMA supports the Digital Markets, Competition and Consumers Bill (DMCC Bill) and welcomes the work by the government in consulting further on consumer protection related matters.

In relation to drip pricing (where consumers are shown an initial price and additional fees are imposed later in the buying process), the CMA takes view that there "should be a ban of all mandatory elements and other charges which are "optional" but which businesses can reasonably foresee most consumers would pay, or which any consumer would have to pay, even if others could avoid them". The CMA states that mandatory variable and "optional" charges should be included in the stated headline price. If there are genuinely optional extras as part of the purchasing process, these should be prominently and fully disclosed in the headline price and be accessible to consumers.

The CMA supports the government's proposals to include fake reviews in the "blacklist" of offences under the DMCC Bill. It agrees with the proposed list, with some amendments. It also considers that businesses would benefit from new guidance on their legal obligations in this area.

On subscription traps, the CMA believes that the renewal of consumers' recurring payments should be banned, unless separate and active consent is explicitly and freely given. In the CMA's view, this should be included in the DMCC Bill and made a criminal offence.

The CMA highlights that, in its view, misleading environmental claims should also be added to a list of banned practices in the DMCC Bill.

Commission launches DSA Transparency Database

The European Commission has announced the launch of the Transparency Database under the Digital Services Act (DSA).

Under Article 24(5) of the DSA, the Commission must set up and maintain a publicly accessible database of statements from online platforms setting out their reasons for making content moderation decisions. Online platforms are required to submit these "statements of reasons" to the database and, under Article 17(1), to the affected user. The statement of reason must be "clear and specific" and explain why a service has been restricted on the ground that it does not comply with the service's terms and conditions or is illegal.

Currently the obligation only applies to very large online platforms already designated as such by the Commission. However, from 17 February 2024, all providers of online platforms, with the exception of micro and small enterprises, will have to submit data on their content moderation decisions.

Influence of NFTs and blockchain on UK consumers

The House of Commons Culture, Media and Sport Committee has published a report in which it considers the impact of non-fungible tokens (NFTs) and blockchain on various sectors, such as the arts, intellectual property, sport and advertising, and on UK consumers.

The report highlights that complexities around these technologies may create confusion for consumers associated with intellectual property rights attached to NFTs (for example, where a consumer buys an NFT not being aware that it infringes someone's rights and unknowingly but wrongfully use the underlying asset). Due to the legal exemptions that online intermediaries hosting third party content have, known as "safe harbour" provisions, the responsibility could be put on consumers. The Committee therefore recommends that the government addresses these exemptions and introduce a code...
Consumer law

of conduct for UK-based NFT marketplaces that protects consumers, creators and sellers from infringing and fraudulent content sold on these platforms.

See Advertising and Marketing section for advertising aspects of the report.

CJEU considers that a consumer is entitled to cancel an initially free and automatically renewed subscription only once

In Verein für Konsumenteninformation v Sofatutor GmbH EU:C:2023:735, the Court of Justice of the European Union (CJEU) considered whether a consumer is entitled to cancel an automatically renewed and initially free subscription contract for services made via a distance contract only once.

The company, offering services in Austria, provided consumers with a 30-day free subscription period when they booked its services for the first time, during which period the subscription could be terminated without notice at any time. After the expiry of 30 days and if the subscription was not terminated within this timeframe, the subscription automatically renewed on a paid-for basis. The company informed consumers of the right of withdrawal when the subscription was made via a distance contract.

The CJEU was asked to interpret Article 9(1) of the Consumer Rights Directive (2011/83/EU) with regard to whether a consumer is entitled to a new right of withdrawal after a free trial subscription is converted into a standard, paid-for subscription, unless terminated either during the free trial or on the point of conversion, and when that standard subscription is subsequently renewed. In other words, the question was whether a consumer's right to withdraw is guaranteed once only, or whether they have that right each time the contract is renewed after conversion into a paid-for contract.

The CJEU noted that the right of withdrawal aims to give the consumer time to understand the characteristics of the services contract concerned to allow them to make an informed decision as to whether they wish to be contractually bound to the services provider.

Under the directive, the CJEU said, one of the essential terms of a distance contract is the total price of the goods or services that form the subject of the contract. The goods or services provider must, under Article 6(1)(e), provide the consumer with information on that total price in a clear and comprehensible manner directly before the order is placed and the contract concluded. In addition, the provider must ensure that the consumer explicitly acknowledges that they understand that placing the order implies an obligation to pay. Failure by the provider to comply with these requirements means that the consumer is not bound by the contract.

In this case, CJEU held that the right to withdraw from a distance contract which includes a free trial subscription that is automatically extended, unless terminated, is, in principle, guaranteed only once. The exception would be if the consumer has not been informed in a clear, comprehensible and explicit manner at the time of ordering the subscription that, after the initial free period, payment will be required for an ongoing subscription.

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Cyber-security
Cyber Security Awareness Month

Cyber Security Awareness Month is celebrated every October – various institutions across the UK, EU and the US have announced activities to promote it. This year's campaign will focus on social engineering and hackers' attempts to breach sensitive data.

To keep you up to date on the latest in cyber matters, Osborne Clarke will be hosting an afternoon event on 9 November 2023, where our cyber partners will be sharing practical insights on what businesses can do to better manage cyber risk. Find out more and register your interest for the event.

Government inquiry on cyber resilience of critical national infrastructure

On 24 October 2023, the Science, Innovation and Technology Committee launched an inquiry into the cyber resilience of the UK's critical national infrastructure.

Among other things, the Committee is seeking views on the types and sources of cyber threats to critical national infrastructure in areas such as communications and energy, which are deemed to be most critical to the country's digital economy.

The National Cyber Security Centre (NCSC) previously warned of the threat to critical national infrastructure from state-aligned groups following Russia's invasion of Ukraine.

See the call for evidence.

Code of practice for app store operators and app developers

On 13 October 2023, the Department for Science, Innovation and Technology (DIST) published an updated code of practice, setting out minimum security and privacy requirements for app store operators and app developers, and extending the implementation period to June 2024.

The voluntary code, which was first published in December 2022 as part of the government's National Cyber Strategy, sets out practical steps that app store operators and app developers should follow to protect users from malicious and poorly developed applications.

The code will be reviewed and updated, where necessary, at least every two years in light of new technological developments or changes to regulations and the threat landscape. DIST also stated that the extended implementation period will be used to engage with developers and operators in order to support future policy.

NCSC releases new supply chain guidance

On 12 October 2023, the NCSC released a new collection of resources dedicated to supply chain security for organisations.

The page serves as a one-stop-shop for links to resources, guidance and knowledge for understanding the impact of supply chain cyber security risks.

NSA and CISA advisory on top 10 cybersecurity misconfigurations

On 5 October 2023, the US National Security Agency (NSA) and Cybersecurity and Infrastructure Security Agency (CISA) released a joint cybersecurity advisory, sharing the most common cybersecurity misconfigurations in large organisations, and detailing the tactics, techniques and procedures that threat actors use to exploit these misconfigurations.

Some of the most common network misconfigurations include:

- default configurations of software and applications;
- improper separation of user/administrator privilege;
- insufficient internal network monitoring; and
- lack of network segmentation.
Cyber-security

The NSA and CISA stated that these misconfigurations illustrated a trend of systemic weaknesses, which are present even in large organisations with mature cyber postures, and encouraged IT teams to implement recommendations within the Mitigations section of the advisory to reduce the risk of malicious actors exploiting the known misconfigurations. Software manufacturers were also encouraged to "embrace" secure-by-design principles to reduce the burden on IT teams.

Draft regulation for EU common criteria-based cybersecurity certification scheme

See Products section

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**Data protection**

**Dipping into Data – Webinar Series**

Our Dipping into Data series continues in November. Following this month's webinar on the ICO's Data Protection Practitioners’ Conference, we are looking forward to diving into a keenly debated issue of the moment: cross-border data transfers. (You can register to attend the session using this link.)

**ICO issues opinion on government assessment of UK extension to EU-US DPF**

The Information Commissioner's Office (ICO) has issued its anticipated opinion on the Data Protection (Adequacy) (USA) Regulations 2023 for the UK extension to the EU-US Data Privacy Framework.

The ICO considered that the extension was not wholly without risks to UK data subjects. However, it was reasonable for the secretary of state to conclude that the UK extension provided an adequate level of protection for UK data subjects.

In addition to monitoring developments in US legislation, the ICO recommended that the secretary of state should pay particular attention to the following areas given the lack of substantially similar legal protections in the US:

- criminal offence data, in particular in relation to the UK’s Rehabilitation of Offenders Act 1974 for which there is no US equivalent;
- right of protection from automated processing; and
- the right to be forgotten or an unconditional right to withdraw consent.

**Top five Data Protection Practitioner’s Conference takeaways**

Following the ICO Data Protection Practitioner’s Conference (DPPC) in London, here are five of the top insights we took away from the event.

- **Data Protection and Digital Information (DPDI) Bill.** The DPDI Bill is expected to become law during the course of next year. The ICO considers the bill as a reformed, trusted and pro-growth data rights regime, which will provide additional clarity and flexibility for businesses to help them reduce costs in complying with their data protection obligations. Key topics discussed included the implementation of the role of "responsible person" as a replacement to the current data protection officer role and ways in which the ICO will support businesses to navigate the DPDI Bill through guidance, communication and engagement with the wider business community.

- **Cookies and ‘dark patterns’.** The ICO has made it clear that non-compliant use of cookies remains an important focus of its enforcement strategy; in particular, those that make use of “dark patterns" and deceptive design technology. The ICO made it clear that its severity of enforcement will depend on an organisation’s engagement following an ICO warning.

- **AI revolution.** The ICO has acknowledged the major changes that AI represents and that it will update its AI toolkit to support companies putting in place a framework to use AI safely. The ICO is always reviewing its guidance on AI, most recently on fairness of AI systems and will continue to support businesses through this change. For more on AI, please see Artificial Intelligence.

- **Data transfer and sharing.** The DPPC touched upon the importance of using privacy enhancing technologies (see the ICO’s guidance on privacy-enhancing technologies) and provided practical guidance for safeguarding data transfers. This includes making sure that a transfer risk assessment is appropriately carried out and an International Data Transfer Agreement is put in place. The ICO mentioned that additional draft guidance is to be released in light of the US-UK Data Bridge to help companies comply with good data governance practices.

- **Cybersecurity.** The DPPC focused on cybersecurity and how to help businesses minimise the risk of data breaches. Most cybersecurity issues come from negligent internal governance and businesses need to maintain a secure supply chain and make cybersecurity a priority. Suggested ways to raise awareness included board level briefings and executive engagement.

**ICO consultation on draft Data Protection Fining Guidance**
The ICO is consulting on new draft guidance on the issuing of penalty notices and calculating of fines under UK data protection legislation. The draft guidance explains the legal framework that gives the ICO the power to impose fines and how they are calculated, as well as the circumstances in which the ICO would consider it appropriate to issue a penalty notice.

The consultation will run until the 27 November 2023 and will then, once finalised, replace the parts of the Regulatory Action Policy which relate to the ICO’s approach to imposing and calculating fines.

The online survey can be accessed here.

UK tribunal overturns ICO enforcement and penalty notices issued against Clearview AI

In October, the First-tier Tribunal issued a decision overturning the ICO Enforcement Notice and Monetary Penalty Notice issued to Clearview AI Inc. in May 2022. This penalty was issued for Clearview’s use of UK individuals’ images to create an online global facial recognition database. The ICO argued this was in violation of UK data protection laws, as the company did not inform the individuals whose images it collected that their data was being processed.

The tribunal held that although this processing amounted to monitoring of UK data subjects, Clearview AI only provided its services to non-UK and EU law enforcement and national security agencies and, as such, their processing was beyond the material scope of the UK General Data Protection Regulation (even if not the territorial scope of the UK GDPR). It decided that the ICO did not have jurisdiction to issue the Penalty, and Clearview AI's appeal was allowed.
Employment and immigration

Fit notes: updated government guidance issued

Updated guidance on fit notes aimed at employers and line managers has been published by the government. It reminds employers that fit notes may now be issued by doctors, nurses, occupational therapists, pharmacists and physiotherapists. It now includes a "Checklist for Employers" which highlights key points to support discussions between an employer and an employee issued with a fit note. Read more here.

Employers should also refer to Acas’ recently issued updated guidance on sickness absence. The Information Commissioner’s Office (ICO) has also published guidance for employers on processing information about a worker's health which provides practical guidance and checklists on handling sickness and injury records, occupational health schemes, medical examinations and drugs and alcohol testing, genetic testing, health monitoring, and sharing workers’ health information. The guidance will be taken into account by the ICO where a complaint is made that there has been a failure to comply with data protection law.

Consultation on draft Code of Practice on predictable working pattern requests

Following the Workers (Predictable Terms and Conditions) Act 2023 receiving Royal Assent in September 2023, Acas is consulting on a draft Code of Practice on handling statutory requests for a predictable working pattern. The new right is expected to come into force in September 2024.

The new statutory right essentially provides a worker with a right to request a more predictable working pattern where there is a lack of predictability in relation to the work that the worker does for the employer regarding any part of their working pattern. This covers matters such as the number of hours worked, the days and times worked and the period for which the worker is contracted to work. Read more.

Acas's draft Code of Practice aims to ensure that requests for a more predictable working pattern are handled in a reasonable manner and that a worker’s request is fully understood and considered. It sets out good practice on:

- holding a meeting to discuss a request before making a decision;
- who should be allowed to accompany a worker at meetings to discuss a request;
- accepting a request where possible;
- only rejecting a request for certain legally allowed reasons and being clear about the reasons for rejecting it; and
- offering an appeal where a request has been rejected.

The draft code also sets out the different procedures that apply depending on whether a request is made by an employee or worker to their employer or an agency worker.

The code will not be legally binding but will be taken into account by courts and tribunals when considering relevant cases. Acas has also indicated that it will be issuing non-statutory guidance to support the new right.

The consultation closes on 17 January 2024.

SRA 'thematic review' of use of non-disclosure provisions in the workplace

In 2018, the Solicitors Regulation Authority (SRA) issued a warning notice (updated in 2020) addressing the conduct expected of solicitors when advising on non-disclosure agreements (NDAs). It has now carried out a review to understand how NDAs are used in an employment context and measures taken to comply with the SRA warning notice ensuring such provisions “do not stray into inappropriate areas”. The term NDA potentially covers a wide-range of provisions which directly or indirectly seek to keep certain information confidential or limit disclosures, including confidentiality clauses, non-derogatory clauses, warranties, indemnities and clawbacks. Read more.

The review provides a timely reminder for those advising on NDAs (including external legal advisers and in-house counsel) to ensure that the warning is carefully considered at all times and NDAs are not simply viewed “as low risk and fairly straightforward activity”; it reflects the SRA's concerns that there can be a "focus far more on [the] nature and extent of any possible financial settlement rather than the specific clauses within any agreement" and that solicitors must consider any risks to the proper administration of justice and public trust in the provision of legal services; for example, whether any unenforceable or improper term risks taking unfair advantage of a client or other party. To this end the SRA is calling for more awareness including training, policies and controls around NDAs to maintain compliance with the warning.

Recognising that templates are commonplace and can support compliance, practical steps suggested by the SRA include:
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- reviewing provisions regularly and comparing them to the warning notice to identify any issues and record any updates;
- checking whether a clause could amount to a breach because it gives "the impression" that certain disclosures cannot be made;
- ensuring terms are clear and relevant to the issues and claims likely to arise;
- signposting examples of good practice or guidance in draft agreements to promote high ethical standards;
- tailoring every agreement to the circumstances; and
- ensuring awareness of the warning notice and best practice from the EHRC or Acas Code of Practice.

Employers should anticipate renewed scrutiny of settlement agreement and other NDA provisions. We may also see claimant's legal advisers potentially requesting a greater discretionary contribution to legal fees depending on the circumstances of the dispute - the SRA notes that solicitors acting for employees "need to be explicit with clients about the extent of the advice they can provide where the budget is limited, and be satisfied that they are able to carry out their role to a competent standard in the time provided". The SRA also calls for greater reporting to it of unacceptable NDAs or behaviours where clauses are considered to fall foul of the applicable requirements.

The SRA now plans to review the current warning and reinforce those areas where gaps in knowledge have been identified, including through webinars and publications aimed at the legal profession, alongside a co-ordinated programme of public education using the Legal Choices website and other media to ensure employee and employer clients are better informed about their rights, the enforceability of key clauses and the obligations of the legal profession advising them.

Menopause: government publishes policy paper, Employment Champion's plans and employer guidance

The government has published a policy paper providing guidance "to help recruit, support and retain women experiencing menopause and stop women considering giving up their employment" recognising that "with close to four million women aged 45-55 employed in the UK and women over 50 representing the fastest growing segment of the workforce, there are few workplaces where menopause is not being experienced by staff. A lack of awareness and treatment are negatively affecting UK productivity".

Helen Tomlinson, the Menopause Employment Champion, introduced a four-point plan which will focus initially on the following sectors: hospitality, retail, care, manufacturing and professional and technical sectors. It includes:

- sharing of employer best practice (within sectors) on a portal that is accessible to all employers whether large or small free of charge;
- a national sector-specific allyship programme which ensures no one is isolated and everyone has someone available to talk to;
- menopause-friendly employers who will support, share and advocate across their sector – retaining and attracting talent to the sector; and
- a communications plan to improve the working lives of women in their sector, achieved by amplification through strategic partnerships.

Further sectors, for example construction and education, will be brought into the programme over the coming months.

The government's Help to Grow website will also be used to build a library of menopause resources and guidance for employers and employees. The government has also highlighted the BSI's recently published standard on menstruation, menstrual health and menopause in the workplace, which sets out practical recommendations for workplace adjustments, as well as strategies to sit alongside existing wellbeing initiatives, and the Menopause Workplace Pledge. To date more than 2,500 employers have signed the pledge.

The Labour Party has indicated that, should it form the government at the next general election, it will introduce a requirement for large organisations to publish a menopause action plan and issue menopause guidance for small businesses. Read more.

Removal of bonus cap confirmed by PRA and FCA

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have jointly published a policy statement, following an earlier consultation, stating that the current bonus cap – which provides for the ratio between fixed and variable components of total remuneration for in scope banks, building societies and investment firms – will be removed from 31 October 2023.
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The changes apply to a firm's performance year that is ongoing which will enable firms “to restructure pay faster” and “give firms further flexibility over their cost base to deal with downturns”. The flexibility to restructure pay faster will also allow for a greater proportion of total pay “to be subject to incentive setting tools within the remuneration framework sooner, which in turn could contribute to a better alignment of incentive and financial rewards with principles of effective risk management, good conduct, and the long-term interests of the firms” and enable firms “to compete for and attract new talent sooner”. The cap has been seen as a factor “limiting mobility”. Firms will however need to remain mindful of employment laws and employee relation issues when seeking to make any changes to the current remuneration structure and the policy statement expressly notes that “although firms may benefit from the flexibility resulting from the change in implementation approach, they may, if they wish, still choose to wait until a later date (for example, the start of their next performance year) before making any changes”.

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UK government publishes draft Vehicle Emissions trading schemes order

On 16 October 2023, the government published a draft order establishing four UK wide trading schemes that are due to operate from 1 January 2024, two in relation to Zero Emission Vehicle (ZEV) production and two in relation to CO2 emissions.

The ZEV production schemes relate to the number of vehicle registrations made by manufacturers, and the allowances for non-ZEVs will decrease annually from 2024. If fewer non-ZEVs are registered than their target then the manufacturer will have surplus allowances. If they register more than their target then they will be in deficit and will need to purchase additional allowances. Surplus allowances can be traded or banked.

The CO2 standard schemes work in a similar way, however allowances are based on a baseline per-vehicle emissions target. Manufacturers must have one allowance for every gram CO2/km they emit on average across their entire fleet. Again, sufficient allowances will be given for manufacturers to meet their targets and surpluses can be traded and banked. If there are deficits, allowances must be bought or can be transferred from ZEV scheme surpluses.

Consultation opens on proposed ban of wet wipes containing plastic

The Department for Environment, Food & Rural Affairs (Defra) has launched a UK-wide consultation on the proposed ban on the manufacture, supply and sale of wet wipes containing plastic, with the aim of reducing plastic and microplastic pollution in the country's waters and improving water quality.

The proposal forms part of the government's Plan for Water in delivering more investment, stronger regulation and stricter enforcement across the water system.

The consultation closes on 25 November 2023.

Government delays mandatory biodiversity net gain to January 2024

On 27 September 2023, the government confirmed that it is delaying the implementation of mandatory BNG requirements for new planning applications.

Guidance and the implementing regulations will be published by the end of November 2023 including:

- The statutory metric which will be used to calculate the biodiversity gain.
- The draft biodiversity gain plan template which must be prepared by developers when submitting planning permission.
- The template habitat management and monitoring plan template which sets out the long term management will improve on and off-site habitats.
- Further BNG guidance and advice for landowners, developers and local planning authorities.

For further information about the BNG requirements please see our Insight.

Government publishes initial list of irreplaceable habitats under the mandatory BNG regime

On 5 October 2023, Defra published an initial list of irreplaceable habitats for biodiversity net gain (BNG) in advance of the introduction of the rules in January 2024. It lists the following habitats to which BNG will not apply:

- Ancient woodland
- Ancient and veteran trees
- Blanket bog
- Limestone pavements
- Coastal sand dunes
- Spartina saltmarsh swards
- Mediterranean saltmarsh scrub
- Lowland fens

The list will be set out in secondary legislation which will state that off-site biodiversity units and statutory biodiversity credits cannot be used to compensate for the loss of irreplaceable habitats.
Environment

This means that BNG will not be a requirement for developments affecting these sites, and instead bespoke compensation must be agreed with the local planning authority to deliver appropriate compensation to reflect the same type of habitat that was lost.

The irreplaceable habitats broadly mirror the list of examples in the national planning and policy framework. The full list will be published in the second half of 2024.

Defra announces household goods will start carrying water efficiency labels

Please see Products.

Defra offers £50m for businesses to meet Windsor Framework labelling requirements

Please see Products.

European Commission adopts measures to prohibit the sale of microplastic containing products

On 25 September 2023 the European Commission adopted measures setting out the international restrictions on the sale of microplastics and of products to which microplastics have been intentionally added that are released when used under REACH.

The restrictions adopt a broad definition and include all synthetic polymer particles under 5 millimetres that are organic, insoluble and resist degradation. Products affected by this include (among others) cosmetics, detergents, glitter, fertilisers and medicines.

The measures do not extend the sale ban to products used at industrial sites or those not releasing microplastics during use.

The first measures (including a ban on loose glitter and microbeads) will come into force from the 15 October 2023.

CMA publish new Green Agreements Guidance on sustainability collaborations

Please see Competition.

Government announces changes to net zero policies

On 20 September 2023, the prime minister announced significant changes to the UK’s net zero policy, although the government has committed to existing domestic and international net zero targets. Below is a summary of the key announcements:

- Delay of the ban on new petrol and diesel cars from 2030 to 2035.
- Delay of the ban on new off-grid oil and LPG boilers and new coal heating for off-grid homes to 2035 instead of phasing them out from 2026.
- The government will no longer require homeowners and landlords to meet energy efficiency targets.

New ban on single-use plastics in force

On 1 October 2023, new bans and restrictions on a range of polluting single-use plastic items came into force. Businesses including retailers, takeaways, food vendors, or the hospitality industry, will no longer be able to sell single-use plastic cutlery, polystyrene cups or food containers in England. The supply of single-use plastic plates, trays and bowls will also be restricted. See further information.

First phase of prohibition on single use plastic launched in Wales

The draft Environmental Protection (Single-use Plastic Products) (Wales) Act 2023 (Commencement No 1) Order 2023 was laid before Welsh parliament on 3 October 2023, and will bring the remaining provisions of the Environmental Protection (Single-use Plastic Products) (Wales) Act 2023 into force on 30 October 2023. The Act makes it an offence to supply certain single use plastic products and oxo-degradable plastic to a consumer in Wales. This includes cups, cutlery, straws, stirrers and takeaway food containers.
Further information is available in the Explanatory Memorandum.

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Environmental, social and governance
Government calls for evidence on Scope 3 greenhouse gas emissions

On 19 October 2023, the Department for Energy Security and Net Zero launched a call for evidence seeking views on the costs, benefits, and practicalities of Scope 3 greenhouse gas emissions reporting in the UK.

The consultation follows the publication of the International Sustainability Standards Board (ISSB)'s inaugural global sustainability disclosure standards (as previously reported), which includes requirements for entities to report their Scope 1, 2 and 3 greenhouse gas emissions. (Under the current Streamlined Energy and Carbon Reporting framework, UK organisations are not required to disclose Scope 3 emissions in their annual reports).

The government is seeking views on whether to endorse the ISSB Standards in the UK which would extend mandatory reporting to Scope 3 emissions.

The call for evidence closes on 14 December 2023.

To find out more, see our Decarbonisation topic page and sign up for our Decarbonisation Week webinar series.

Law Society guidance on climate risk governance and greenwashing risks

On 13 October 2023, the Law Society published guidance for both in-house and private practice solicitors who provide advice to companies and directors on good climate risk governance and mitigating greenwashing risks, and how they might affect solicitors' and directors' duties.

The guidance note includes:

- a list of climate-related issues that should be addressed in best practice advice given to the executive team and the board;
- a list of relevant regulation and greenwashing risks to identify when advising organisations; and
- guidance to solicitors regarding standards of conduct and potential exposure for advice on climate-related risks.

The guidance, which should be read in conjunction with the Law Society's guide on the impact of climate change on solicitors, serves as a helpful reminder to solicitors as to their duty to advise companies on their duties under the Companies Act 2006 and climate-related disclosures.

For further information, see our Insight.

CMA publishes Green Agreements Guidance for cooperation on environmental goals

On 12 October 2023, the Competition and Markets Authority (CMA) published the final version of the Green Agreements guidance, providing insight to business on how to comply with competition law when engaging in collaborations with competitors on climate change and environmental sustainability topics.

The guidance follows a consultation launched in February 2023 and includes practical examples that businesses can use to inform their decisions when working with firms operating at the same level of the supply chain on environmental sustainability initiatives.

See the full guidance https://www.gov.uk/guidance/green-agreements-guidance-how-competition-law-applies-to-environmental-sustainability-agreements. For more information, see Competition section.

ECON draft report on proposed regulation on ESG rating activities

On 6 October 2023, the European Parliament's Economic and Monetary Affairs Committee (ECON) published a draft report on the European Commission's legislative proposal for a regulation on the transparency and integrity of ESG rating activities.

The draft report contains a draft European Parliament legislative resolution, the text of which sets out suggested amendments to the proposed regulation.
Environmental, social and governance

The explanatory statement outlines views on the proposed regulation, including the following:

- The disclosure requirements should be more stringent and instructive. It should be clear, at all times, what types of materiality are considered and whether a rating is referring to absolute or relative performance.
- Encouraging competition among ESG rating providers and fostering an environment where smaller rating providers can enter the market is essential. Entities seeking multiple ratings should prioritise at least one provider with a market share below 5% to ensure diversity and competitiveness in the marketplace.
- The ESG rating market suffers from a lack of transparency, with some companies producing useful, reliable evaluations, while others remain opaque and even misleading. For this reason, the reliability and transparency of ESG rating activities needs to be improved.
- The objectives of the rating providers need to be clarified. ESG analysts often limit themselves to assessing financial materiality, whereas a complete and relevant evaluation must analyse the consequences of the company’s activity on the rest of society.

See our [Insight](#) for more information on ESG.

EU MEPs approve new European green bonds to fight greenwashing

On 5 October 2023, members of the European Parliament (MEPs) adopted a new voluntary standard for use of the "European Green Bond" label, which will be a world-first, uniform standard for defining green bonds. Issuers who wish to use the designation of EuGB, or "European Green Bond" for the marketing of their bond will be required to disclose considerable information about how the bond’s proceeds will be used. They will also be obliged to show how the bond's proceeds feed into the transition plans of the company as a whole.

To find out more about greenwashing, register [here](#) for our webinar on "Greenwashing and green claims: Identifying and mitigating risk" which will run on 22 November 2023, as part of Osborne Clarke's [Decarbonisation Week](#).

EIOPA to target greenwashing in 2024-2026 work plan

The European Insurance and Occupational Pensions Authority (EIOPA) has outlined its strategic priorities for 2024-2026 in its [revised Single Programming Document](#).

The document sets out clear priorities and aims to ensure that the agency can continue to deliver value to policyholders and beneficiaries, businesses, and the EU economy. The EIOPA identified sustainable finance as a top priority. In particular, the EIOPA will report to the EU Commission on greenwashing risks and supervision of sustainable finance policies in 2024, which will inform future activities.

Register for [our webinar](#) on "Greenwashing and green claims: Identifying and mitigating risk" on 22 November 2023.

FCA reveals GFIN Greenwashing TechSprint winners

See [Fintech, digital assets, payments and consumer credit](#)
Fintech, digital assets, payments and consumer credit
**Fintech, digital assets, payments and consumer credit**

**New rules on marketing cryptoassets to UK consumers now in force**

On 8 October 2023, new financial promotions rules for qualifying cryptoassets came into force. The definition covers cryptoassets that are fungible and transferable and excludes, for example, non-fungible tokens (NFTs). The rules apply to all firms marketing cryptoassets to UK consumers, including firms based overseas. Please see our earlier Insight for more details on the scope of the new rules.

There are now four routes to promote cryptoassets to UK consumers legally:

- The promotion is communicated by a person authorised under the Financial Services and Markets Act 2000. For these purposes, a firm authorised only under the Electronic Money Regulations and/or the Payment Services Regulations is not considered an authorised person.
- The promotion is made by an unauthorised person but approved by an authorised person. It is important to note the incoming new rules for approving financial promotions – for more details, please see our Insight.
- The promotion is communicated by a cryptoasset business registered with the Financial Conduct Authority (FCA) under the Money Laundering Regulations, in reliance on a specific exemption in the Financial Promotion Order.
- The promotion is otherwise communicated within an available exemption in the Financial Promotion Order.

As a result, the FCA has taken over regulation of technical claims in adverts for qualifying cryptoassets in non-broadcast media from the Advertising Standards Authority (ASA), with non-technical aspects remaining under the ASA. The ASA remains the regulator of cryptoasset adverts in broadcast media, as well as advertising of cryptoassets that are not regulated by the FCA.

**Payment service contract termination rule changes**

HM Treasury has published a policy statement on implementation, timings and next steps for payment service contract termination rule changes on 2 October 2023.

In July 2023, HM Treasury announced that it would amend the Payment Services Regulations 2017 (PSRs) to extend the notice period for termination of a framework contract from two months to 90 days, and to require providers to give a clear and tailored reason for the termination.

HM Treasury has now set out details of its intended approach to amendments to the PSRs relating to payment service contract termination rules, including the following points:

- The amendments will apply primarily to regulation 51 of the PSRs, which provides for the termination of a framework contract. The new requirements will apply to firms and services that are currently within the scope of regulation 51.
- It does not intend to prescribe the specific information that should be provided to a customer where a provider decides to terminate a contract for the provision of a payment service.
- It is considering the extent to which providers will have limited flexibility not to provide 90 days’ notice of account closures or a clear and tailored reason for account closures (or both) where this would bring the provider into conflict with other legal requirements or regulatory obligations.

HM Treasury intends to publish a draft statutory instrument by the end of 2023 and make the relevant amendments to the PSRs 2017 as soon as parliamentary time allows.

HM Treasury has also published a press release announcing that it intends to consult on changes to the threshold conditions that apply to banks with the aim of ensuring that banks uphold their duties to protect freedom of speech with an aim to legislate on this issue in 2024.

**FCA reveals GFIN Greenwashing TechSprint winners**

On 29 September 2023, the FCA announced the winners of the Global Financial Innovation Network (GFIN) Greenwashing TechSprint, in which participating firms and regulators showcased solutions that could help tackle the risk of greenwashing in financial services to a panel of judges.
Fintech, digital assets, payments and consumer credit

The participants took on one of two problem statements centred around greenwashing in financial services and built a solution in response to these challenges:

- How can technology, including artificial intelligence and machine learning, enable regulators and supervisors to verify that ESG-related product claims to retail consumers are accurate and complete?
- How can technology help monitor, collate and identify examples of greenwashing from financial services firms’ websites, social media platforms and other documentation or data which can also be shared across jurisdictions?

For further information on greenwashing, see our Insight and sign up for our Decarbonisation Week webinar series.

City of London Corporation and FCA launch APP synthetic dataset to help tackle fraud

On 27 September 2023, the City of London Corporation published a press release announcing that it and the FCA have launched an authorised push payment (APP) synthetic dataset to develop products and services designed to minimise fraud.

The dataset, hosted on the FCA’s permanent Digital Sandbox, is intended to lay the foundation for better understanding how data can be shared to deal with obstacles to tackling fraud. It allows analysis of rare patterns of behaviour to progress the understanding of the role of synthetic data as a regulatory and compliance tool.

The dataset is comprised of 30 million rows of synthetic data, 20,000 synthetic individuals with full details, 20,000 synthetic accounts with 30,000 fraud events, over 70 million rows of synthetic text and call metadata, and two years of data.

EBA technical advice on classification of asset-reference tokens and e-money tokens and related fees under MiCA

On 29 September 2023, the European Banking Authority (EBA) published technical advice for the European Commission relating to delegated acts to be adopted under the Regulation on Markets in Cryptoassets (MiCA), which establishes an EU-level supervision framework for asset-referenced tokens (ARTs) and electronic money tokens (EMTs) determined by the EBA to be significant. The provisions in MiCA relating to issuers of ARTs and EMTs apply from 30 June 2024.

The technical advice relates to delegated acts on:

- Criteria for classifying ARTs and EMTs as significant. The EBA proposes a set of core and ancillary indicators for determining the circumstances under which ARTs, EMTs and their issuers can be considered as interconnected with the financial system and their activities as significant on an international scale. This relates to a delegated act mandated under Article 43(11) of MiCA.
- Supervisory fees to be charged to issuers of significant ARTs and EMTs. The EBA’s advice covers the type of supervisory fees, the matters for which fees are due, the amount, and the manner in which they are paid, as well as the methodology for calculating the maximum amount that can be charged per entity. This relates to a delegated act mandated under Article 137(3) of MiCA.

The EBA has identified gaps in reporting obligations for issuers of ARTs and EMTs under MiCA, and intends to start work in Q1 2024 on guidelines intended to achieve consistent reporting of data by issuers, in accordance with common formats and templates.

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Food law

FSA Board discusses and plans approach on precision breeding

The Food Standards Agency (FSA) Board met on 21 September 2023 to discuss and decide on aspects of the new process to regulate the use of precision-bred organisms for use in food and feed. Following agreement on the FSA Board’s preferred approach, the proposals will be subject to public consultation in November 2023 before the FSA formally provides advice to ministers.

For further information, please see our previous Regulatory Outlook.

Consultation launched for updating labelling guidance for no and low-alcohol alternatives

The government has launched a consultation seeking views on whether to raise the threshold set out in guidance for describing a drink as “alcohol free” to 0.5% alcohol by volume (ABV). The current threshold in the UK is 0.05%.

The main aim of updating the low-alcohol descriptions is to encourage more people to choose no and low-alcohol drinks to help shift the market to “healthier” alternatives. Views are also being sought on whether to update labelling guidelines, so that manufacturers display the alcohol percentage on any no or low-alcohol product clearly on the bottle.

The consultation is specifically interested in seeking views and evidence on:

- using descriptors such as “alcohol free”, “de-alcoholised”, “non-alcoholic” and “low alcohol” and whether such conditions should be set in regulations;
- displaying numerical information of the alcoholic strength on the label;
- displaying the UK chief medical officers’ low risk drinking guidelines on the label and alternative ways of communicating this information to consumers; and
- displaying an age restriction on alcohol-free or low-alcohol (NoLo) products and alternative options for preventing children and young people from accessing and consuming NoLo drinks.

The consultation closes on 23 November 2023.

Reforms to the wine sector to begin in 2024

Following a public consultation, the government has set out reforms for the wine sector which will begin in 2024. Changes will include:

- Ending the mandatory use of mushroom-shaped stopper and foil sheaths on sparkling wine, reducing unnecessary waste and packaging costs for consumers.
- Ending rules on bottle shapes giving producers the freedom to use bottle shapes they could not previously use for their wines.
- Ending the requirement for imported wines to have a named importer on the label. This is intended to create more frictionless trade and reduce administrative burdens. This will also mean that only the Food Business Operator (FBO) responsible for the food information will need to be identified on packaging.
- Producers will now have the option to apply to protect designations of origin and geographical indications for wines produced using hybrid varieties of grapes. This is intended to increase options for consumers and increase the resilience of the grapes (and wine produced) in the face of climate change and disease.
- Ending the ban on the blending (coupage) of imported wines. Blending is a commonplace practice around the world and this is intended to offer scope to develop a wider variety of wines while expanding consumer choice.
- Allowing producers to now make and market piquette (a lower-alcohol drink produced by rinsing the by-products of wine production, including grape skins and stalks, with water and fermenting that rinse). This is intended to open new income streams for wine producers and help to meet demand for lower-alcohol drinks.

Updated guidance on promotions of HFSS products

The government has updated the guidance on restricting promotions of products high in fat, sugar or salt by location and by volume price to provide reflect the new implementation date of the volume price promotion restrictions, which will come into force on 1 October 2025.

The transition period for promotions on packaging is until 30 September 2026. A reminder that all location restrictions have come into force (since 1 October 2022).
Food law

For further information please see our previous Regulatory Outlook.

FSA update on tackling food crime from the Food Fraud Working Group

The FSA, in collaboration with representatives of the food industry, has published a stakeholder message setting out proposals from the Food Fraud Working Group.

These proposals have the aim of strengthening the response to food crime and include various suggestions such as launching a new freephone food fraud hotline, working with the industry on ways to encourage food fraud whistleblowing, and strengthening information sharing arrangements between food businesses’ third-party auditors and the FSA.

The FSA has also published two research reports on the estimated cost of food crime in the UK, and another on ways to prevent food fraud.

FSA updates consumer advice for CBD

On 12 October 2023, the FSA has issued new advice on cannabidiol (CBD), recommending that healthy adults should limit their consumption of CBD from food to 10mg per day (around four to five drops of 5% CBD oil). The previous recommended intake published in February 2020 was 70mg of CBD per day.

The FSA stated that the change in advice was based on new evidence from the industry and the Advisory Committee on Novel Foods & Process’ new position paper also published on the same day. It was previously reported that the FSA will not be able to sign off CBD products until at least 2024.

In the interim, the current grace period for enforcement applies to CBD products that have submitted a valid novel foods application and appear on the FSA list.

FSA consultation on Food Contact Materials Regulations

The FSA launched a consultation seeking views on the post- implementation of the Materials and Articles in Contact with Food (England) Regulations 2012, and whether the objectives of the regulations were achieved and remain relevant.

It also looks at whether there have been any unintended effects on stakeholders’ and consumers’ perspectives on the regulations.

The closing date for the consultation is 9 November 2023.

EU Parliament issues briefing on proposed legislation to regulate plants produced by certain new genomic techniques

The European Commission is proposing a new legal framework for plants obtained by certain new genomic techniques (NGTs) such as genome editing and the food and feed produced from them.

The European Parliament has now released a briefing that provides an initial analysis of Commission’s impact assessment and proposal, arguing that the existing genetically modified organisms (GMOs) legislation is not fit for purpose for plants, and splits the problem into three components:

- the current GMO authorisation procedure and risk assessment are not adapted to NGT products;
- the current GMO legislation raises implementation and enforcement challenges for certain NGTs; and
- the current GMO legislation is not conducive to innovation.

The adopted act is currently open for feedback until 5 November 2023.

FoodDrinkEurope supports proposals to remove PFAS from food contact materials

FoodDrinkEurope, an industry representative of European food and drinks companies, has confirmed their support and published their key recommendations on proposals to remove per- and polyfluoroalkyl substances (PFAS) in food contact.

Key messages include:

- any restrictions of PFAS from use in food contact should provide for a controlled and organised assessment of use, presence, alternatives and removal across sectors;
- any substitutions of PFAS in food contact should not put food production, food safety, or food security at risk; and
- any restrictions of PFAS from use in food contact need to be complemented with actions to mitigate the occurrence of PFAS in the environment and in the agri-food chain.
Food law

For further information please see our previous Regulatory Outlook.

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Health and Safety

New building safety regime

As previously reported, on 1 October 2023, the Building Safety Regulator (BSR) became the new Building Control Authority. A reminder that all occupied higher-risk buildings in England must now be registered with the BSR and Key Building Information submitted – failure to do so is a criminal offence that can result in prosecution.

For those higher risk buildings with planning and under construction a transitional period runs until April next year, provided construction is sufficiently progressed (foundations laid) then these developments will continue to be governed by the old building control regime (this avoiding the Gateway 3 requirements under the Act).

For further information, see our Insight.

Government guidance for people with duties under fire safety laws

On 29 September 2023, the Home Office published guidance for people with duties under the Regulatory Reform (Fire Safety) Order 2005 (as amended) and the Fire Safety (England) Regulations 2022.

This guide aims to help identify the Responsible Person(s) at a premises and to assist those “persons” meet their duties under fire safety legislation in simple, non-legal language. More detailed government guidance for fire safety duty holders can be found on the Home Office website.

It also aims to assist in deciding the identity of the responsible persons at any premises. This is often not clear and can lead to gaps in compliance as entities operating in the same premises are not fully aware of their responsibilities.

EU Parliament approves new rules to protect workers from exposure to asbestos

On 3 October 2023, the European Parliament approved new rules to protect EU workers from the health risks related to asbestos and to improve its early detection.

The law aims to reduce exposure to asbestos fibres to the lowest possible level. The occupational exposure limit (OEL) will be ten times lower with the limit value being decreased from 0.1 to 0.01 fibres of asbestos per cubic centimetre (cm³), without a transition period. The law includes more robust requirements on the wearing of individual protective and respiratory equipment, cleaning of clothing, decontamination procedures and high-quality training requirements for workers.

After a maximum transition period of six years, Member States will also have to switch to the more modern technology of electron microscopy to detect fibres.

HSE welcomes three partners to Working Minds campaign

On 10 October 2023, as part of World Mental Health Day, the Health and Safety Executive (HSE) announced that three new partners in the entertainment and leisure sector would be joining the Working Minds Campaign, which urges workplaces to take action on work related stress and mental health.

For further information, see our Insight.

ILO welcomes new global measures addressing workplace hazardous chemicals

On 5 October 2023, the International Labour Organisation (ILO) welcomed the adoption of a new Global Framework on Chemicals, which was created in hopes to reduce environmental and health risks from chemicals and waste.

The framework is backed up by a high-level declaration to set targets and guidelines across the lifecycle of chemicals, including the phasing out of some of the most harmful chemicals.

HSE publishes early findings from ‘Dust Kills’ health campaign

On 3 October 2023, the HSE published early findings from its latest "Dust Kills" health campaign, which aims to raise awareness of health issues in relation to dust exposure and the importance of effective control measures to improve the long-term health of those working in construction.
Health and Safety

The HSE carried out more than 1,000 inspections between May and July, which revealed examples of good and bad practice on sites and within companies in preventing or controlling the respiratory risks from construction dust.

One key area of concern for the HSE was that inspectors were still finding sites where the hierarchy of controls "were simply not considered at all", and where there was no effective design or planning to eliminate risks from dust.

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Modern slavery

EU Parliament Joint Committees adopt report on prohibiting products made with forced labour

On 16 October 2023, the European Parliament’s Legal Affairs Committee (JURI) and Internal Market and Consumer Protection Committee (IMCO) adopted a report on the proposal for a regulation on prohibiting products made with forced labour on the EU market.

The report, which was first presented in May 2023, seeks to improve the proposed regulation by strengthening the role of the EU Commission in investigations, improving information exchange, and aims to help economic operators, in particular small and medium enterprises, to comply with the regulation.

It also seeks to protect individuals who have shared information about forced labour products and addresses forced labour imposed by state authorities.

The EU Parliament (in its plenary session) will now have to confirm it as their negotiating mandate, and once the EU Council also adopts its position, talks will begin on the final shape of the regulation. See more here.
Products
European Parliament committees approve Product Liability Directive to better protect consumers against defective products

On 9 October 2023, the European Parliament's Legal Affairs Committee and Internal Market and Consumer Protection Committee approved their position on the regulation of economic operators' liability for damage caused by defective products.

The new Product Liability Directive will replace the existing product liability framework (under directive 85/374/EEC), and we expect it to have completed the legislative procedure by the end of 2024.

The European Parliament will now need to adopt the draft mandate as a whole at the next plenary session, before talks with EU member states on the final Product Liability Directive can start.

Key goals under the new legislation include:
- ensuring that even when something defective was bought outside the EU, there is an EU-based business that can be held liable for the damage it causes;
- an easier compensation procedure, including a simplified procedure around burden of proof; and
- extended liability so that claims can be made not only against physical damage but also against (1) medically recognised psychological damage, and (2) the destruction or irreversible corruption of data (such as deletion of files from a hard drive) when the economic loss exceeds €1000.

For further information, please see our previous Regulatory Outlook.

Draft regulation for EU common criteria-based cybersecurity certification scheme

On 12 October 2023, the European Commission published a draft regulation setting out the European Common Criteria-based cybersecurity certification scheme (EUCC) developed under the EU Cybersecurity Act.

The draft regulation follows a consultation held in 2020 by the European Union Agency for Cybersecurity (ENISA), and is of interest for organisations in the IT sector operating in the EU. Once adopted, the regulation will apply to all information and communication technologies products, including their documentation, which need to be submitted for certification under the EUCC.

For further information on the EU's cybersecurity strategy for IT product design please see our Insight.

MHRA publishes labelling and packaging guidance under Windsor Framework

The Medicines and Healthcare products Regulatory Agency (MHRA) has published guidance on the implementation of labelling and packaging requirements for medicinal products for human use under the Windsor Framework.

This guidance ensures that medicines can be approved and licensed on a UK-wide basis by the MHRA, with medicines using the same packaging and labelling across the UK.

New streamlined notification scheme for lowest-risk clinical trials

The MHRA has introduced a new streamlined clinical trials system. The new scheme aims to reduce the time taken by the MHRA to approve the lowest-risk clinical trials by more than 50% (that is, within 14 days instead of the statutory 30 days).

The scheme follows the MHRA's clinical trials consultation, the outcome of which was published on 21 March 2023, and forms part of the regulator's reform of the regulation of clinical trials. An estimated 20% of UK initial clinical trial applications are expected to be eligible for the scheme. However, applications for clinical trial amendments will not be eligible.

Safety warnings to be provided with valproate-containing medicine

On 11 October 2023, the government announced that valproate-containing medicines will be dispensed in the manufacturer's original full pack, following changes to the Human Medicines Regulations 2012.
The aim is to ensure that patients always receive the latest safety warnings and pictograms each time a prescription is dispensed. This will include a patient card and patient information leaflet, contained in the manufacturer's original full pack. These materials are recognised as a key part of the safety messaging and specifically alert patients to the risks to the unborn baby if valproate-containing medicines are used in pregnancy.

**OPSS releases exemption process guidance for cosmetic products with CMR substances**

On 5 October 2023, the Office for Product Safety and Standards (OPSS) released guidance on the exemption process for the use of substances classified as carcinogenic, mutagenic and toxic for reproduction (CMR) in cosmetic products.

The document describes the exemption process and timelines for the continued use of CMR substances in cosmetic products. The exemption can only be granted by the Secretary of State where all criteria for exemption are fulfilled, and ultimately there needs to be sufficient evidence to show that the substance is safe for use in cosmetic products.

**EU MEPs adopt position on revision of CLP Regulation for chemical substances**

On 4 October 2023, the European Parliament adopted its position on the revision of the Classification, Labelling and Packaging (CLP) Regulation ((EC) No 1272/2008) which introduces new rules to classify, label and package chemical substances and mixtures.

It aims to better identify and classify hazardous chemicals, improve communication on chemical hazards and address legal gaps and high levels of non-compliance. The European Parliament will now start negotiations with EU Member States on the final law.

**Government proposes tobacco products ban; consultation to tackle smoking and youth vaping**

On 4 October 2023, the government announced proposals for the introduction of new legislation that will make it an offence for anyone born on or after 1 January 2009 to be sold tobacco products, effectively raising the smoking age by a year each year until it applies to the whole population.

The Department of Health and Social Care (DHSC) also published a command paper setting out the proposed actions the government will take to tackle smoking and youth vaping. The paper also sets out wider measures to support existing smokers to quit smoking, and ensure the law is enforced.

On 12 October 2023, the government launched a consultation on the proposals, focusing on questions in three areas for which new legislation would be needed:

1. **Creating a smokefree generation**: consulting on the smokefree generation policy and its scope.
2. **Tackling youth vaping**: consulting on several options to ensure we take the most appropriate and impactful steps, building on England’s analysis of the youth vaping call for evidence.
3. **Enforcement**: consulting on the proposal to introduce new powers for local authorities in England and Wales to issue fixed penalty notices to enforce age of sale legislation of tobacco products and vapes.

The consultation closes on 6 December 2023.

**Consultation opens on improving alcohol treatment services**

The DHSC has launched a consultation seeking views on the first UK-wide clinical guidelines for alcohol treatment. The draft guidelines aim to develop a clear consensus on best practice for treatment for alcohol dependence, to improve outcomes for patients.

In particular, the alcohol clinical guidelines will provide:

- a detailed framework to support providers with high quality alcohol treatment guidance to help inform the quality of their services;
- guidance for health and social care staff involved in helping people experiencing alcohol dependence or drinking at harmful levels;
- guidance on managing and supporting treatment pathways, such as between hospitals or prisons and the community; and
Products

- a reference point for national regulatory bodies when inspecting alcohol treatment services. The consultation closes on 8 December 2023.

Consultation opens on proposed ban of wet wipes containing plastic

Please see Environment.

New ban on single-use plastics comes into force

Please see Environment.

Defra announces household goods will start carrying water efficiency labels

Following consultation, on 29 September 2023 Defra announced that products including toilets, sinks, dishwashers and washing machines will soon be sold with new water efficiency labels with the aim of helping consumers reduce their water wastage and save money. The labels will mimic energy efficiency labels, with a category rating from A to F on household goods.

See more on the government’s Plan for Water here.

Defra offers £50m for businesses to meet Windsor Framework labelling requirements

On 29 September 2023, Defra announced that the government is offering up £50 million in funding through the Transitional Labelling FinContact 2x2 Region

Please see Food.

FSA consultation on Food Contact Materials Regulations

Please see Food.
Regulated procurement
Regulated procurement

The new Procurement Act

The Procurement Bill received Royal Assent on 26 October 2023. The Procurement Act 2023 will reform the existing procurement legislation with the aim of creating a simpler and more flexible procurement approach.

The Procurement Act 2023 will come into force from October 2024. From now until it comes into force, the government will be releasing e-learning resources and virtual courses to prepare procurement specialists for the implementation of the changes.

To help our clients get to grips with the new Act, we have published a series of webinars and Insight articles on our microsite. Here you will find everything you need to upskill yourselves quickly on the key changes that the Act will mean for you. If you would like to find out more or discuss bespoke training, please get in touch with a member of our team.

NHS Provider Selection Regime comes into force on 1 January 2024

The Department of Health and Social Care has recently announced its intention to implement the long-awaited Provider Selection Regime (PSR) on 1 January 2024.

The PSR will provide a new set of rules for procuring healthcare services by "relevant authorities"; this includes NHS England, integrated care boards, NHS trusts and foundation trusts, and local authorities and combined authorities. The new set of rules will include the introduction of three provider selection processes which relevant authorities can follow to award healthcare services: direct award process, most suitable provider process and a competitive process.

To aid the implementation of the new regulations, NHS England has published draft statutory guidance to assist relevant authorities. Once the regulations are in force, relevant authorities must have regard to this statutory guidance. A draft toolkit has been created and NHS England is also hosting webinars to assist with the application of the PSR.

The PSR legislation will remove the procurement of health services by relevant authorities from the scope of the current legislation. However, until it is in force relevant authorities should continue to follow the rules under the Public Contracts Regulations 2015 and the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.

Where a procurement exercise is started before 1 January 2024 (with definitions of started found here), it will not be affected by the PSR and can continue under the current rules.

We will publish more updates regarding the scope and effect of this regime in the coming weeks.

Public Service Obligations in Transport Regulations 2023 published

On 16 October 2023, the Department for Transport published the Public Service Obligations in Transport Regulations 2023. This statutory instrument revokes and replaces Regulation 1370/2007, which sets out the conditions under which "competent authorities" may award Public Service Obligation (PSO) contracts for rail passenger services to train operating companies, bus and tram concession services.

The regulation restates the relevant EU case law and principles, and makes amendments to ensure that the government is able to meet its obligations in relation to subsidy provision under the UK-EU Trade and Cooperation Agreement (read our article to find out more), and to harmonise its provisions with the Subsidy Control Act 2022, and the Procurement Act.

Updates to PPN 09/23: Cyber Essentials Scheme

On 16 October 2023, the Cabinet Office updated the Public Procurement Notice (PPN) 09/23 on updates to the Cyber Essentials Scheme. The second bullet point for question nine has been replaced with reference to the Government Functional Standard (GFS), which replaces the Security Policy Framework (SPF).

For further information, see our previous Regulatory Outlook.
Regulated procurement

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Sanctions and Export Control
New Export Control Regulations to come into force

The Export Control Joint Unit announced that the Export Control (Amendment) (No 2) Regulations 2023 will come into force on 23 October 2023, amending the Export Control Order 2008 and the retained Dual-Use Regulation (EC) 428/2009, setting up a community regime for the control of exports and the transfer, brokering and transit of dual-use items.

The regulations will amend the 2008 order and the retained Dual-Use Regulation as follows:

- removing Syria from Part 2 of Schedule 4 to the 2008 order; and
- correcting two drafting errors in the Dual-Use Regulation.

The consolidated list of strategic military and dual-use items that require export authorisation will also be amended and republished in due course.

FCDO statement following Boris Mints judgment

On 16 October 2023, the Foreign, Commonwealth & Development Office (FCDO) issued a statement following the judgment in Boris Mints v PJSC National Banke and PJSC Bank Otkritie Financial Corporation.

The FCDO states that it is "carefully considering" the impact of the judgment, and in particular the Court of Appeal's views that the Central Bank of Russia, is "controlled" by designated persons by virtue of the political office. The FCDO clarifies that there is "no presumption that a private entity based in or incorporated in Russia or in any jurisdiction in which a public official is designated" is sufficient evidence to demonstrate that the relevant official exercises control over that entity.

In future, the FCDO will look to designate a public body where possible when designating a public official, if it considered that the relevant official was exercising control over the public body. See our Insight for a detailed analysis of the judgment.

UK and EU Russian iron and steel import ban in force

As previously reported, UK sanctions in relation to the import of Russian iron and steel products processed in third countries came into force on 30 September 2023. The Department for Business & Trade guidance on these measures can be found here.

OFSI issues new general licences

The Office of Financial Sanctions Implementation (OFSI) has issued the following general licences:

- General Licence INT/2023/3626884 (payments to Companies House) – this general licence permits UK designated persons to make payments to Companies House for fees owned by or due for filing a confirmation statement in respect of UK companies registered with Companies House, and the payment of late filing penalty fees. The general licence takes effect from 6 October 2023 and is of indefinite duration.

- General Licence INT/2023/3566356 (corresponding banking payments) – this general licence is issued for the purpose of providing certainty that a credit or financial institution may return a payment to another credit or financial institution which sent the relevant payment directly to it. The licence takes effect from 29 September 2023 and expires on 1 December 2023.

OFSI amends UK general licences

OFSI has amended the following general licences:

- General Licence INT/2022/2300292 (payment to utility companies for gas and electricity by UK designated persons who own or rent properties in the UK) – the duration of the general licence has been extended and is now of indefinite duration.

- General Licence INT/2023/3024200 (permitting UK persons who are owed funds or economic resources by designated persons, under a contract that was signed before the designated person was designated, to receive payment) – the duration has been extended and the general licence will now expire on 21 May 2024.
Telecoms
Telecommunications (Security) Act 2021: First Code of Practice implementation dates on the horizon

Introduced during 2021 and 2022 through the Telecoms Security Act, the Electronic Communications (Security Measures) Regulations and Telecommunications Security Code of Practice, a new set of telecoms security rules sees a step-change in the expectations on the communications sector with respect to assessing and reducing risks of security compromises on networks and services.

Tier 1 providers (companies caught by the Act with an annual revenue over £1bn) must implement the first set of requirements by 31 March 2024. These requirements are generally seen as the most straightforward and least resource-intensive measures (for example, maintaining accurate records of all externally-facing systems). For companies that have not yet started a telecoms security compliance project, the advice is not to panic, but the sooner you can start, the better.

Although the implementation timeframes for Tier 2 (with annual revenue over £50m) and Tier 3 providers are further away than for Tier 1, this is in recognition that it may take these providers longer to achieve compliance, so Tier 2 and 3 providers should not wait they are one year out before starting to think about compliance.

It is paramount for providers to recognise that the requirements and deadlines affect not only the providers themselves but also their suppliers. Suppliers who provide services or equipment to Tier 1 and Tier 2 providers also face a countdown to the looming deadlines, as providers will need to implement measures that relate to their supply chain. Suppliers themselves may not be directly regulated under the telecoms security rules, however Tier 1 and Tier 2 providers are required to include clauses in their contracts to flow down the regulations to their suppliers. Suppliers must therefore ensure they are aware of the requirements (and implementation dates) and consider how they are going to comply as well.

Compliance with the rules should focus on the business’s understanding of how the rules will apply to it (whether as a telecoms provider or a supplier of one). Information gathering and the implementation of new policies and governance procedures are some of the key measures that a business should take when conducting a compliance project.

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