



## Regulatory Outlook

*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:

- two consultations have been launched this month under the Online Safety Act;
- progress of the AI Act falters due to EU institutions not being able to agree on certain provisions; and
- changes to the UK public procurement regimes set to deliver digital healthcare in the NHS.

November 2023

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## Advertising and marketing

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# Advertising and marketing

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## EU Commission looks into influencer marketing practices

The European Commission has published an [Influencer Legal Hub](#) and has [announced](#) plans to look into influencer marketing online practices. The Commission, in cooperation with the Consumer Protection Cooperation (CPC) Network, plans to screen online posts to identify testimonial and endorsement content that is misleading to consumers. This effectively means we can expect a CPC sweep of influencer marketing content.

Influencer marketing is an emerging topic for the EU. The Commission addressed the issue when it consulted on its [fitness check on EU consumer law](#) and has now confirmed that the results of this online "sweep" will be fed into the fitness check. This means it is likely that additional express requirements regarding disclosures for influencer marketing could be part of the proposals for the updates to consumer law.

In the meantime, the Influencer Legal Hub aims to provide influencers with a better understanding of EU consumer law, as well as media and advertising laws applicable to influencer marketing. It comprises a collection of materials including video training, written legal briefs, overviews of important European laws, cases decided by the Court of Justice of the European Union, and more. This is in addition to national requirements – for example, see our [Insight](#) on how this issue is addressed in France.

In the UK, influencer marketing also continues to be a hot topic and equivalent materials providing guidance and historic enforcement can be found on the CMA and ASA websites.

## CAP publishes new rules on advertising of alcohol alternative products

Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) have released new rules and guidance on advertising of alcohol alternatives. Alcohol alternative products are defined as follows:

*Alcohol alternatives are non-alcoholic drinks (for the purposes of the CAP / BCAP Code, those at or under 0.5% ABV) that are intended to replace alcoholic drinks in contexts where they would normally be consumed, such as non-alcoholic beer.*

In a [regulatory statement](#) CAP and BCAP have summarised outcomes of their consultation on the topic launched in February 2022 and outlined amendments made to Section 18 of the CAP Code and Section 19 of the BCAP Code in relation to alcohol alternatives. The [guidance](#) is designed to support advertisers to promote alcohol alternatives in a responsible way and to provide marketers with guidelines on whether an ad is likely to be subject to the rules covering alcohol alternatives.

The new rules and guidance will come into force on **14 May 2024**.

## CAP and BCAP publish an update statement on their work relating to the use of digitally altered images in ads

CAP and BCAP have [provided an update](#) on their ongoing review into the use of digitally altered images in advertising and the potential harmful impact on body image. See our previous [Regulatory Outlook](#) for background.

So far, CAP and BCAP do not consider that requiring a label to be added to images in which body parts or proportions have been digitally altered would achieve the goal of protecting consumers from potential harmful impact on their body image perception. CAP and BCAP have committed to continue the assessment of the existing advertising codes to establish whether they sufficiently address harms arising from digitally altered body images in ads. CAP and BCAP intend to release the outcome of their review in spring 2024.

## House of Commons library report on regulation of gambling advertising

The UK House of Commons Library has published a [research briefing](#) summarising the regulation of gambling advertising. The report considers the current regulatory framework for gambling ads, the gambling industry's voluntary actions taken in response to concerns about gambling advertising and the proposals set out in the gambling white paper published in April 2023.

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# Advertising and marketing

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## House of Commons library report on loot boxes in video games

The House of Commons Library has published a [research briefing](#) on the issue of loot boxes in video games.

Loot boxes have been defined as "*features in video games which may be accessed through gameplay, or purchased with in-game items, virtual currencies, or directly with real-world money*". The report considers: (i) the controversies surrounding loot boxes and their similarity with gambling; (ii) how the government has addressed the issue so far, eventually saying that it does not intend to amend gambling law to capture loot boxes (among other things, as set out in the gambling white paper published in April 2023); and (iii) the games industry guidance on loot boxes published in July 2023.

## IAB Europe publishes summary of its DSA Ads Transparency Approach

IAB Europe has published a [summary](#) of their recommended approach to help the advertising industry, particularly the ad tech ecosystem support online platforms in meeting advertising transparency requirements under the EU Digital Services Act (DSA).

The DSA obliges online platforms to provide users with certain information about every ad carried on their sites or apps. IAB Europe's DSA Ads Transparency Taskforce has developed an industry solution to enable the collection and delivery of the required information. The summary document explains how the standardised protocol works and what participants will need to do to help online platforms comply with their DSA transparency requirements. The full specification will be published by IAB Tech Lab, in collaboration with IAB Europe.

## IPA guiding principles for use of generative AI in advertising

See [AI section](#).



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# Artificial Intelligence

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# Artificial Intelligence

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## AI and business risk

Managing AI risk is rapidly becoming a widespread business consideration. We have brought together our experts across various fields to offer an overview of legal risks arising from this transformative technology, highlighting the additional risks from generative AI. [Access the overview](#).

We will also be discussing practical steps for managing those risks as part of our In-House Lawyer programme – see [more details and register](#).

## AI Safety Summit 2023

The UK hosted the first international AI Safety Summit on 1 and 2 November 2023 at Bletchley Park. The main outcomes were:

- **the Bletchley Declaration** – signed by the 29 countries in attendance (including the European Union), the [Bletchley Declaration](#) confirms their commitment to sustaining and strengthening their cooperation in relation to the specific risks of frontier AI, including with further AI Safety Summits planned for South Korea (in six months) and France (in 12 months).
- **State of the Science report** – the UK has commissioned Yoshua Bengio, a leading figure in AI development, to lead production of a ["State of the Science" Report](#) on the capabilities and risks of frontier AI, to be published ahead of the next AI Safety Summit.
- **the AI Safety Institute** – launched by the UK prime minister, the [AI Safety Institute](#) will test new types of frontier AI, working closely with the Alan Turing Institute. As well as evaluating advanced AI systems, it will drive foundational AI safety research and facilitate information exchange (including with the separately [announced](#) US AI Safety Institute).

Commentators have observed that the UK secured a diplomatic win by convening so many countries including both the US and China, but also that the events of the week (including the US's AI executive order and the principles and code of conduct published by the G7 group of countries published just before the summit – discussed below) rather emphasised that the UK does not lead in this field.

## New AI regulatory framework for autonomous vehicles

New legislation to provide a regulatory framework for AI-powered autonomous vehicles has been [introduced](#) into the UK Parliament.

The [Automated Vehicles Bill](#) will create a definition of "self-driving" and will create a rigorous safety and authorisation regime for self-driving vehicles. Authorisation will also be required for the organisation responsible for how they drive, plus a licensing regime for companies responsible for the operation of "No User in Charge" (NUIC) vehicles. The bill will remove liability from users of a NUIC vehicle for the driving-related aspects of its use, but not for non-driving aspects, such as insurance, roadworthiness and use of seatbelts.

The focus of the legislation, which implements the recommendations of a four year-long review of the law, is on safety and clarity of responsibility and liability.

As a general statement, the UK is not planning new legislation about AI, as set out in the [white paper of March 2023](#), but this is an example of application-specific regulation based on detailed review of changes needed to current law to support trust, investment and growth of this AI-based field. This is not a rapid approach to adapting law for AI but it may be how we see AI regulation developing over time, sector by sector.

## UK CMA's chair speech on consumers, competition and AI

The approach to [AI regulation set out in the UK's white paper](#) is to use existing regulation to oversee applications of this technology. The chair of the UK Competition and Markets Authority (CMA), Marcus Bokkerink, delivered a [speech](#) at a side event to the AI Safety Summit, which discusses CMA thinking in relation to consumers, competition and AI.

The CMA's work on protecting consumers from unfair practices in the digital environment has included fake reviews, dark patterns, automatically renewed subscriptions, pressure selling and drip pricing, pressuring consumers into sharing their

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personal data, and more. The CMA's chair discussed how AI could both help tackle these problems but also enhance them. For example, the CMA already uses AI tools to identify fake reviews, but at the same time AI could be used to generate more convincing fake reviews in huge numbers.

In terms of how the white paper's principles apply to the CMA's remit of protecting competition and consumers, it continues to apply its strict approach against any unfair commercial practices in the digital environment, including AI-related breaches. In addition, to enable preventive measures and not only to react to breaches, it published an [initial report](#) on AI foundation models, as we reported in September 2023.

See the [Competition section](#) for more.

## IPA guiding principles for use of generative AI in advertising

The Institute of Practitioners in Advertising (IPA) has released [twelve guiding principles](#) for the use of generative AI in advertising. The non-exhaustive list is aimed at agencies and advertisers to ensure that generative AI is used in an ethical way towards both consumers and creative industry. The principles broadly suggest that:

- AI should be used in an ethical, responsible and transparent manner.
- The use of AI should not discriminate against individuals or groups and adversely impact their rights, including in relation to personal data.
- Advertisers should bear in mind potential impact of generative AI on environment, holders of intellectual property rights, and employment and talent.
- Advertisers should carry out appropriate due diligence of the AI tools they use to ensure they are safe and secure.
- Human oversight and accountability process should be in place.
- Advertisers should monitor and assess their use of AI on a regular basis.

## AI Act progress falters

As we reported in the previous [Regulatory Outlook](#), the fourth round of trilogue negotiations between the EU Commission, Council and Parliament on the detail of the AI Act took place on 24 October.

Since then, the institutions have hit problems in agreeing provisions to regulate foundation models (not included in the original draft of April 2021). Disagreement has emerged between Member States on how (or whether) to tackle this issue. Because there is no settled Council negotiating position, discussions with the Parliament cannot progress. The Commission has proposed a compromise, focused on transparency, technical documentation, and information about training data. We understand that there is a concern from the Parliament that, without upstream obligations along these lines, downstream developers using a foundation model to build a high risk AI application would struggle to meet their own AI Act obligations.

However, there are strong political incentives to break the current deadlock in time for a constructive further trilogue meeting on 6 December 2023. With European Parliament elections looming next June, agreement in principle on the text has to be reached between the institutions by the end of the year, so that the resulting technical drafting can be completed by February 2024 at the absolute latest. This timing is driven by the need for the Parliament to approve the final text before the current parliamentary session ends.

## OECD updates the definition of AI for the AI Act

The Organisation for Economic Co-operation and Development (OECD) has [updated](#) its definition of AI as follows:

*"An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that [can] influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment."*

The main change is the addition of the final sentence. Interestingly, this brings to mind the [UK white paper's approach](#) which does not try to capture AI in a detailed definition but identifies AI systems for regulatory purposes by reference to their key characteristics of autonomy and adaptiveness.

The new definition is expected to be inserted into the draft AI Act.

## G7 publishes a code of conduct for developers and final 11 guiding principles on AI



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On 30 October 2023, shortly before the UK AI Safety Summit, the G7 nations (Canada, France, Germany, Italy, Japan, UK and USA, as well as the EU) announced a voluntary International [Code of Conduct](#) for AI developers, as part of their Hiroshima AI Process. The G7 are calling on organisations developing advanced AI systems to sign up to the code and hope to announce the first signatories "*in the near future*".

The Code of Conduct is the outcome of what were originally bilateral discussions between the EU and US for a voluntary code of conduct. The Commission has [welcomed the code](#).

In addition to the Code of Conduct, the G7 have also published their agreed eleven [Guiding Principles](#), which underpin the code and which, in turn, build on the OECD AI principles. The code follows the eleven principles, adding detail and granularity about what is expected of developers which have signed up to it. Both are stated to be "living documents" to be adapted over time.

## US President issues executive order on safe, secure and trustworthy AI

Also on 30 October 2023, US President Biden announced a new [executive order](#) to tackle various aspects of AI. Most high profile has been the requirement on developers of the most powerful AI systems to share their safety test results and other critical information with the US government, stated to be in accordance with the "Defense Production Act".

Many of other initiatives concern actions to be taken by the US administration, such as the development of standards, guidance, pilots and the development of best practice for public bodies. Interestingly, the order includes a call on Congress to pass non-partisan privacy legislation at federal level – perhaps reflecting the enforcement lead taken in Europe by data protection authorities against generative AI.

## DIST publishes policy paper on frontier AI: capabilities and risks

See more in Cyber security.



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

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# Bribery, fraud and anti-money laundering

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## Criminal Justice Bill introduced in Commons

On 14 November 2023, the [Criminal Justice Bill](#) was introduced in the House of Commons.

Among other things, the bill proposes to replace sections 196 to 198 of the [Economic Crime and Corporate Transparency Act](#) which will expand the "identification doctrine" so that companies can be held criminally liable for criminal acts committed by senior managers of the company acting within the "actual or apparent authority granted by the organisation". The government committed to reform of the identification doctrine by expanding its scope to apply to all criminal offences in the Economic Crime Plan 2 and the Fraud Strategy.

The relevant provisions in the Economic Crime and Corporate Transparency Act, which are due to come into force on 26 December 2023, confines the offence to specified economic crimes. The second reading of the bill took place on 28 November 2023. See the [government factsheet](#) on the bill.

## Economic Crime and Corporate Transparency Act commencement regulations

As previously reported, the [Economic Crime and Corporate Transparency Act](#) (ECCTA) received Royal Assent on 26 October 2023, introducing among other things, important changes to the UK's company register and a new corporate criminal offence of failure to prevent fraud.

On 16 November 2023, the [Economic Crime and Corporate Transparency Act 2023 \(Commencement No. 1\) Regulations 2023](#) were published. These will bring into force on 15 January 2024 a number of provisions within the ECCTA, including information sharing measures for businesses within the anti-money laundering regulated sector for the purposes of preventing, investigating and detecting economic crime.

To find out more, sign up for our [webinar](#).

## FCA publishes multi-firm review of anti-fraud controls and complaint handling in firms

The Financial Conduct Authority (FCA) [published](#) a multi-firm review examining the systems and controls payment service providers have in place to mitigate the risks of authorised push payment (APP) fraud and prevent fraud.

The review carried out a high-level evaluation of 12 current account providers, challenger banks and payment firms to assess their current approach to fraud risk management. In particular, the FCA found instances where firms were unable to provide adequate support offered to customers who were victims of fraud.

Firms are expected to use the FCA's findings to improve their fraud detection and management processes and align themselves with the FCA's expectations of firms. The FCA will continue to monitor and work with firms in strengthening anti-fraud systems to prevent losses.

The review should be read in conjunction with the FCA's [publication](#) on the proceeds of fraud. See the full [press release](#). For further information, see our [Insight](#).

## PSR publishes APP scams performance report

The Payment Systems Regulator [published](#) its first APP fraud report, covering the performance of the largest 14 banking groups from January 2022 to December 2022 on tackling APP fraud and their treatment of victims of fraud.

The report, which focuses on Faster Payments as it was used for 98% of APP fraud payments, provides greater transparency on how well firms handle APP fraud prior to the [PSR's new reimbursement requirement](#) that will come into force in 2024.

The PSR will collect data from payment firms for 2023 as well with the aim of publishing a report in the following year.

See the full [press release](#).

## FATF report: Illicit Financial Flows from Cyber-Enabled Fraud

The Financial Action Task Force (FATF) [published](#) a report which identifies the top three areas which jurisdictions should focus on to help mitigate the threat of cyber-enabled fraud and related money laundering:

- enhancing domestic coordination across public and private sectors through greater information sharing;

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## Bribery, fraud and anti-money laundering

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- supporting international collaboration between various sectors in investigating and recovering cyber-enabled fraud proceeds; and
- strengthening the detection and prevention of cyber-enabled fraud by promoting awareness and improving crime reporting mechanisms.

The report also includes a list of recommended risk indicators and useful anti-fraud requirements and controls that public and private sector entities should implement to detect and prevent instances of cyber-enabled fraud and money laundering.

See the full [press release](#).



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# Competition

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# Competition

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## Changes to National Security and Investment Act

On 13 November 2023, the Cabinet Office issued a [call for evidence](#) in relation to the National Security and Investment Act 2021 (NSIA) to collect views on how the national security and investment regime can be more business friendly while maintaining and refining the protections needed to protect national security.

The government is looking for views from cross economy stakeholders in the UK and overseas. Oliver Dowden, the deputy prime minister, has indicated that the powers are to be pared back to make them “*more business friendly*” with the aim of “*narrowing and refining*” the scope of the regime. In particular, this evidence will help the government:

- hone the scope of the system’s mandatory notification requirements;
- improve the notification and assessment processes under the NSIA; and
- develop the government’s public guidance and communications on how the NSIA works and where the government tends to see risk arising.

Depending on the responses received, a more detailed consultation on specific measures or legislative changes may be necessary. However, changes that require primary legislation are not currently being considered.

Notably, Mr Dowden proposes removing internal restructures from the regime as the ultimate beneficial owner of the company remains the same in these scenarios.

The call for evidence is open until 15 January 2024.

Businesses involved in M&A and private equity activity should remain aware of this development, as the proposed alterations would implement significant changes to a number of parts of the regime. To discuss responding to this call for evidence please get in touch with your usual Osborne Clarke contact.

## AI and competition

Competition enforcement authorities across the globe are taking an increased interest in the impact AI can have across a range of industries. These concerns include maintaining a competitive landscape in the market for AI itself as well as the impact that this technology can have on competition in other sectors of the economy.

A number of these concerns were recently identified by the Competition and Markets Authority (CMA) in [its initial report into foundation models](#). Reflecting the rapid development of this area, the CMA plans to publish an update on the report in March 2024, covering: further developments in the market; the CMA's thinking on its proposed regulatory principles; an update on how key inputs (discussed below) are being accessed; and consideration of the role AI semiconductor chips play in the foundation model value chain. These concerns were echoed in a speech given at the [AI Fringe Hub on 1 November by Marcus Bokkerink](#), chair of the CMA.

In addition the CMA, as part of its work in the Digital Regulation Cooperation Forum, hopes to publish a joint statement with the Information Commissioner's Office in 2024, which will address areas of crossover between competition, consumer and data protection objectives – all underlining the CMA's commitment to understanding and, if necessary, regulating AI.

The CMA is not alone – a recent [G7 Communiqué on Digital Competition](#) identified a number of key inputs for the development and deployment of large-scale AI, stating that inability to access these key inputs may inhibit competition to develop AI and AI applications, consequently reducing innovation and harming consumers.

The statement points to the resource-intensive nature of large-scale AI, including datasets, skilled work force and computational power, arguing that an inability to access these resources could inhibit competition. Bundling, tying, exclusive dealing and self-preferencing were mentioned as potential anticompetitive conduct by incumbent AI companies. Incumbents could also use mergers and partnerships to entrench their market power, the statement warns. These principles reflect those being developed under emerging digital markets regulation, including the [UK Digital Markets Competition and Consumer Bill](#), which may empower multiple regulators to intervene in AI markets.

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# Competition

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The communiqué also mentioned the risk posed by algorithm-based digital cartels in facilitating collusion or price manipulation. This risk has been discussed in [a report by the CMA](#), in which it committed to work with others to identify problematic markets and firms violating consumer or competition law. Earlier this year the European Commission identified algorithmic collusion as a "study subject" for the authority and the US Department of Justice is involved in two investigations into AI-fuelled information sharing which it sees as the "*backbone*" of inflation in kitchen staples.

Interestingly, although it contributed to the [Compendium of Approaches to Digital Competition In Law](#), India has not progressed further legislation in this area. Earlier this year, a committee was formed to review the adequacy of extant Indian competition laws with respect to the regulation of digital markets. India has a two-decade old law, the Competition Act, 2002, that is ill-suited to modern digital markets. The committee was tasked with considering whether a separate digital competition law was required to address the challenges posed by emerging markets, technologies, and significant players. Despite several extensions, the committee has overshot the deadline for submitting its report and has failed to meet even once during the past three months.

In the face of extensive delays, not to mention severe opposition from tech giants, and a lack of consensus among regulators, the fate of a new digital competition in India law remains uncertain.

The use of AI and algorithms is becoming increasingly widespread across all business areas. As such all businesses should remain aware of these developments in order to ensure compliance with competition laws.

## Employment and competition

On 2 November, the Law Society and the CMA held a webinar highlighting the CMA's increasing focus on anti-competitive agreements in the employment sector. The CMA highlighted that it is paying particular attention to non-compete clauses, non-poaching agreements and restrictive covenants in employment contracts. It takes the view that these can have anti-competitive effects, including a detrimental impact on individuals/households in a cost of living crisis. There has been growing concern about the use of non-compete clauses and restrictive covenants in employment contracts, and the CMA is seeking to address these concerns.

The CMA is also concerned about the potential for agreements between employers to result in information sharing between competitors (the employers). It has caveated these concerns with the need to balance them with increasing demands for pay transparency and the requirements of other employment legislation.

This approach is reflected in a number of other jurisdictions, notably the EU and US.

The CMA itself is conducting two investigations into a number of undertakings involved in the production, creation and/or broadcasting of television content: one into sport content in the UK and another into all other television content in the UK. Both investigations focus on the purchase of services from freelance providers, and the employment of staff who support the production, creation and/or broadcasting of television content in the UK.

It is vital for businesses to remain aware of this development, as breaches of competition law can result in substantial fines and director disqualification, making it critically important to review employment contracts and discussions/arrangements with competitors for competition law compliance. There is also the potential for significant reputational damage following competition law breaches.



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# Consumer law



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# Consumer law

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## Update on the UK Digital Markets, Competition and Consumers Bill

The Digital Markets, Competition and Consumers Bill (DMCC Bill) was included in the King's Speech on 7 November 2023. (See our [Insight](#) on the digital, data and media bills announced in the speech.) The DMCC Bill was re-introduced to Parliament on 8 November 2023 and the [amendments](#) were tabled to it on 15 November 2023. The DMCCB had its first reading in the House of Lords on 22 November.

A new version of [the bill](#) has been published, incorporating the amendments passed on third reading in the House of Commons. It is due to have its second reading in the House of Lords on 5 December.

## Ofcom launches a consultation on illegal harms duties under the Online Safety Act

Ofcom has published its first consultation under the Online Safety Act, which focuses on services' duties to protect users from illegal content. See our [Insight](#) for more details. To find out more about the new legislation, also see our Insights providing an [overview of the Act](#), covering the [scope of the Act](#) and looking at [10 key takeaways for online service providers](#).

## UK government consults on introducing a 'super-complaint' system under the Online Safety Act

The Department for Science, Innovation and Technology has launched a [consultation](#) on allowing certain organisations, such as children's charities, free-speech advocates, and "other groups", to raise online safety and freedom of expression concerns directly to Ofcom by making a "super-complaint" under the Act.

The Act provides that a super-complaint will only be admissible if Ofcom considers that it is of particular importance or that it relates to the impacts on a particularly large number of users. The idea behind a super-complaint system is to help Ofcom stay on top of systemic harmful trends and emerging threats by letting some organisations raise concerns as soon as they emerge.

The government is seeking views from "expert groups" to help define which organisations can make super-complaints, the conditions and format of a super-complaint and expectations as to how Ofcom should respond to such a complaint.

The consultation closes on 11 January 2024.

## EU draft report on addictive design in the digital environment

The European Parliament's Internal Market and Consumer Protection Committee has [adopted](#) a draft report on the addictive design of certain digital services.

While admitting the positive influence social media can have on society, the committee takes the view that social media's addictive design can cause physical, psychological and material harm. It is especially concerned about the impact digital addiction has on children and adolescents and calls for more research.

The draft report also addresses dark patterns and MEPs conclude that companies should be obliged to develop ethical and fair digital products and services "by design".

The committee also says that recent legislative developments, such as the Digital Services Act and the Artificial Intelligence Act, are not enough to address the issue of addictive design, and calls on the European Commission to present new legislation on the topic.

Once adopted, this report will feed into the Commission's fitness check on EU consumer law.

## EU Commission adopts proposal to adapt out-of-court dispute resolution to digital markets

The [European Commission](#) has adopted a proposal aimed at adapting out-of-court dispute resolution to digital markets. The proposal aims to extend the scope of the Alternative Dispute Resolution (ADR) Directive (2013/11/EU) and expand the range of issues that can be resolved out-of-court to cover non-EU traders and to be able to address manipulative interfaces, misleading advertising or geo-blocking rules.

The proposed changes envisage businesses continuing to be free to decide whether to participate in ADR or not, but if a consumer asks for ADR intervention, the business would be obliged to reply within 20 working days. The amendments aim to assist consumers' (especially vulnerable ones) understanding of the procedure.

The Commission has launched a [feedback period](#) on its proposals, which closes on 29 December 2023.

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# Consumer law

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## European Parliament and Council adopt negotiating positions on Right to Repair Directive

The Commission's proposal for a Right to Repair (RTR) directive was first introduced in March 2023 (see this earlier [Regulatory Outlook](#)).

The proposal aims to encourage a sustainable consumption of goods by strengthen the consumers' rights to repair defective goods. The original proposal by the Commission would have made repair the default remedy for breach of consumer rights. The [European Parliament](#) and [Council](#) have adopted their negotiating positions in anticipation of trilogue discussions.

The Parliament's position is:

- Consumers to be given an additional right to bring a claim in relation to lack of conformity of goods against the manufacturer. This would be in addition to the existing right to bring a claim against the retailer.
- In line with the Commission's proposal, repair should be the primary remedy for lack of conformity (unless the repair would create significant inconvenience to the consumer). Where consumers choose repair as a remedy, they should be offered a one-year extended warranty starting from the moment their repaired good is returned to them.
- That the seller should undertake the repair within a reasonable period of time. In situations where this is not the case, the seller should loan the consumer a replacement product free of charge.
- Whether or not an item is "repairable" will become a relevant factor in considering whether the goods are in conformity.

The Council in contrast proposes to maintain the consumer's choice as to whether to repair or replace a product. But it would require retailers to bring the obligation to repair to the consumer's attention. The Council also proposes an extension of the liability period of six months from the moment when the product is brought into conformity.

Neither of the current drafts are the final version of the legislation – they constitute the Parliament's and the Council's respective positions for further negotiations between the institutions to reach an agreement on the final version of the text.

For the products angle of the RTR directive proposal and further details see [Products section](#).

## UK CMA's chair speech on consumers, competition and AI

See [AI section](#).



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# Cyber-security

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# Cyber-security

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## NCSC annual review 2023

On 14 November 2023, the National Cyber Security Centre (NCSC) [published](#) its annual review, covering key developments from September 2022 to August 2023. These include:

- publication of guidance on the MOVEit ransomware attack and assessing supply chain cyber security (see more in our [Insight](#));
- issuance of joint guidance exposing Snake malware (see our previous [Regulatory Outlook](#)); and
- publication of a joint advisory on the most common vulnerabilities exploited in 2022 (see our previous [Regulatory Outlook](#)).

The NCSC also outlined the three priorities that it will focus on in the coming year:

- improving the UK's cyber resilience to significant cyber risks;
- ensuring the country stays ahead of future cyber security challenges and technological innovations; and
- continuing to evolve as the national technical authority on cyber security by engaging with experts and increasing workforce diversity.

## Consultation response to review of Computer Misuse Act 1990

On 14 November 2023, the Home Office [published](#) its analysis of the consultation responses to its review of the offences and powers available to law enforcement agencies to investigate those offences in the [Computer Misuse Act 1990](#), which ran from February to April 2023.

Among other things, the Home Office notes that there was broad support for a new power to allow law enforcement to take down and seize domains and IP addresses, and calls to review the levels of sentencing and statutory defences for the current Act. The Home Office will continue to work with public and private sector partners to consider the proposals further, with the aim of providing legislative solutions in due course.

## Counter Ransomware Initiative joint statement discouraging ransom payments

On 1 November 2023, members of the international Counter Ransomware Initiative (CRI), which includes the EU, US and the UK, released a [joint statement](#) to publicly denounce ransomware and discourage ransom payments being made to cyber criminals.

The CRI committed to lead by example by asserting that member institutions under their respective national governments will not pay any ransomware extortion demands.

On 2 November, members of the CRI [affirmed](#) that relevant funds from central government should not be used to pay ransom payments. It was also the first time the UK government publicly confirmed the central government policy of not making ransom payments.

## DIST publishes policy paper on frontier AI: capabilities and risks

On 25 October 2023, the Department for Science, Innovation and Technology (DIST) published a [discussion paper](#) on capabilities and risks from frontier AI, as part of the [AI Safety Summit 2023](#).

The summit defined frontier AI as "*highly capable general-purpose AI models that can perform a wide variety of tasks and match or exceed the capabilities present in today's most advanced models*". This includes large language models (LLMs).

The paper emphasised that frontier AI is likely to "*significantly exacerbate*" existing cyber risks due to its ability to be used by potentially anyone, even those unskilled in programming, to create tailored phishing campaigns or replicate existing malware. The sectors most at risk from future frontier AI developments include critical infrastructure, such as energy, transportation, health care and finance.

The paper concludes that AI systems are likely to be used both to conduct and defend against cyber attacks due to their potential to upskill threat actors in conducting attacks and, in terms of acting as a defence, by improving the cybersecurity of systems.

## UK-Republic of Korea joint advisory about DPRK state-linked attacks on supply chains

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## Cyber-security

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On 23 November 2023, the National Cybersecurity Centre (NCSC) and the National Intelligence Service of the Republic of Korea [released](#) a joint advisory warning about the rising risk of Democratic People's Republic of Korea (DPRK) state-linked cyber actors targeting software supply chain products.

Organisations (particularly those in the public, financial services and defence industry sectors) are advised to take note of the tactics, techniques and procedures detailed in the advisory, and implement suggested preventative measures to mitigate supply chain compromises.

The joint cybersecurity advisory follows the [announcement](#) of the UK-Republic of Korea Strategic Cyber partnership on 22 November 2023, as part of the new Downing Street [Accord](#), in which the two countries commit to working together to address common cyber threats and attacks.



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# Data protection

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# Data protection

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## UK King's Speech announces Data Protection and Digital Information Bill

On 8 November, the UK Parliament announced that it would be carrying over the Data Protection and Digital Information (No. 2) Bill and reintroducing it in the 2023-2024 session; re-named the [Data Protection and Digital Information Bill](#). The bill is intended to simplify and modernise the UK's data protection framework, providing greater flexibility to UK businesses in their compliance processes. For more information, please see our [Insight](#).

The bill also sets out enabling legislation for smart data schemes in the UK; the recent consultation by the UK's Department for Science, Innovation and Technology (DSIT) on "Open Communications: a Smart Data scheme for the UK telecoms market" is a potential example of such a scheme.

## UK government publishes IDTA and EU SCC Addendum evaluation

DSIT [published](#) the first phase of its evaluation into the implementation of the UK International Data Transfer Agreement (IDTA) and the Addendum to the European Commission's Standard Contractual Clauses (EU SCC Addendum). The evaluation assessed the changes from the European Commission's Standard Contractual Clauses to the IDTA and EU SCC Addendum and how they had been implemented by businesses.

The evaluation found that most businesses (especially SMEs) were at risk of incorrectly implementing both instruments due to a lack of awareness and reliance on larger suppliers for data protection compliance. The evaluation noted that the UK Information Commissioner's Office (ICO) should be raising awareness of the IDTA and EU SCC Addendum, as well as monitoring its implementation and evaluating its wider impact and uptake. A second phase of research will be conducted after the end of the transitional period.

The ICO has been promising guidance for organisations on how to use the IDTA and EU SCC Addendum for some time, but it has been subject to continuous delays and has seemingly been pushed down the ICO's priority list. It will be interesting to see whether these comments from DSIT push the ICO to finalise this guidance.

## ICO to appeal Clearview AI decision

The UK Information Commissioner's Office (ICO) [seeks permission](#) to appeal the [Clearview AI decision](#) of the First Tier Tribunal (Tribunal), in which the tribunal overturned the ICO's Enforcement Notice and Monetary Penalty Notice issued to Clearview AI for its use of UK individuals' images to create an online global facial recognition database in breach of UK data protection law.

As reported in our previous Regulatory Outlook, 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.

The ICO considers that the tribunal incorrectly interpreted the law in finding that Clearview AI's activities were not subject to UK data protection law on the basis that it provides its services to foreign law agencies. The ICO is arguing that due to Clearview AI not processing data for foreign law enforcement purposes itself, it should not be outside of the scope of UK data protection law (and the ICO's jurisdiction).

## ICO warns UK's top websites to make cookie changes

On 21 November, the ICO issued a [statement](#) confirming that it has warned some of the UK's top websites that they face enforcement action if they do not make changes to comply with data protection law. Specifically, the ICO has requested that those websites make it as easy for users to "Reject All" advertising cookies as it is to "Accept All".

Those websites have 30 days within which to comply. The ICO will provide an update on this work in January, including details of companies that have not addressed its concerns. This update from the ICO follows comments made by it, together with the Competition and Markets Authority, on the use of dark patterns on websites and other online services (such as apps) (see our [Insight](#)).

## EU Parliament approves Data Act

The European Parliament has [adopted](#) the EU Data Act, which was initially proposed in February 2022 by the European Commission as part of the EU Data Strategy package.

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## Data protection

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This new legislation aims to facilitate the voluntary sharing of data by individuals and businesses, in particular in the context of connected products or related services. The Data Act is also aimed at making better use of industrial data, enabling businesses to monetise and generate value through their data. It is expected to contribute to the development and use of artificial intelligence in particular, by enabling increasing amounts of data utilisation and sharing.

The Data Act applies to product manufacturers and suppliers of related services, data holders that make data available to EU recipients as well as public sector bodies. Personal and non-personal data is covered, with rights of access for B2B and B2C data sharing being tackled.

The Data Act still needs to receive formal approval from the European Council, before it can finally become law.

### EDPB adopts draft guidance on the scope of cookie requirements

The European Data Protection Board (EDPB) has issued [draft guidance](#) on the technical scope of the cookie requirements within the ePrivacy Directive, in order to "*remove ambiguities related to the application of the said provisions to emerging tracking tools*".

The guidance clarifies the core elements that determine whether or not tracking tools fall within scope of the requirements, such as the terms "information", "terminal equipment of a subscriber or user", "gaining access" and "stored information and storage".

The EDPB also applies this to a number of "common techniques" (beyond cookies), such as URL and pixel tracking and Unique Identifiers, clarifying that many of these alternative cookie solutions do still fall within the scope of the ePrivacy Directive.

The guidance is open for consultation, running until 28 December 2023.

### EDPB picks topic for 2024 Coordinated Action

The European Data Protection Board (EDPB) has [selected](#) the topic for its third coordinated enforcement action during its October plenary, concerning the implementation of the right of access by controllers. This action will be launched in 2024, which will enable data protection authorities to prioritise this topic, generating deeper insight and implementing changes at the national level.

The previous topic selected by the EDPB was the designation and position of data protection officers (DPO). It has also announced that it expects to publish in the coming months its report on the outcome of this coordinated action.

### UK Court of Appeal rules ICO acted lawfully in subject access request complaint litigation

The Court of Appeal has recently [published](#) its judgment in which it upheld an earlier [High Court decision](#) to dismiss a claim by an individual that the ICO had unlawfully failed to determine his complaint about a subject access request made to an organisation.

An important question considered by the Court of Appeal was the extent to which the ICO has to go in investigating and reaching decisions on the merits of every complaint. The Court of Appeal confirmed the ICO's broad discretion in its investigation processes. It determined that the ICO is entitled to reach and express a view on a complaint, without necessarily determining whether there has been an infringement.

### Themes from the International Association of Privacy Professionals (IAPP) Europe Congress 2023

Members of Osborne Clarke's international data team attended the IAPP Europe Data Protection Congress 2023 in Brussels in mid-November. There were a couple of key themes coming out of that congress.

Firstly, speakers from the European Parliament, regulators and business all emphasised the significance of data protection and privacy issues in the development and use of artificial intelligence (AI), and the role that data protection and privacy teams have in supporting or leading AI governance within their organisations.

Secondly, the intersection of data protection with other areas of regulation – including competition, digital regulation and (potential) AI regulation – was emphasised throughout the congress. It has always been important to consider data protection and privacy issues within the broader context in which they arise, bearing in mind the wider commercial and legal framework. That is increasingly important as the volume of that intersecting/overlapping regulation (in both the UK and the EU) is on the rise.



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## Data protection

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### India's new Digital Personal Data Protection Act 2023 (DPDP Act)

India has been preparing for a privacy overhaul since August 11, 2023. The DPDP Act, when operational, will become the primary legislation governing the processing and regulation of personal data in India. This is expected by the current year end.

This law has wide-ranging implication for controllers, collectors and processors of personal data, with respect to the provision of a notice for obtaining express consent, restrictions on the processing of children's data, and implementation of an effective grievance redressal (among others). Unlike the GDPR, the DPDP Act is more "principle-based", with detailed rules for implementation to be released by the end of this calendar year.



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# Employment and immigration

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# Employment and immigration

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## TUPE, Working Time records and holiday pay

The government, on 9 November, published its response to its [recent consultation](#) looking at retained EU employment law reforms, which focused on proposals to "*simplify*" certain aspects of the Working Time Regulations 1998 (WTR) and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE); together with its [separate consultation](#) on holiday entitlement for irregular and part-year workers following the Supreme Court's decision in *Harpur v Brazel*.

The response to the consultations confirms the following legislative changes:

- **Record-keeping.** Employers will only need to keep adequate records to demonstrate compliance with the WTR.
- **Annual leave entitlement.** The government will not introduce a single annual leave entitlement but instead "*two distinct pots*" and "*two existing rates of holiday pay*" will be retained; workers will continue to receive four weeks holiday at their normal rate of pay and 1.6 weeks at their basic rate of pay. The meaning of "normal remuneration" will be defined in legislation (see below).
- **Irregular and part-year workers (including some agency workers).** An accrual method will be introduced in legislation to calculate entitlement at 12.07% of hours worked in a pay period in the first year of employment and beyond. The government will also introduce rolled-up holiday pay for these workers.
- **TUPE consultation.** Legislation will allow small businesses (with fewer than 50 employees) that undertake a transfer of any size and businesses of any size that undertake a transfer of fewer than 10 employees, to consult their employees directly where there are no existing employee representatives in place. Where employee representatives are in place, an employer would still be required to consult with them.

These changes are reflected in the draft Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (Employment Rights Regulations) statutory instrument recently laid before Parliament.

The Employment Rights Regulations also provide what types of payments are to be included when determining the amount of a week's pay for WTR purposes and restate retained EU case law permitting elements of carry-over of statutory annual leave where a worker has been unable to take it due to being on maternity or family-related leave or sick leave and where an employer has failed to inform a worker of their right to paid annual leave or has failed to enable them to take it.

The Employment Rights Regulations are due to take effect on 1 January 2024 with provisions relating to irregular and part-year workers stated to apply to leave years beginning on or after 1 April 2024.

## Restatement of equality laws

The draft Equality Act 2010 (Amendment) Regulations 2023 (Equality Regulations) have also been laid before Parliament and set out legislative reforms to ensure that "*key rights and principles in equality law are safeguarded and enshrined in domestic legislation*".

The principles reproduced by the Equality Regulations that will apply from 1 January 2024 are:

- That special treatment can be afforded to women in connection with pregnancy, childbirth or maternity.
- That less favourable treatment on grounds of breastfeeding constitutes direct discrimination on grounds of sex, and that this applies in the workplace as in other settings covered by the 2010 Act.
- That women are protected from unfavourable treatment after they return from maternity leave where that treatment is in connection with the pregnancy or a pregnancy-related illness occurring before their return.
- That women are protected against pregnancy and maternity discrimination in the workplace where they have an entitlement to maternity leave which is equivalent to compulsory, ordinary or additional maternity leave under the Maternity and Parental Leave etc. Regulations 1999.
- That a claimant without a relevant protected characteristic, who suffers a disadvantage arising from a discriminatory provision, criterion or practice together with persons with the protected characteristic may bring a claim of indirect discrimination.
- That employers and equivalent for other work categories may be liable for conduct equivalent to direct discrimination if a discriminatory statement is made regarding recruitment, even when there is not an active recruitment process underway.

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# Employment and immigration

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- That an employee is able to draw a comparison for the purposes of equal-pay claims with another employee where their terms are attributable to a single body responsible for setting or continuing the pay inequality and which can restore equal treatment, or where their terms are governed by the same collective agreement.
- That the definition of disability must be understood as specifically covering a person's ability to participate in working life on an equal basis with other workers.

The explanatory notes to the Equality Regulations state that there is "*no change to the overall effect of the law as a consequence of these regulations*"; as such, no new guidance is currently planned but current guidance will be kept under review.

## Supreme Court provides clarification on 'Bear Scotland' rule in unlawful deduction of wages claims

We also now have the Supreme Court decision in the *Agnew* case which looked, among other things, at the decision of the Employment Appeal Tribunal in the *Bear Scotland* decision that a series of unlawful underpayments would end where a gap between two unlawful underpayments exceeded three months.

The Supreme Court found the Employment Appeal Tribunal was in error in reaching this conclusion: to give proper effect to the unlawful deduction of wages provisions, an unlawful deduction of wages claim is "*not necessarily confined*" to the act or failure which occurred in the three months prior to the claim being brought where it is shown to be the latest in a series of deductions "*all of which are relevantly connected with each other... they are all comprised in one series, which for this purpose is 'in time'*". While the claim before the Supreme Court considered holiday pay, the decision will have applicability to other alleged unlawful deductions.

Employers in England and Wales do, however, still benefit from the "two-year backstop" introduced in 2015, essentially limiting unlawful deduction claims from extending back more than two years.

For more, see our fuller [Insight](#).

## Statutory minimum wage rates

The government confirmed in the Autumn Statement that it is increasing the statutory national minimum and living wage rates from April 2024 in line with recommendations from the Low Pay Commission. From that date, the statutory national living wage will also apply to workers aged 21 and over (at present it only applies to those aged 23 and over).

The new statutory minimum rates from 1 April 2024 will be as follows:

- 21 and over - £11.44 (increase of £1.02);
- 18 to 20 - £8.60 (increase of £1.11);
- 16 to 17 and apprentices - £6.40 (increase of £1.12).

The accommodation offset will increase to £9.99 per day.

Read more on what the Autumn Statement 2023 means for employers [here](#).

## Consultation on hiring staff to cover industrial action

Following the High Court decision [earlier this year](#) quashing statutory regulations which repealed regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which prevent employment businesses from supplying agency workers to cover striking workers, the government has now [launched a consultation](#) which again looks at repealing the regulation.

Under the government's proposals, employment businesses would be permitted to supply agency workers to hirers to cover strikes in any sector; "*It would be a permissive measure. Employment businesses would be permitted, but not required to supply agency workers to their hirers to cover strikes. Similarly, agency workers would be free as they are now to turn down any assignment they are offered*".

The government considers that regulation 7 "*is a significant interference in the operations of private companies and other employers. It also prevents work seekers being offered certain assignments that they may otherwise wish to take*" and that this interference "*is unnecessary and disproportionate*".

The consultation closes on 13 January 2024.

## Code of practice on 'reasonable steps' under Strikes (Minimum Service Levels) Act 2023

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# Employment and immigration

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The government has [published a response to its consultation](#) on updating the Code of Practice trade unions will be required to take into account to encourage compliance with work notices issued under the Strikes (Minimum Service Levels) Act 2023.

The Act amends the Trade Union and Labour Relations (Consolidation) Act 1992 to allow minimum service levels to be applied in certain sectors including health, transport and education; regulations will specify the minimum service level which applies to important public services within relevant sectors.

The updated Code of Practice will now be laid before Parliament for approval and is expected to come into force in mid-December.

## Revised rehabilitation periods

The Rehabilitation of Offenders Act 1974 was amended from 28 October 2023 to reduce the length of time for which some criminal records need to be declared and after which time they will be deemed spent. [Government guidance](#) setting out the new periods has been updated to reflect the changes.

## Immigration spotlight

There are major developments and changes under way in the world of UK immigration as the last months of 2023 approach. In the latest edition of their [newsletter](#), our immigration team looked at the significant issues employers are now facing following the recent increase in fees. While the implemented increases are not huge, the forthcoming changes will bring a dramatic increase to the cost of hiring overseas talents. Since publishing the newsletter, the government has announced that the increase to the health surcharge will come into force from 16 January 2024.



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# Environment

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# Environment

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## Provisional agreement reached on new EU law on environmental crime

The Council and European Parliament have reached a provisional [agreement](#) on the proposed law on protecting the environment through criminal law.

As noted in our [Insight](#), the new proposal will replace the 2008 directive and aims to improve the investigation and prosecution of environmental crime offences by imposing a number of new EU environmental criminal offences and tougher sanctions.

The number of offences has been increased from nine to eighteen and new offences include timber trafficking, the illegal recycling of polluting components of ships and serious breaches of legislation on chemicals.

For companies that commit an environmental offence, the fines range from 5% of the total worldwide turnover, or an amount corresponding to €40 million, for the most serious offences, to 3% of total worldwide turnover, or an amount corresponding to €24 million, for all other offences.

Individuals, including company representatives, committing environmental offences causing death can be sentenced to imprisonment for 10 years, and a five year prison sentence for offences committed with at least serious negligence causing death. For other intentional offences included in the legislation, a maximum prison term of either at least five years or at least three years could be given.

The agreed draft text needs to be approved by both the European Parliament and Council before it can enter into force.

## Agreement reached on EU proposal to reduce methane emissions in energy sector

The European Parliament and Council have [reached](#) a provisional agreement on a new EU regulation which reduces energy sector methane emissions.

The new regulation introduces a number of obligations for the fossil gas, oil and coal industry including to carry out regular checks on their equipment that is in EU territory to detect and repair methane leaks.

Additionally the regulation will require operators to regularly report and verify methane emissions and will introduce bans on flaring and venting unwanted methane into the atmosphere.

## Biodiversity net gain: government publishes draft biodiversity gain plan template and guidance

While the government has delayed the implementation of mandatory biodiversity net gain requirements for new planning applications to January 2024 (see our previous [Regulatory Outlook](#)), the Department for Environment, Food & Rural Affairs has recently [published](#) a draft biodiversity gain plan template and related draft guidance for developers and local planning authorities, as well as [step by step flowcharts for land managers](#).



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## **Environmental, social and governance**



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## Environmental, social and governance

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### **FCA review finds firms need to do more to embed ‘Guiding Principles’ for ESG and sustainable investment funds**

A recent review conducted by the Financial Conduct Authority (FCA) found that further improvement is required by authorised fund managers (AFMs) to fully implement and comply with the guiding principles for ESG and sustainable investment funds. While the FCA found good practice among most AFMs, it also found examples of poor practice. This included products that were inconsistently aligned with their ESG and sustainability goals, as well as instances where ESG and sustainability information was not properly explained, put into context or included in disclosures - meaning relevant information was not clear to investors. The [press release](#) notes that the regulator will continue to monitor firms to ensure they, along with their investment products, are meeting its expectations.

### **CFA Institute definitions for responsible investment approaches to avoid greenwashing**

On 1 November 2023, the CFA Institute, Global Sustainable Investment Alliance, and Principles for Responsible Investment jointly [published](#) a set of definitions for the following key responsible investment terms: screening, ESG integration, thematic investing, stewardship, and impact investing.

The groups aim to provide harmonised definitions for use by investors, regulators, and governments. A [previous report](#) from the CFA found that inconsistencies in the meaning of ESG-related terms contributed to perceptions of greenwashing.

Please also see our new international [ESG Knowledge Update](#) for a round-up of legal, regulatory and market news.



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## Fintech, digital assets, payments and consumer credit

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# Fintech, digital assets, payments and consumer credit

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## UK cryptoasset regulation

### HM Treasury update on regulatory approach to cryptoassets

On 30 October 2023, HM Treasury published a formal [response](#) on its proposals for the future financial services regulatory regime for cryptoassets.

In the response, HM Treasury confirms that it intends to bring the financial services regulation of cryptoassets within the regulatory framework established by the Financial Services and Markets Act 2000 (FSMA). In particular, it will expand the list of specified investments in the Regulated Activities Order, and require firms undertaking relevant activities involving cryptoassets by way of business to be authorised by the Financial Conduct Authority (FCA).

In the response, HM Treasury considers issues including:

- the definition of cryptoassets;
- market access arrangements;
- the new regulated activities; and
- the new market abuse regime.

HM Treasury also sets out its policy on issues raised in the call for evidence relating to decentralised finance, the regulation of other cryptoasset activities (including investment advice and staking) and sustainability.

### FCA finalised guidance on cryptoasset financial promotions

The cryptoasset financial promotion regime came into force on 8 October 2023. On 2 November 2023, the FCA published finalised [non-Handbook guidance](#) providing information on, and setting out the regulator's expectations of, the communication and approval of financial promotions relating to qualifying cryptoassets.

The guidance applies to authorised persons and persons registered with the FCA under the Money Laundering Regulations 2017 (MLRs) who communicate financial promotions relating to qualifying cryptoassets. It also applies to others involved in the communication of financial promotions relating to qualifying cryptoassets, including social media influencers and platforms. The guidance clarifies firms' existing regulatory obligations, rather than creating new obligations.

Areas covered by the guidance include:

- The context and scope of the cryptoasset financial promotion regime.
- Application of FCA rules on cryptoasset financial promotions.
- Ensuring cryptoasset financial promotions are fair, clear and not misleading.
- Financial promotions on social media.
- Due diligence before communicating a financial promotion.
- Disclosing legal and beneficial ownership of a cryptoasset.

### FCA Q&As on cryptoasset registration under MLRs

On 27 October 2023, the FCA published a new [webpage](#) containing Q&As to help cryptoasset firms applying to be registered under the MLRs.

The Q&As cover the FCA's requirements and expectations of cryptoasset businesses for registration under the relevant anti-money laundering regime. They cover typical questions about preparing to apply, and what happens after the application has been submitted. There are also questions relating to individuals who may need to be appointed by applicant firms, such as the money laundering reporting officer.

Only cryptoasset businesses registered with the FCA under the MLRs (who are not otherwise authorised persons) can take advantage of an exemption under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 to

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# Fintech, digital assets, payments and consumer credit

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communicate their own financial promotions in relation to qualifying cryptoassets, without the promotion being approved by an authorised person.

## FCA warns of common issues with cryptoasset financial promotions

On 25 October 2023, the FCA published a [statement](#) warning about common issues with cryptoasset marketing. The regulator has identified three common issues with cryptoasset financial promotions:

- promotions making claims about the "safety", "security" or ease of using cryptoasset services without highlighting the risks involved;
- risk warnings not being visible enough due to small fonts, hard-to-read colouring or non-prominent positioning; and
- customers not being given adequate information on the risks associated with the specific products being promoted.

Please see our [Insight](#) for more details.

## HM Treasury policy paper on regulatory approach to fiat-backed stablecoins and other related publications

On 30 October 2023, HM Treasury published an [update](#) on its plans for regulation of fiat-backed stablecoins. HM Treasury intends to bring certain fiat-backed stablecoins within the remit of the FCA, the BoE and the PSR, aiming to minimise the potential for customer harm and mitigate the conduct, prudential, and financial stability risks of such stablecoins, particularly when used for payments.

In the update, HM Treasury sets out an overview of its plans for the regime, with details of the specific roles and powers for the FCA, the BoE and the PSR. HM Treasury intends to bring forward secondary legislation to regulate activities relating to fiat-backed stablecoins as soon as possible and by early 2024, subject to parliamentary time.

The authorities have also released a raft of other publications relating to stablecoins:

- HM Treasury [response](#) to May 2022 consultation on managing the failure of systemic digital settlement asset (including stablecoin) firms
- BoE [discussion paper](#) on the proposed regulatory regime for systemic payment systems using stablecoins and related service providers
- FCA [discussion paper](#) on the proposed approach to regulating fiat-backed stablecoins that may be used for payments (DP23/4)

## Other updates

### FCA BNPL research note

On 31 October 2023, the FCA published a [research note](#) exploring the use of unregulated buy-now-pay-later (BNPL) credit (referred to in the note as deferred payment credit) by consumers in the UK.

The research covers the growth in use of BNPL credit, the demographics of users, how and why it is used, and the impact of its use. It also explores how this relates to the use of other forms of credit such as overdrafts and high-cost credit. The data forms part of the FCA's Financial Lives research.

The analysis will help to inform the FCA's position on BNPL credit. Although it is not currently regulated, BNPL credit is expected to become subject to regulation in due course.

## Economic Crime and Corporate Transparency Act receives Royal Assent

On 26 October 2023, the Economic Crime and Corporate Transparency Act 2023 received royal assent. The Act is the second part of a legislative package aimed at preventing abuse of UK corporate structures and tackling economic crime.

Among other things, it delivers:

- reforms to Companies House, including enhanced abilities to verify the identities of company directors, remove fraudulent organisations from the company register and share information with criminal investigation agencies;

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## Fintech, digital assets, payments and consumer credit

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- reforms to prevent the abuse of limited partnerships;
- additional powers to seize, freeze and recover suspected criminal cryptoassets;
- reforms to give businesses more confidence to share information in order to tackle money laundering and other economic crime; and
- new intelligence-gathering powers for law enforcement.

The Act brings significant business crime developments including:

- The introduction of a failure to prevent fraud offence, imposing a criminal liability on a large organisation that fails to prevent fraud intended to benefit the organisation, with a defence of adequate procedures in place to prevent fraud; and
- a change to corporate criminal liability by expanding the class of persons whose conduct can be attributed to the company. An organisation will be guilty of an offence where a senior manager acting within the scope of their authority commits a relevant offence.

Please see our [Insight](#) for more details on the corporate and limited partnership transparency changes.



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# Food law

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# Food law

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## FSA launches consultation on proposals for a new framework in England for the regulation of precision-bred organisms used for food and animal feed

On 8 November, the Food Standards Agency (FSA) published a [consultation](#) on proposals for a new regulatory framework for the use of precision bred organisms (PBOs) for food and animal feed. The proposals include introducing a two-tiered regulatory approach for pre-market authorisation (see the previous [Regulatory Outlook](#) for more).

**Tier 1** is for PBOs that are very similar to traditionally bred organisms, where the potential safety risks are understood and a bespoke safety assessment is therefore not required. This type of PBO would have a simpler route to market where a **notification** needs to be made to the FSA, and it would acknowledge receipt of the notification and provide a recommendation to the Secretary of State (SoS) that the PBO be authorised for use in food and feed.

**Tier 2** is for PBOs that have traits where further analysis of data is required. For example, where the PBO includes novelty or PBOs that have compositional changes which could affect toxicity, allergenicity, nutritional quality, or other safety concerns where potential food and feed safety risks need further consideration. These PBOs therefore require a bespoke safety assessment process. The first step would be an **application** to the FSA, which would then carry out a bespoke risk assessment. It would then provide a recommendation to the SoS that the PBO should either be authorised (with or without conditions of use) or not authorised for use in food/feed.

Under the proposed secondary legislation, the FSA would also introduce a public register for PBOs for food/feed that have received marketing authorisations and also provisions for enforcement of requirements under the new framework.

The consultation closes on Monday 8 January 2024.

## Government responds to committees disappointment on HFSS delay

The government has published its [response](#) to the Environment, Food and Rural Affairs Committee inquiry on food security. Within this, the committee outlined its disappointment on the delay of the introduction of the ban on volume price promotions of food high in fat, sugar and salt (HFSS) to October 2025.

The committee stated that it is "*not convinced that the delay to banning certain volume price promotions for HFSS food will save consumers money*" and called on the government to produce a detailed timetable on how the volume price promotion will impact consumers and businesses.

In its response, the government accepts that the delay will impact health as the restrictions "*will result in additional years for the health benefits to start to accrue*". However, the government still believed that the regulations around HFSS will have positive impacts in obesity in the long term.

Lastly, the committee also recommended that the government should publish a full impact assessment of the introduction of a sugar and salt reformulation tax. The government responded that it was not the "*right time to introduce new taxes that will push up the cost of food*".

## FSA's annual report highlights resourcing challenges

The FSA and Food Standards Scotland (FSS) have published their annual ["Our Food" report](#), which reviews food standards across the UK for 2022. The [report](#) highlights that there are shortages in key occupations needed to keep food safe. The FSA and FSS have called on the government, local authorities, professional bodies and industry to:

- address the decline in local authority Trading Standards officers, Environmental Health and Food Law officers to ensure food standards are maintained;
- tackle the shortage of Official Veterinarians to protect animal health and welfare and trade and assure food hygiene is maintained;
- share more and better-quality information across the food industry to help stop criminal gangs and tackle food crime that costs the UK up to £2 billion per year; and
- introduce import controls on food imported from the EU to help reduce the risk of unsafe food entering the UK from the EU.

## Government does u-turn on food waste reporting by businesses

As reported in this earlier [Regulatory Outlook](#), the government recently announced that it would not implement mandatory food waste reporting for large companies. The government has now, on 22 November, [withdrawn](#) this decision and has indicated that it is reconsidering whether food waste reporting should be made mandatory.

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## Food law

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### UK CAP publishes new rules on advertising of alcohol alternative products

Please see [Advertising and marketing](#).



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## Health and Safety

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# Health and Safety

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## King's Speech 2023 – health and safety aspects

The [King's Speech](#), given on 7 November, set out the government's legislative agenda for the current parliamentary session, which is likely to be the last before the next general election. It confirmed a very generally stated intention to protect leaseholders by "*extending the measures in the Building Safety Act 2022 to ensure it operates as intended*" in relation to ensuring that freeholders and developers are "*unable to escape their liabilities to fund building remediation work*".

The Terrorism (Protection of Premises) Bill, also known as Martyn's Law, was also included in the speech (see this earlier [Regulatory Outlook](#) for an outline of the bill). Ahead of formal introduction of the bill into Parliament, the government will launch a [consultation](#) on the standard tier to ensure the right balance is struck between protecting the public and avoiding burdens on small premises.

## HSE publishes annual work-related ill health statistics for 2022/23

According to the HSE's [latest annual work-related ill health statistics](#), 1.8 million workers suffered from work-related ill health in 2022/2023. While the HSE statistics from the 2021/2022 period also estimated that 1.8 million workers suffered work-related illness, the HSE has [advised](#) that the data for this period has been impacted by the coronavirus pandemic which has created issues with comparability. Instead, the HSE has reported that the figures for 2022/2023 should be compared to pre-coronavirus period (2018/2019) whereby there were 1.4 million cases; illustrating a general upwards trend of work-related ill health in Great Britain.

During the 2022/2023 period, 875,000 workers suffered from work-related stress, depression, and anxiety of which 338,000 are new cases. While this shows a 4.5% decrease from 914,000 cases during the 2021/2022 period, the HSE's advice on the impact of comparability during the coronavirus pandemic years applies. In fact, there has been a rise of cases in recent years with the HSE reporting 2,590 work-related stress, depression, and anxiety cases per 100,000 workers (2.6%) during the 2022/2023 period as compared to 1,800 cases per 100,000 workers in the 2018/2019 period. This follows an upwards trend established in previous [years](#). The figures also outlined that that 135 workers were killed in work-related accidents during this time period.

As discussed in this previous [Insight](#), mental health amongst workers is at the forefront of the HSE's [Protecting People and Places](#) strategy for 2022 to 2032. In light of these latest HSE figures showing considerably higher reported rates of work-related mental health issues than pre-pandemic, businesses need to continue to ensure that they are implementing the necessary measures to mitigate occupational mental health risks that take into account the HSE's latest guidance and [tools](#).

## Ministerial statement on transitional arrangements for second staircase in residential buildings

The government has published a [ministerial statement](#) announcing the transitional arrangements for new proposals for a second staircase in residential buildings over 18 metres in height.

Once the second staircase proposals have been formally published (via change to Approved Document B of the Building Regulations relating to fire safety), there will be a 30 month transitional period during which developers can elect whether to proceed under the old or new guidance, provided that any projects which proceed without a second staircase "*get underway in earnest*" within 18 months.

The introduction of a transitional period is intended to avoid further project delays, which have been reported due to a lack of certainty in the industry.

## Government letter on the changes made to the building control process for higher-risk buildings

On 31 October, the government [circulated a letter](#) providing further detail on the changes made to the building control process for higher-risk buildings and the wider changes to procedural building regulations.

What is noteworthy is that the letter provides a definition of "commencement" of building work which replaces the recognised guidance outlined in previous circular letters.

For complex buildings, work is considered commenced when the foundation supporting the building and the structure of the lowest floor of the building are completed. Where the work consists of a building that is not complex, or a horizontal

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extension of a building, work is considered commenced when the sub-surface of the building or the extension, basement level and the structure of the ground floor level is completed.



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## Modern slavery

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# Modern slavery

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## Modern Slavery Bill left out of King's Speech

The [King's speech](#) given on 7 November set out the legislative agenda for the current parliamentary session, which is likely to be the last before the next general election. The [Modern Slavery Bill](#), which was first announced in the Queen's Speech in May 2022, was not included in this year's speech, making it unlikely that it will be introduced before the election.



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## Products

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# Products

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## European Parliament and Council adopt negotiating positions on Right to Repair Directive

On 20<sup>th</sup> November the European Parliament [adopted](#) its position on the Commission's proposal for a Right to Repair (RTR) directive which was first introduced in March 2023 (see this earlier [Regulatory Outlook](#)). The RTR proposal does two things: (i) firstly it amends the rights in which consumers have when they are sold defective products to have them repaired; and (ii) secondly it creates a new general obligation on “producers” to repair goods.

The European Parliament's position proposes some quite significant changes to the commission plans regarding right to repair, which will only be implemented if this position is implemented in full. Specifically:

- extend repair obligations for goods which are outside of the SGD guarantee period. The EP's proposal widens the scope of products that these obligations will apply to (bicycles would be added to the initial product groups) and gives the Commission powers to expand the scope of products caught in the future (in light of legislative or market developments).
- If Article 5 obligation to repair applies to a product, producers will need to ensure that spare parts, and repair-related information and tools, are available for at least the expected lifespan of the product.
- Additionally, Producers of products would be prevented from impeding repairs by third parties by contractual, hardware or software techniques, and would also need to allow repairs to be made via original or second-hand spare parts, compatible spare parts, and 3D printed spare parts. The RTR, if amended as proposed, would also prevent producers refusing to service or repair a device that was bought or previously repaired outside their service / distribution networks.
- A fine for non-compliance may be up to 4% of the seller's or the producer's annual turnover in the Member State or Member States concerned.

The Council [adopted](#) its position on 22<sup>nd</sup> November. Changes made to the Commission's original proposal by the Council include not prioritising repair over replacement within a product's legal guarantee, arguing that the consumer should have a choice whether to replace or repair a defective product. The Council's adopted text does not go as far as the European Parliament's and in some instances deviates from that of parliament's text, for instance limiting the requirement on manufacturers to provide information on repair services to those that have a legal obligation to fix defective products.

A differing transposition period has been adopted among all three versions of the proposal. The Commission's proposal outlined a 24 month period, whereas Parliament adopted an 18 month period, and the Council adopted a 30 month period. Therefore the transposition period will depend on the outcome of the inter-institutional negotiations which are scheduled for 7 December, but it seems likely that a middle ground will be reached of the initial 24 month period, which would mean obligations would start to arise from September 2026.

Neither of the current drafts are the final version of the legislation – they constitute the Parliament's and the Council's respective positions for further negotiations between the institutions to reach an agreement on the final version of the text.

For the consumer rights angle of the directive proposal please see the [Consumer law section](#).

## EMA publishes first electronic product information for human medicines

The [European Medicines Agency](#) (EMA) is currently exploring the use of electronic product information (ePI) with a year-long pilot scheme where companies can create and submit ePIs as part of their regulatory application. Product information of a medicine includes its labelling, package leaflet and summary of a product characteristics. These documents accompany every medicine authorised in the EU and can all be found on a printed package leaflet in the medicine's box and also on the websites of EU regulators.

The published ePIs are for medicines evaluated by the EMA or by the national authorities in the countries taking part in the pilot (Denmark, the Netherlands, Spain and Sweden).

Twenty-five medicines are involved in the pilot. The EMA has now published the first lot of ePI data it has received which can be viewed on the "[Product Lifestyle Management Portal](#)". The EMA notes that in future the platform could include

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functionalities such as automatic update notifications, access to supportive videos or audio content and online adverse reaction reporting tools.

By transitioning to the use of ePI, the EMA stated it should make sharing product information easier, will mean the information can be updated more readily and will be more easily accessible to both healthcare professionals and patients.

The pilot comes to an end in July 2024 and the results will help to integrate the use of ePI across the EU. However, concerns have been raised that ePI should not completely replace paper leaflets and the European Consumer Organisation, BEUC, has warned that certain people could be left behind if this approach is taken.

### MHRA launches AI-Airlock

On 30 October 2023, the [Medicines and Healthcare products Regulatory Agency](#) (MHRA) launched a new "regulatory sandbox" known as the AI-Airlock, which will provide a regulator-monitored virtual area for developers to generate evidence for their advanced technologies within the current regulatory system.

The MHRA acknowledged that it can be challenging to test AI technologies using traditional trial techniques and the AI-Airlock is designed to provide a collaborative approach to identifying and managing regulatory evidence requirements. This could result in patients benefiting from quicker access to developing technologies. The press release states that the sandbox will allow AI technology to be used in NHS settings (with strict safety controls) before navigating the process of getting regulatory approval. It is due to be launched in April 2024.

### UK government's summary of new EU toy safety regulation

The Department for Business and Trade has published an [explanatory memorandum](#) on the EU's new proposal for a new toy safety regulation (see earlier [Regulatory Outlook](#)).

As well as providing a high level summary of the changes the regulation will introduce, it highlights that while the requirements for products placed on the GB market will not change, GB manufacturers placing products on the EU market will need to ensure they are comply with the new requirements.

It goes on to outline that the [UK's Product Safety review](#), which concluded on 24 October, will review sector specific legislation, including toys, "to fit within any emerging changes that might be considered for the framework as a whole". The government "will consider the benefits and risks of adopting similar measures as set out in the EU's proposal" and will take this into account alongside the responses it receives to the consultation.

### Government's response to Pro-Innovation Regulation of Technologies Review on advanced manufacturing

Professor Dame Angela McLean (chief scientific adviser to the UK government) has published her [Pro-Innovation Regulation of Technologies Review on advanced manufacturing](#), to which the government has [responded](#).

The review sets out a number of recommendations on regulatory opportunities for advanced technologies, including evolving the existing regulatory framework to safe testing and rollout of electric Vertical Take-off and Landing (eVTOL), accelerating the development of standards for digital twins, and looking to developing repair, reuse and recycling technology. The review includes a caveat that it does not include an exhaustive list of every sub-sector, rather it has focused on areas where regulatory challenges or opportunities are arising.

The government's response outlines what it is doing in these areas, which includes the following:

- The Department for Business and Trade manages the National Digital Twin Programme which it says will work with the British Standards Institute to determine a roadmap and develop standards required for digital twins.
- The government is taking forward the Department for Transport's Future of Flight programme which will, among other things, work with the Civil Aviation Authority to develop regulation for new aviation technologies, and has also funded £300 million to support the development of new technologies, including eVTOL.
- The High Value Manufacturing Catapult is looking to ways in which UK-based manufacturers can design their products to be more sustainable, including designing products for repair, reuse and recycling, as well as helping UK businesses looking to develop new circular materials, technologies and processes.



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## Products

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The government's response provides businesses with some interesting information on what is being done in particular areas to help assist the regulatory framework so that it is fit for these developing technologies.

### Agreement reached on new voluntary scheme for branded medicines pricing, access and growth

The government, NHS England and the Association of the British Pharmaceutical Industry (ABPI) have reached an agreement on a [voluntary scheme for branded medicines pricing, access and growth](#) (VPAG), which will run for five years from 1 January 2024.

The agreement introduces a new mechanism which will support "*lower industry payment rates for more innovative and pioneering branded medicines*" and will allow savings that are double those under the current medicine pricing agreement, the voluntary scheme for branded medicines pricing and access (VPAS).

The government and ABPI will review VPAG twice over the five years: once in 2025 and spring 2027. The government's [press release](#) states that VPAG should save the NHS £14 billion in medicine costs and that industry will invest a further £400million into the sector to accelerate work on clinical trials, manufacturing and in health technology assessments agencies.

### MHRA launches eligibility checking tool for upcoming International Recognition Procedure

In line with its introduction of the [International Recognition Procedure \(IRP\)](#) (see this earlier [Regulatory Outlook](#)), the MHRA has launched an online eligibility checking tool which applicants can use to determine whether their marketing authorisation application is suitable for IRP and identify which route to follow, before submitting an IRP application.

The MHRA is encouraging applicants to start using the tool ahead of the IRP becoming fully operational: it is due to go live on 1 January 2024. For businesses looking to place new medicines on the UK market in the new year, the tool will provide helpful guidance as to what route they will follow in order to do so.

### Government publish response to Lord O'Shaughnessy review into commercial clinical trials

On 22 November, the Department of Health and Social Care published its [response](#) to [Lord O'Shaughnessy's review of commercial clinical trials](#) that was published in May 2023. Following this the government made [five headline commitments](#) as an immediate first step, backed by up to £121 million, which were to: to improve the speed of commercial clinical trials; deliver a comprehensive and mandatory national approach to contracting; provide "real-time" data on commercial clinical activity in the UK; establishing a common approach to contacting patients to take part in research and achieving greater data usage for research delivery; and accelerating new and innovative ways to deliver trials.

The government's latest response highlights the significant progress made in commercial clinical research, with performance exceeding pre-pandemic levels. It also, among other things, announces the commencement of a new NIHR Research Delivery Network (RDN) and outlines its role in supporting health and care research delivery. The plan sets out that new performance indicators will be implemented to improve the speed and predictability of commercial research in the NHS.

### Autumn statement – life sciences aspects

The [Autumn Statement 2023](#) highlights that "*life science is a strength of the UK economy*". The statement outlines that £520 million funding will be allocated within the sector from 2025-2026 for transformational manufacturing investments, a Clinical Trials Delivery Accelerator, an Oligonucleotide Manufacturing Centre of Excellence, and AI Life Sciences Accelerator Mission. The introduction of the new VPAG scheme is estimated to save the NHS around £14 billion, and the statement also sets out that "*a £400 million fund will also be established by industry to support investment in the UK life sciences ecosystem, including improved clinical trial capacity.*"

### European Parliament adopts position on Packaging and Packaging Waste Regulation

On 23 November, the European Parliament [adopted](#) its negotiating position on the proposal for a regulation on packaging and packaging waste regulation. Amendments introduced by the MEPs include introducing specific targets for each Member State to reduce plastic packaging as follows: 10% by 2030, 15% by 2035 and 20% by 2040, this is in addition to the Commission's overall general packaging reduction targets which are 5% by 2030, 10 % by 2035 and 15 % by 2040. This position therefore goes further than that of the Commission as Member States will have to meet both the specific

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## Products

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targets for general packaging, as well as the specific targets for plastic packaging, that is if this amendment is brought forward in the finalised version of the proposal.

The Parliament have also introduced a ban on the sale of very light plastic carrier bags as well as restricting the use of certain single use packaging formats, such as hotel miniature packaging for toiletry products and shrink-wrap for suitcases in airports.

As detailed in our [Insight](#), the Commission's proposal outlined that single-use plastic or composite packaging for foods and beverages filled and consumed on premises cannot be used from 1 January 2030 (including disposable plates, cups, bags and trays). This requirement has been deleted by the European Parliament which will be welcomed by food businesses. Other packaging formats that were also included within this provision under the Commission's proposal that have also been axed by Parliament include single-use packaging for fruit and vegetables and single-use sachets and tubs.

Additionally, the European Parliament has introduced provisions banning the use of "forever chemicals" (per- and polyfluorinated alkyl substances or PFAS) and Bisphenol A in food contact packaging from being place on the Union market. This is a new requirement introduced by the European Parliament and if carried forward into the final draft of the proposal will have huge implications on packaging manufacturers who will need to consider alternative packaging materials to use.

In terms of next steps, the Council will now have to adopt its negotiating position. Once the Council has adopted their position, both drafts will constitute the Parliament's and the Council's respective positions for further negotiations between the institutions to reach an agreement on the final version of the text.



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## Regulated procurement

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# Regulated procurement

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## The Procurement Act and Net Zero

In our first podcast on the new Procurement Act, [Craig McCarthy](#) and [Millie Smith](#) discuss the interaction between public procurement and net zero, and whether the new Act goes far enough in its commitments to net zero. [Listen](#) to the podcast and [subscribe](#).

For more content on the new Procurement Act, see our "[Navigating the changes under the Procurement Act](#)" microsite.

## Changes to the UK public procurement regimes set to deliver digital healthcare in the NHS

The digitalisation of the NHS is well underway. The £1.9bn Frontline Digitalisation programme was launched in 2021 to bring all NHS Trusts in England up to a core level of digital capability. The digitalisation of the NHS comes as two significant pieces of public procurement legislation are due to come into force in 2024: the Provider Selection Regime and the Procurement Act 2023. Both regimes will help the NHS to harness the huge potential of AI and data to drive efficiencies, improve patient outcomes and reduce spend. Read our [Insight](#) for more.

## PPN 10/23: Taking account of a bidder's approach to payment in the procurement of major contracts

The Cabinet Office has published [Procurement Policy Note \(PPN\) 10/23: Taking account of a bidder's approach to payment in the procurement of major contracts](#) which sets out how payment approaches can be taken into account in the procurement of major government contracts. It replaces PPN 08/21 from 1 April 2024. The key change to the approach in PPN 08/21 is the introduction of a new threshold based on average payment days bidders have to meet to demonstrate they have effective payment systems in place to ensure the reliability of their supply chains.

The [guidance](#) outlines that payment performance is assessed by contracting authorities by looking at the following two aspects of the supply chain management system: whether the bidder has paid its suppliers in accordance with the contractual terms that it applies to its supply chain; and whether, overall, the bidder has paid its suppliers promptly by:

- paying at least 95% (at least 90% if an action plan is provided) of invoices within 60 days, which is considered an appropriate measure of overall payment promptness, and;
- meeting the average payment days threshold of at least 55 days for all invoices.

Bidders will need to be aware of this new requirement that when bidding for government contracts exceeding £5 million, they will be required to show that they settle their invoices within an average of 55 days. The recently published [Autumn Statement](#) outlined that this change was being introduced to encourage prompt payment and further added that this timeframe will be further reduced to 45 days in April 2025 and eventually to 30 days in the future. Suppliers should note that these payment times apply to payments made under both public and private contracts.

The recently updated [standard selection question](#) for central government includes questions in relation to when payments and invoices have been paid. Therefore it is imperative that businesses who wish to bid for government contracts monitor and report on these payment figures in order to provide these to the contracting authority as non-compliance could lead to significant consequences.

PPN 10/23 applies for in-scope public procurements advertised on or after 1 April 2024 and in the meantime, PPN 08/21 continues to apply. PPN 10/23 applies to all Central Government Departments, their Executive Agencies and Non Departmental Public Bodies.

## The Public Procurement (Agreement on Government Procurement) (Thresholds) Amendment Regulations 2023

On 26 October 2023, the [Public Procurement \(Agreement on Government Procurement\) \(Thresholds\) \(Amendment\) Regulations 2023](#) were laid before Parliament.

The regulations will amend the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016, and the Utilities Contracts Regulations 2016. The regulations will update the financial thresholds that govern the procedures for the award of public contracts for goods, works and services and will come into force on 1 January 2024.

The amendments to the thresholds are as follows:

## Public Contract Regulations 2015

# Regulated procurement

Contract type	Current threshold	New threshold
Public works contract	£5,336,937	£5,372,609
Public supply contracts and public service contracts awarded by central government authorities, and their design contests.	£138,760	£139,688
Public supply contracts and public service contracts awarded by sub-central contracting authorities, and their design contests.	£213,477	£214,904

## Utilities Contracts Regulations 2016

Contract type	Current threshold	New threshold from 1 January 2024
Public works contract	£5,336,937	£5,372,609
Public supply and services contracts and design contests	£426,955	£429,809

## Concession Contracts Regulations 2016

Contract type	Current threshold	New threshold from 1 January 2024
Concession contract	£5,336,937	£5,372,609

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## Regulated procurement

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# Sanctions and Export Control

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## Guidance on Russian iron and steel import ban

As [previously reported](#), UK sanctions in relation to the import of Russian iron and steel products processed in third countries will come into force on 30 September 2023.

The Department for Business & Trade and the Department for International Trade have now published [specific guidance](#) on third country processed iron and steel of Russian origin to help businesses comply with the measure.

The guidance explains the scope of the ban and the supply chain evidence the business can provide to demonstrate compliance.

## OFSI publishes guidance on disclosure enforcement powers

On 31 August 2023, the Office of Financial Sanctions Implementation (OFSI) updated section 10 of its [Enforcement and Monetary Penalty Guidance](#) to provide further details on how it assesses the severity of financial sanctions breaches.

The updated guidance provides clarification on the circumstances in which OFSI will make a disclosure notice rather than issue a monetary penalty, the timing of case summary publications, and the details which may be included in such a publication, which may include:

- the identity of the designated person to whom the breach relates;
- the summary of the facts of the case;
- the aggregated value of the transactions involved in the breach;
- compliance lessons OFSI wishes to highlight in the case; and
- other information required to give a true understanding of the case and OFSI's considerations of it.

Please see our [Insight](#) for further information.

## HM Treasury frozen assets review 2023

The deadline for HM Treasury's annual frozen assets review is 10 November 2023.

The frozen asset reporting exercise requires all persons holding or controlling funds or economic resources belonging to a designated person to complete the required reporting form. The report must include the value of all frozen assets as at close of business on 29 September 2023.

A reminder that the report must be made using the [new frozen assets reporting template](#) that was published by HM Treasury and OFSI on 8 September 2023.

## FCA publishes guidance on identifying and assessing sanctions risks

On 6 September 2023, the Financial Conduct Authority (FCA) [published](#) the key findings from its assessment of sanctions systems and controls in financial services firms.

The FCA identified examples of good practice and areas for improvement in five key areas.

Firms are now expected to consider the findings in order to evaluate their approach to identifying and assessing sanctions risks and to take action where appropriate.

Please see our [Insight](#) for further information.

## DBT issues general trade licence for legal advisory services

On 11 August 2023, the Department for Business & Trade issued a [general licence](#) permitting the direct or indirect provision of legal advisory services in relation to Russian sanctions.

The general licence permits the provision of legal advice on whether a client's proposed activity was prohibited by sanctions issued from other jurisdictions by UK lawyers.

OFSI's Russia sanctions guidance can be found [here](#).



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# Sanctions and Export Control

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## OFSI amends general guidance relating to rejected licence applications

OFSI amended its [UK Financial Sanctions General Guidance](#) in relation to options available following a rejected general licence application.

Section 6.12 on "Refusal of a licence" has been amended to remove the option to request a review of its decision from OFSI. As su **FCDO and OFSI guidance on ownership and control in UK sanctions regimes**

On 17 November 2023, the Foreign Commonwealth and Development Office (FCDO) and the Office of Financial Sanctions Implementation (OFSI) [issued](#) joint guidance clarifying the government's approach to ownership and control under UK sanctions regimes.

This follows on from the Court of Appeal judgment in *Mints & others v PJSC National Bank Trust & another*, handed down in October 2023, where the court took the view that it might be argued that President Putin controlled everything in Russia – in which case it might be argued that no trade could be permitted with Russian entities.

The newly issued guidance from the FCDO and OFSI clarifies that "ordinary" private companies in Russia are not deemed to be subject to the control of a designated public official simply because they are based in, or incorporated in Russia. For further information, see our [Insight](#).

## NECC red alert on abuse of gold to evade sanctions

On 8 November 2023, the National Economic Crime Centre (NECC), a multi-agency unit within the National Crime Agency, OFSI and the FCDO (together with the Joint Money Laundering Intelligence Taskforce) [issued](#) a red alert with the aim of increasing awareness over Russia's use of gold as a means of undermining UK sanctions.

The alert provides information on common techniques used to evade gold-related sanctions which financial institutions and other members of the regulated sector should be aware of as part of their due diligence and sets out guidance on making reports of suspected gold-based financial and trade activity.

See the [press release](#).

## Ongoing commitments as part of OFAC-OFSI enhanced partnership

The US's Office of Foreign Assets Control (OFAC) and the UK's OFSI have [committed](#) to ongoing collaboration with the aim of aligning financial sanctions implementation between the two countries as part of its enhanced partnership.

The statement was released in honour of the one year anniversary of the partnership, and follows joint industry guidance issued by OFAC and OFSI to provide greater clarity on UK and US Russia-related humanitarian assistance. See more in our previous [Regulatory Outlook](#).

## UK Export Control Joint Unit strategic export controls guidance

The UK Export Control Joint Unit has published new guidance for those exporting goods, software or technology which might be subject to strategic export controls. The new guidance can be found [here](#).ch, where applications for a licence is refused, only the following options remain:

- re-applying with new or supplementary evidence or supporting arguments;
- re-applying under a different derogation; or
- challenging the decision in the courts.



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## Sanctions and Export Control

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**Telecoms**

## Ofcom net neutrality guidance changes

The UK regulator, Ofcom, has revised its [guidance](#) in respect of how net neutrality rules should apply in the UK.

Net neutrality rules support the "open internet", which helps to ensure that internet users can control what they see and do online, rather than the broadband or mobile providers. Ofcom started its review of net neutrality in 2021. The review found that, in general, the current net neutrality rules did support consumer choice and generally worked well. However there were some areas where Ofcom felt it could provide more clarity to allow internet service providers to manage their networks in a more efficient manner.

In its guidance, Ofcom has provided clarity for broadband and mobile providers to:

- **Offer premium quality retail offers:** Allowing internet service providers to provide premium quality retail packages means they can better meet some consumers' needs. For example, people who use high quality virtual reality applications may want to buy a premium quality service, while users who mainly stream and browse the internet can buy a cheaper package. The updated guidance clarifies that internet service providers (ISPs) can offer premium packages which offer low latency (for example), provided it is made sufficiently clear to customers what they can expect from the services they buy.
- **Develop new 'specialised services':** New 5G and full fibre networks will allow internet service providers to innovate and develop their services. The guidance clarifies when they can provide "specialised services" to deliver specific content and applications that need to be optimised. This may include real time communications, virtual reality and driverless cars.
- **Use traffic management measures to manage their networks:** Traffic management can be used by internet service providers on their networks, so that a good quality of service is maintained for consumers. The updated guidance clarifies when and how internet service providers can use traffic management, including the approaches they can take.
- **Offer zero-rating offers in most circumstances:** Zero-rating is where the data used by certain websites or apps is not counted towards a customer's overall data allowance. The updated guidance clarifies that these offers will generally be allowed: for example where the site is socially beneficial, provided by a public sector organisation and there is no competing supplier that offers a comparable alternative. The guidance also clarifies the limited circumstances where Ofcom may have concerns.

Ofcom maintains that internet service providers must be transparent with their offers to allow consumers to make informed choices.



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