FREETHS

# Retail Horizon Scanner

June 2024

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# Contents

# Trending Now in Retail

**Seamless retail experience**

Retailers are investing in various forms of technology to enhance customer service, improve efficiencies, and offer a seamless shopping experience. Any type of friction can negatively impact the customer experience, leading to a potential loss of sale and damage to the brands reputation.

Solutions like self-checkout systems, autonomous checkout, expanded payment options, and real-time inventory updates are gaining momentum. Artificial Intelligence (AI) and smart robots can automate in-store operations and reduce operational expenses. It can replace sales personnel to assist customers in the store, reduce queues through cashier-less payment, and replenish stock by real-time stock monitoring.

Technology has enabled us to really enhance the shopping experience and the ability to process and deliver orders quickly will always be important for retailers. But it's important to be aware that consumers don't just want fast; fast is not a story, and it doesn't build brand loyalty.

'Slow retail' means offering consumers what matters to them, a brand and story they can engage with. So instead of speeding customers to the checkout, this approach focuses on allowing customers to develop an emotional connection with the products, the people, the brand.

As a result, customer experience-based technologies are gaining greater traction including interactive screens, video displays, virtual reality, digital mannequins and holograms, which all provide exciting opportunities to engage with customers.

We're also seeing many retailers invest in digital technologies that can tailor the online shopping experience, such as personalised sounds and clothing selections, visual and voice searches, and online personal assistants. We have been helping many retailers as they embrace new retail innovations and invest in new technologies. It's essential to get the small print right. This will save time, reduce costs, and avoid potential disputes down the line.

Jump to our Artificial Intelligence legal update section to read more.

**Complexity in consumer trends**

There's lots of complexity in consumer trends, polarisation even. One consumer can fall into two opposing categories, depending on circumstances.

For example, we're seeing consumers save and splurge. The cost-of-living crisis meant cost conscious consumers are everywhere, yet 26% of shoppers are spending the same on luxury as they are on essentials. This trend of being cost conscious but also splurging is growing and likely to continue, with options to "buy now and pay later" here to stay.

Fast fashion brands giving shoppers infinite choice are growing apace, but so are brands with very limited, highly curated product ranges. Often, the same customer will shop with both types of brands: affordable disposable and limited luxury.

Retailers can respond to these contradictory and complex trends by offering both value and a luxury experience. A mass-market, high-street brand can give their customer a feeling of luxury through the fit out of a store, by offering in store experiences that complement the brand, or by offering premium ranges alongside the main ranges.

**Social commerce**

Directly selling to consumers through social media platforms not only drives more sales, but provides opportunities for more engagement between brand and customer. Certain forms of social commerce also remove unnecessary steps such as redirecting customers to an online store, so it streamlines the process, creating a friction-free journey.

Platforms like Instagram and TikTok play such a crucial role in retail. We have been helping brands on formulate their social commerce strategies, advising on every step from concept to social shop.

Our commercial team have supported household name brands on the international rollout of their TikTok shop experience, and are happy to talk through this if helpful. For support on social media more generally, read more here about our Digital & Social Media team, Digital & Social Media Law | Online Intellectual Property | Freeths

**Working with Influencers**

Influencer marketing continues to be indomitable.

The benefits for brands in collaborating with influencers are compelling: the potential to tap into pre-existing audiences, opportunities to convert loyal followings to loyal customers, cost-effective content with high engagement rates, greater visibility and granularity of audience reach data, real time feedback on collaborations and returns on investment, opportunities to align brand ethos and values… the list goes on.

Yet issues surrounding transparency and legal compliance are starting to signal possible challenges for the industry, so it's never been more important to set out ground rules for influencer collaboration in a watertight agreement and ensure all parties are covered, and to have a plan in place if things go wrong. The Influencer Market - What to do if the ASA complains? Read our article here.

The Influencer Market - What to do if the ASA complains? (freeths.co.uk)

Watch back our Advertising & Marketing webinars here, which includes our Working with Influencers webinar. Advertising & Marketing Webinars | IP & Media Lawyers | Freeths

**Talent shortages**

Talent shortages remain a big concern for retailers right now, and have been a challenge for some time. Reasons include a lack of available people in the sector, people making career changes out of retail, wanting careers with greater flexibility in terms of hours and location, skills gaps, and high salary expectations. With a lack of available people, retail leaders need to explore how they can better engage and reward their existing employees to reduce turnover, whilst also building an exciting work environment, to retain staff and attract talent back into the sector.

Retailers could also explore the opportunities of technology and automation to bridge the gap particularly with the continuing pressure to reduce costs and drive efficiencies in light of tight margins. Self-checkout systems, robotic stock management, AI-powered chatbots, and warehouse automation are a few examples of how retailers are adapting to achieve efficiencies.

While these innovations may reduce the need for traditional retail roles, they also create opportunities for skilled workers in data analysis, machine learning, and customer-focused roles, such as product advisors and brand ambassadors.

To ensure resilience, it's essential retailers have a forward-looking approach and embrace innovation, whilst prioritising people strategies that create a rewarding place to work.

Early 2024 we conducted an Employment survey and discovered over four out of five businesses across the UK are still struggling to recruit people in 2024 following the Covid-19 pandemic four years ago. A total of 81 per cent of employers revealed the main reason being a lack of candidates with the right skillset. To read more about findings click here. UK businesses prioritising the retention of talent following Covid, finds Freeths' latest employment survey | Freeths

To jump to the Employment Law updates, click here.

To watch our Immigration webinar on Securing Skills in the Retail sector, click here Securing Skills in the Retail Sector Webinar | Business Immigration | 15.05.24 - YouTube.

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### ESG

Retailers continue to face the challenge of demonstrating their ongoing commitment to sustainability and investing in environmental, social and governance (ESG) practices is essential. Not only does it help retailers towards fighting climate change, but it enhances their relationships with their employees, suppliers, and communities. In many cases such changes reduce costs in the long term, too.

ESG can't simply be a tick box exercise, it needs to be a key part of business strategy. Transparency on what retailers are doing in this area is therefore absolutely crucial. And it's not just regulators who want to see and understand the data; it's consumers, suppliers, job applicants, and industry partners, who all want to engage with businesses whose values, cultures and practices support ESG.

ESG Reporting: What do UK businesses need to be aware of? Click here to read our overview of the key UK disclosure requirements which are in force and upcoming, as well as equivalent EU legislation which may be relevant for UK businesses. ESG Reporting: What do UK businesses need to be aware of? | Clean Energy, Waste & Sustainability | Freeths

There is plenty of change on the near horizon because of forthcoming changes to obligations in terms of how businesses deal with their waste. We have produced a summary of the legislation together with an overview of timescales for implementation and our view on likely challenges, steps to be taken by businesses to prepare for the changes, and opportunities the changes may present. To get your copy, please email Kirstin Roberts FCIWM.

### Conscious consumerism

Conscious consumerism continues to grow with consumers becoming ever more informed and considerate about their purchasing choices and which brands they associate with. The cost-of-living crisis has also driven the rise in conscious consumerism, with many people opting for pre-loved purchases and luxury rentals, offering greater value, whilst also being a more sustainable purchase choice. Re-sell platforms have also become very popular, and we have been helping retailers in launching their own platforms and initiatives to reuse, resell, and recycle their products.

As retailers and brands make serious investment into sustainability, they rightly want to shout about their achievements. But it's important to note that the regulators are hot in this area, and unsubstantiated green claims – labelled as greenwashing – can lead to reputational damage that it is hard to climb back from.

Sustainability with substance - know your risk in relation to environmental claims - read more here Greenwashing Legal Risks | Sustainable Business | Environmental Compliance (freeths.co.uk)

### Loyalty programs & subscription models

Consumers are more likely than ever to join a loyalty scheme or sign up to a subscription type model, especially if they guarantee discounts, savings and other relevant benefits. These types of programs allow for lots of data capture, so retailers are able to understand much more about their customers. Retailers can then use this data to offer personalised recommendations and targeted promotions, driving purchases and enhancing customer loyalty.

Given they involve the collection and processing of lots of customer data, UK GDPR is never far away. Read more here on some of the data protection issues that loyalty program retailers need to think about when running loyalty programs. Loyalty Program Providers | Data Protection Law | GDPR | Retail Law (freeths.co.uk)

Click here to jump to our update on the Data Reform Bill that is working its way through Parliament.

### Rise in health and wellness

There has been a big rise in consumers' focus on health and wellness and the industry is booming. It's no surprise retailers and brands are leveraging from this trend by launching new wellness related products and services or marketing their existing products in a different way. However, brands need to be very careful when navigating the advertising landscape. What happens when wellness claims become medicinal claims, and so subject to stricter regulations?

Watch back our Advertising & Marketing webinars here, which includes our Wellness Claims webinar. This is relevant for those marketing medicines, devices, food, drinks, cosmetics and therapies in the wellness space.

Advertising & Marketing Webinars | IP & Media Lawyers | Freeths

### Pop-ups & consumer communities

We're seeing more and more brands, in particular online retailers, try pop-up stores to provide a temporary and exclusive shopping experience. They give the retailer flexibility, as well the opportunity to experiment, with much less commitment and risk.

As well as also being a great way to meet and engage with consumers, they also bring consumers together, and we're seeing a huge rise in brands looking for different ways to create consumer communities, to create a buzz and get closer to their customer base. Retailers are utilising social media forums, metaverse and events to build stronger relationships with their consumers, understand their needs and desires, and nurture a sense of belonging, making them feel truly part of the brand. We're seeing product launches in the Metaverse, athleisure brands hosting wellness events and makeup brands hosting workshops. These things aren't all new, but as consumers demand more from brands, retailers need to think outside of the box, creating another forum to engage and add value.

**Supply chain disruptions**

Having the ability to be reactive and responsive is crucially important for retailers and brands. Retailers must have efficient and resilient systems in place that allow them to flex and adapt quickly to meet increased, or declining, demand.

Amid the challenges such as worker shortages and strained international relationships, supply chains have become vulnerable and fragmented, meaning they are susceptible to disruptions and delays. Retailers need to therefore 'stress test' and seek greater visibility within their chains, minimising the risks and building strong and sustainable partner relationships.

We're seeing many retailers re-evaluate their supply chain strategies and diversify suppliers. Given recent trade disruptions with China, 'the factory of the world', brands have been looking elsewhere to maintain resilience and exploring opportunities in India, Bangladesh, Vietnam and Mexico, to name a few. We're also seeing retailers move parts of their operations closer to Europe, relocating their warehousing to countries such as Turkey, which puts them in a better position to react quickly to changing circumstances.

Retailers are also continuing to invest in supply chain management technology. There are lots of systems and processes which give retailers greater visibility across the chain, and help deliver a more efficient service, whilst also identifying and relieving pressure points and disruptions – micro-fulfilment centres, on-demand delivery methods, smart shelves, video surveillance, automation, cloud technology are prime examples. We're also seeing the increased use of blockchain with the retail sector which the allows movement of a products to be recorded and monitored by all parties involved. This technology also addresses security and counterfeit issues, something which is still a big challenger within the sector.

The increasingly demanding and conscious consumer and ESG risks, also call for more strict regulation over supply chains which may require retailers to reconsider their current business model in order to meet their aspirations. Want to hear how to better protect, manage and mitigate risk within your business and your supply chains? Watch our webinar in collaboration with Aon on Managing Risk within the Supply Chain The Future of Retail: Managing Risk within the supply chain | 27.06.24 (youtube.com) or read here to learn more about Freeths Logistics & Warehousing team. Logistics & Warehousing | Supply Chain Solutions | Freeths Solicitors

**Equality, diversity and inclusivity**

More and more brands are engaging in inclusive marketing activities. Consumers from underrepresented communities are often more loyal to the brands who take the time to serve them in a way that makes them feel like they belong. But this must go beyond just marketing campaigns. It also needs to be reflected in the employees and the brand representatives selling to them.

Retailers need to get an accurate picture of their workforce and consider setting diversity targets and goals to work towards. A more diverse and inclusive workforce is also in many cases more productive, creative and effective at selling products to an increasingly socially aware, demanding customer base.

People within the LGBTQ+ community are increasingly disappointed by brands that only show up for PRIDE month. And the same goes for other awareness celebrations too. These communities have their needs and concerns all year round — not just for one month, week, or day of the year, and brands should seek to better serve their customer base year around.

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# Key Legal Updates Artificial Intelligence

## NEWS

### The Rise of AI: Impact on Businesses

Consistently with the rapid pace of AI development, attitudes to the technology are also maturing at considerable speed. Where in 2023 much of the media and popular focus was on generative AI (ChatGPT etc) the peak of the hype cycle in relation to that particular implementation of AI now seems to have passed. A growing appreciation of the limitations, and particularly the risks (see below), of generative AI tools is ensuring that most businesses are cautious in how they move to exploit it, with many going to the lengths of banning staff from using it at all, except in limited circumstances or under carefully controlled conditions.

For those who had, perhaps, been unaware of AI until about 18 months ago, or who imagined that all AI was generative AI, any negative experiences with chatbots, image generation tools and text to video converters might suggest that talk of AI was all hype and no substance. But this would be as much of a mistake as rushing headlong into replacing all call centre staff with chatbots. There are a dizzying array of AI use cases which are relevant to the retail sector and which make use of an equally broad range of artificially intelligent capabilities.

### Automation

While a gradual move towards process automation has been underway for years, in retail just as in other sectors, AI offers new possibilities to introduce efficiencies at various stages of the retail journey. We expect to be supporting more retailers who are looking to use AI powered tools to enhance efficiencies in different aspects of their business.

This might be by adopting tools that claim to be able to predict trends in supply and demand based on historical data – with the potential to reduce the risk of over- or under-stocking. Or it might be through pricing optimisation, using AI-enabled services that help to calibrate prices based on market intelligence and inventory information.

As is something of a general theme running through this note, care is needed when adopting such tools – they need to be carefully configured to ensure that automated pricing doesn't disregard profit margins and human oversight will be needed to identify and respond to unprecedented events which an analysis of historic trends might not be able to predict.

### Personalisation

One of the advantages of AI is the ability, at scale, to draw together diverse threads of information about a retailer's customers and produce personalised marketing content which engages specifically with their preferences and interests, and which can be targeted geographically or by historic purchasing patterns.

The big challenge here is managing this rich data set which the retailer has accumulated over the years, in a way which is consistent with data protection law and, crucially, with the reasonable expectations and fundamental rights of their customers. It can be difficult, for example, to reconcile the purpose for which information was originally collected at point of sale with a new purpose, perhaps years later, under which that same information will be analysed in order to make predictions about future purchasing habits. Particular care needs to be taken where, directly or by inference, the information which a retailer might analyse is capable of producing conclusions about protected characteristics such as sexuality or political leanings, or about medical information such as pregnancy or mental health conditions.

Retailers will be well aware of the, possibly apocryphal, story of the US big box store that sent pregnancy-related coupons to a young woman who had not yet revealed to her parents (with whom she was still living) that she was pregnant. This is obviously at the severe end of potential risks. But there are also risks when using insights to deliver targeted advertising if customers take exception to the category that the algorithm has placed them in.

It is going to be important to understand the capabilities of any new tool being deployed in this area, so that transparent information can be provided to customers to appropriately inform them of how their personal information is going to be used – to make sure that they can see the benefits to them of any new system, and for that matter to give them a coherent and reliable mechanism for objecting and opting out of that processing, if they are not comfortable with it.

## Facial Recognition & other biometrics

Having initially been met with some scepticism, we expect to see recent trends continue with increased adoption of these technologies for identification of both staff and customers. Biometric ID (such as face or fingerprint scans) offers enhanced security to premises such as warehouses and back office sections where enhanced security is required such as server rooms or finance/HR offices. Security is also the watchword when it comes to the deployment of facial recognition at store-fronts, in order to guard customers, staff and assets against the behaviour of vandals or shoplifters. Although other use cases are sometimes promoted (such as VIP shopper identification) these are significantly more difficult to justify against the inherently intrusive nature of the technology.

As with the acquisition of any new IT tool, it is going to become important for retailers to become conversant with the technical specifications of such technologies, and able to ask challenging questions about the extent to which the tools have been engineered to safeguard privacy by design. With AI tools, a new set of questions must also be investigated – whether that is related to the steps taken to eliminate bias in the training data that were used to generate the AI models, or the environmental and social impact of using the technology as against less energy and water intensive options.

The same applies, to a lesser extent, to other tools that promise to provide insights at a generalised level into foot traffic around retail premises, or the behaviour of visitors to the virtual storefront of a retailer's online presence.

In each case, although the eventual output which is provided to the retailer might be aggregated statistical data, the data collection methodology often involves the capturing of distinctive individual data points (a phone MAC address or other identifier when it connects to the store WiFi, for example, or the placement of cookies and other tracking technologies to monitor online visitors). Layering that with a degree of algorithmic analysis will again introduce risks that need to be properly managed before retailers can deploy such tools with confidence.

## Chatbots and customer interaction

For all that the initial hype around these has started to wane, it must be acknowledged that generative AI technologies have come on leaps and bounds within the last year and a half, and improvements can continue to be expected over the next 6-12 months. As these generative chat technologies become more sophisticated, however, it is important not to be deceived by the ability to synthesise authentic sounding language, into thinking that this is backed by actual intelligence. As with most generative tools, chatbots are essentially statistical iteration machines, taking an input of data and generating the most statistically plausible output for that input. This doesn't render them valueless, far from it, but without proper guardrails and controls, it runs the risk of highly credible but inaccurate information being produced by these tools and disseminated to customers (the inaccurately termed "hallucination" effect).

At its worst, this can leave companies contractually exposed – Air Canada earlier this year found itself on the losing end of a Court case to uphold a contract made between a customer and the company's customer service chatbot. The chatbot "hallucinated" a policy on refunds in connection with a change of travel plans following a bereavement, and although this was significantly more favourable than the company's actual policy, and the chatbot even indicated that it was attempting to summarise the policy and provided a link to the full (and accurate) terms, the Court still held the company to the policy as invented by the AI.

This again underscores the importance, when deploying such tools, of ensuring that they are properly configured, limited in their ability to invent answers, and subject to a degree of human oversight – even if that means limiting the functionality to a preliminary triaging of information before allocating customers to an appropriate human overseer.

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### Latest Developments in Copyright and AI

For more information on this topic, please see our article in the Intellectual Property & Media section here.

## CASE LAW

To read about the latest case law developments in the AI space, please see the following articles in our IP & Media section below:

- AI as Patent Inventor - Thaler v Comptroller- General of Patents – Appeal to the Supreme Court
- Patentability of AI - Emotional Perception AI vs Comptroller - General of Patents
- Does training AI amount to copyright and/or database right infringement? Getty Images (US) Inc v Stability AI Ltd

# Commercial

## LEGISLATION

### Consumer

#### A New Era in Consumer Law: The Digital Markets, Competition and Consumers Act

The Digital Markets, Competition and Consumers Act (DMCC Act) received Royal Assent on 24 May 2024. The DMCC Act will bring about substantial changes in the way consumer markets operate such as the expansion of enforcement powers granted to the Competition and Markets Authority (CMA). The CMA will no longer need to rely on court action or undertakings from traders. Instead, it will have the authority to directly impose fines of up to 10% of global turnover, as well as enforce consumer redress measures.

The DMCC Act will also address the issue of fake reviews, a growing concern in the digital marketplace. The Act will prohibit the creation of fake reviews and mandate that steps are taken to remove any such reviews. The DMCC Act will also introduce a bespoke information and cancellation regime for most subscription contracts. Therefore, businesses that rely on consumer subscriptions will need to review their processes for compliance with the new requirements.

These requirements include:

- Pre-contract information: The provision of specific information to ensure consumers understand the contract, including how the business may change its prices, how to terminate the subscription and how much notice is required for termination;
- Cooling-off period: Consumers will be allowed to cancel a subscription and obtain a refund during an initial 14-day period, for any reason and without any penalty;
- Reminders: Reminders should be issued regarding renewal and the right to terminate before the end of a free trial or discount period; and
- Termination rights – Consumers will be able to end a contract by giving a 'clear statement' of their intention to terminate

While it remains to be seen how the CMA and the courts will utilise these new powers, there is significant motivation to do so, given that reviews and subscriptions are currently seen as significant areas of consumer harm. The Government's hope is that a more efficient enforcement process, coupled with meaningful monetary penalties, will provide a more robust deterrent against consumer law violations. Businesses should review their subscription and online review arrangements in light of the new changes.

#### Government consultation on the future of the Commercial Agents (Council Directive) Regulations 1993

The government proposes to deregulate the agency regulations, meaning no more commercial agents would be created under the regulations. The consultation, available on the gov.uk website, closes on the 11th July 2024. It is proposed that the commercial agents regulations should be removed from E&W's legal framework on the basis that they contradict a longstanding principle of freedom of contract and in accordance with the government's view that the regulations may stifle innovation.

Any deregulation is likely to take significant time to make it's way into (or rather, out of!) the statute books, particularly in light of an upcoming election in which the incumbent government are, according to current polls, falling out of favour.

That said, retailers engaging new agents in the UK may wish to consider a shorter agreement term to enable them to benefit from any removal of statutory protections afforded to agents under the current rules, should deregulation be approved. On the flip side, agents might now seek to contractualise protections that are currently provided for under regulation, now or indeed in the event of deregulation, on the basis of established commercial bargain.

It's worth noting that UK businesses could still fall foul of the European Regulations when operating internationally, even if no equivalent exists in E&W going forward.

## Proposed code of conduct for software vendors

A proposed voluntary Code of Practice for software vendors has been developed by the government along with the National Cyber Security Centre, academics and industry and technical experts.

The draft code of practice contains 21 provisions organised by four key principles:

- Secure design and development
- Build environment security
- Secure deployment and maintenance
- Communication with customers

The code of practice, even in draft form, will be helpful for procurement and legal teams looking to understand and manage risk in contracts with third party software providers. Once implemented, it may function as a standard against which to measure quality and performance. As technology supply chains become increasingly complex in e-commerce and physical retail, cyber security is key. The consultation closes on 10th July 2024.

## Changes to EU consumer law

Following an extensive consultation period, we are expecting a report from the EU Commission imminently (Q2 2024). The wide-ranging consultation is intended to drive reform of the consumer law framework in the EU.

## The CSDDD and its Impact on ESG

The EU Council adopted the Corporate Sustainability Due Diligence Directive (CSDDD) on 24 May 2024. EU member states will have two years to implement the CSDDD into national legislation. The CSDDD will bring about a paradigm shift in the way large companies operate in the EU. Specifically, it imposes a due diligence duty on these corporations to identify and address specific adverse human rights and environmental impacts. This responsibility extends not only to their operations but also to those of their subsidiaries and their wider supply chain. Whilst this is EU legislation, it will also impact on UK companies which trade into the EU, so will need to be given serious consideration by any such businesses.

## The CSDDD and its Impact on ESG

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## A New Era in Consumer Law: The Digital Markets, Competition and Consumers Bill

2024 sees the introduction of the Digital Markets, Competition and Consumers Bill (DMCC Bill). Expected to come into effect in the autumn of 2024, this legislation promises to bring about substantial changes in the way consumer markets operate. One of the most anticipated aspects of the DMCC Bill is the expansion of enforcement powers granted to the Competition and Markets Authority (CMA). The CMA will no longer need to rely on court action or undertakings from traders. Instead, it will have the authority to directly impose fines of up to 10% of global turnover, as well as enforce consumer redress measures.

The DMCC Bill will address the issue of fake reviews, a growing concern in the digital marketplace. The legislation will prohibit the creation of fake reviews and mandate that steps are taken to remove any such reviews. The DMCC Bill will also introduce a bespoke information and cancellation regime for most subscription contracts. While the specifics of this regime are still under discussion, businesses that rely on consumer subscriptions will need to review their processes for compliance with the new requirements once they are finalised later in the year.

These requirements are expected to include:

- A prescribed 'cooling-off' period for new subscriptions
- More detailed requirements for the provision of information regarding the nature of a subscription contract

While it remains to be seen how the CMA and the courts will utilise these new powers, there is significant motivation to do so, given that reviews and subscriptions are currently seen as significant areas of consumer harm. The Government's hope is that a more efficient enforcement process, coupled with meaningful monetary penalties, will provide a more robust deterrent against consumer law violations. Businesses should prepare for a review of their subscription and online review arrangements later this year.

## EU Deforestation Regulations and the UK Environment Act 2021

UK businesses trading into the EU need to be aware of the EU's 'Deforestation-free Products Regulation'. This regulation is designed to prevent any commodity or product associated with deforestation, forest degradation, or illegal logging from entering or circulating within the EU. For businesses within the scope of this regulation, preparation is key. They will need to undertake due diligence to ensure that specified commodities, along with some derived products, are 'deforestation-free' from 30 December 2024. This cannot just be a box-ticking exercise but must be seen as a step towards sustainable business practices and environmental responsibility. Meanwhile, here in the UK, we are anticipating developments of our own in this space. The Environment Act 2021 is being amended to set out parallel, albeit not identical, requirements on 'Illegal deforestation and supply chain reporting'. We expect to see movement on this front this year

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# Competition

## LEGISLATION

**Digital Markets, Competition and Consumers Act: UK's Reform of Digital Market Regulation**

The Digital Markets, Competition and Consumers Bill was introduced before Parliament in 2023 and received Royal Assent on 24 May 2024.

The Act (which we discussed in more detail here) will develop and reform competition and consumer policy in the UK. More specifically, it aims to:

- Promote competition to drive enterprise, innovation, growth, and productivity
- Update consumer rights to keep pace with markets
- Strengthen the enforcement of consumer law by individuals and regulators including the Competition and Markets Authority (CMA).

From a competition policy perspective, the Act will introduce new turnover thresholds for the purposes of the UK's merger control regime and will give the CMA more power to assert jurisdiction over and review 'killer acquisitions' (whereby a dominant firm acquires a small, emerging firm to pre-empt potential competition). It will also provide greater flexibility for the CMA in its market inquiries and equip the CMA with stronger enforcement powers.

Examples of the proposed consumer protection reforms include new rules to combat 'subscription traps' as well as fake reviews and online exploitation. For more information on the consumer position please see our article in the Commercial section here. The Act will also protect certain prepayment and saving schemes.

These reforms have been discussed and broadly consulted on for many years and the content of the draft legislation largely aligns with the reforms set out in the Government's April 2022 announcement.

The new digital markets rules are likely to start applying to the designated tech companies only in 2025 following the nine-month designation process, whereby the CMA will designate firms that have 'strategic market status' in accordance with the legal thresholds of the Act.

The Act will introduce significant reform to the UK's competition and consumer law regime.

### Green Agreements: Collaborating with competitors on environmental sustainability

Environmental cooperation between competitors has generally become less risky following the publication, on 12 October 2023, of the CMA's new Green Agreements Guidance on environmental sustainability and climate change agreements (and its earlier Guidance on Horizontal Agreements issued on 16 August 2023).

The new guidance explains how UK competition law applies to environmental sustainability and climate change agreements ("Green Agreements") and largely augments the CMA's earlier draft guidance (discussed here) through the addition of new examples and the use of tighter language.

The guidance also clarifies the circumstances in which collaboration with competitors to promote environmental sustainability may be permitted – and when it may be prohibited as anti-competitive under the UK competition law prohibition of anti-competitive agreements or practices (the Prohibition).

It covers three broad situations:

- Green Agreements which are unlikely to infringe the Prohibition
- Green Agreements which could infringe the Prohibition
- Exemption to permit Green Agreements that would otherwise infringe the Prohibition

The new principles applying to such collaboration are outlined in further detail here.

The CMA continues to acknowledge that industry collaboration is likely to make an important contribution to meeting the UK's binding international commitments and domestic legislative obligations to achieve a net zero economy. It is "*keen to help businesses take action on climate change and environmental sustainability, without undue fear of breaching competition law*" and emphasises its 'open-door policy' to provide informal guidance in the case of uncertainty.

## First practical example issued

In December 2023, the CMA published its first informal guidance, which it had provided to the Fairtrade Foundation. The Foundation requested guidance on its new Shared Impact Initiative ("Initiative") which aimed to enhance sustainability and resilience in food supply chains. One of the objectives of the Initiative was to provide longer-term contractual stability to give producers the opportunity to invest in more environmentally sustainable farming practices, being reassured that they had the investment pipeline to achieve this. Grocery retailers would also agree to commit to purchase minimum volumes of bananas, coffee and/or cocoa from a pool of Fairtrade producers on long-term contracts.

The CMA concluded that the Initiative as a whole was unlikely to affect competition on the potentially affected markets and was unlikely to have appreciable effects on competition, in view of the limited scale of the pilot. Furthermore, the CMA concluded that the Initiative was likely to result in additional availability and choice of Fairtrade products for UK consumers, leading the CMA to conclude that the Initiative was likely to be assessed as being neutral or having positive effects on competition.

In this case, there were clear and identifiable benefits for consumers. In relation to the minimum purchasing requirements, other than the core volume and duration features of the Initiative, each retailer would continue to act unilaterally in respect of the terms on which it purchases from the suppliers. As such the CMA could get comfortable with this level of competitor cooperation.

## Second practical example issued

In March 2024, the CMA published informal guidance which it had provided to the WWF-UK.

WWF-UK's request related to the 'WWF Basket – Climate Action' initiative. The objective of this proposal was to help reduce 'scope 3' emissions in the grocery sector, through participating retailers agreeing to require suppliers that account for at least 80% of the emissions produced by a retailer's supply chain to set net-zero science-based targets.

The CMA concluded that the proposal constitutes a 'climate change agreement' and advised that it would not expect to take enforcement action in relation to the proposal.

In line with the CMA's Green Agreements Guidance, the CMA considered the effects of the proposed collaboration on UK consumers as a whole, rather than only on those consumers affected by the agreement.

## Conclusion

It remains to be seen whether the boundaries of permissible environmental collaboration will be informed by supplementary CMA guidance on Green Agreements or through case studies setting out lessons learned from informal guidance requests made to the CMA or, indeed, by future CMA enforcement action on environmental collaboration that strays over the line into anti-competitive activity.

Businesses currently participating in, or seeking to enter into, Green Agreements with competing businesses should review the guidance carefully and seek specialist competition law advice.

## National Security and Investment Act 2021: Government publishes response to Call for Evidence

In November 2023, the Cabinet Office initiated a call for evidence and sought views on the impact, scope and operation of the National Security and Investment Act 2021 ("NSIA"), which came into force on 4 January 2022. The NSIA regime allows the Government to scrutinise and intervene in certain acquisitions and investments that may pose a risk to national security. The call for evidence aimed to gather views to inform proposed reforms that will ensure the regime remains effective and proportionate.

The call for evidence closed in January 2024. On 18 April 2024, the Cabinet Office published its response to the call for evidence. The response summarises the feedback received and sets out the Government's plans to improve the framework by taking the following action:

- Consult on revised definitions for the 17 sensitive areas of the UK economy that trigger mandatory notifications. A formal public consultation will be launched which will include proposals for a standalone Semiconductor area and a Critical Minerals area. The Government will also explore adding the water industry to the list of prescribed areas

- Bring forward secondary legislation in Autumn 2024 to create an exemption from the mandatory notification requirement for the appointment of liquidators, official receivers, and special administrators. The Government will also consider additional exemptions for intra-group reorganisations and certain other transactions and events
- Improvements to NSIA operating systems and processes, administered by the Investment Security Unit

# May 2024 updates

### Updated Section 3 Statement

The Government has provided further detail on how it expects to use its call-in power in relation to the Section 3 Statement:

- **Trigger events** – further guidance has been issued on situations in which certain acquisitions could be considered under the NSIA i.e. the incorporation of new entities, the formation of joint ventures and outward direct investment
- **The target of acquisitions** – how the Government may consider technology transfer risks when reviewing asset acquisitions
- **Acquirers** – instances in which the Government may see risk from UK acquirers or acquirers that have previously been cleared through the NSI system
- **The control being acquired** – how the Government may consider control risk in cases involving passive and non-controlling investments
- **Examples** – improved examples of how the Government assesses target risk, acquirer risk and control risk

### Updated Market Guidance

The Government has also provided further updates to the market guidance:

- **Notifying the Government about an acquisition** – additional guidance has been provided on how long assessments under the NSIA will take, what is meant by 'governing the affairs of the entity' as well as information clarifying when timelines for screening can be expedited
- **The potential impact on people or acquisitions outside the UK** - the NSIA can apply to Outward Direct Investment ("ODI") from the UK. It may apply to ODI when the acquisition leads to a party gaining control over a qualifying entity or asset that is outside the UK and the relevant tests of the Act are met. In these circumstances, the acquisition of a foreign qualifying entity may be subject to mandatory notification
- **Guidance on completing and registering a notification form** - further guidance has been provided to ensure forms are completed correctly without sending any classified information
- **Guidance for the higher education and research-intensive sectors** – additional information has been provided on the following which is relevant to the higher education sector: whether a particular transaction or collaboration will amount to a qualifying acquisition, how to contact the Research Collaboration Advice team, the interaction between the NSIA and the UK's system of export controls as well as new examples of how the NSIA can apply to certain academic collaborations

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FREETHS

# Compliance & Regulatory

## LEGISLATION

### Martyn's Law

On Tuesday 7 November 2023, the King's Speech set out the programme of legislation that the Government intends to pursue in 2024, which included The Terrorism (Protection of Premises) Bill more commonly known as 'Martyn's Law'.

The Bill is designed to keep people safe by introducing new security requirements for certain public locations and venues to ensure preparedness for and protection from terrorist attacks.

To fall within the scope of the proposed Bill, premises and events must be accessible to the public, they must be used for a purpose listed in the Bill (for example entertainment and leisure, retail, food and drink) and have a capacity of 100 or more individuals. Premises may be a building or outdoor locations which have a readily identifiable physical boundary and access by express permission. Provision is also made in the Bill for temporary events such as festivals that have express permission to enter and a capacity of 800 or more individuals.

The Bill will set out requirements for 'standard tier' and 'enhanced tier' premises, which will be linked to the activity or event taking place and its capacity.

The Government has confirmed that dedicated guidance and support will be provided to businesses and organisations, to ensure that those in scope have the required information on what to do and how best to do it.

But for now, the Government intends to launch a public consultation on the standard tier to ensure that the Bill strikes the right balance between public protection and avoiding undue burdens on smaller premises for example village halls.

The consultation process concluded on 18th March 2024, however there has been no response to the consultation yet.

### The Economic Crime and Corporate Transparency Act 2023

The Economic Crime and Corporate Transparency Act 2023 finally received Royal Assent on 26 October 2023. On the back of similar legislation which preceded it in recent years, such as the Bribery Act 2010 and Criminal Finances Act 2017, this new act forms part of the Government's broader reform of corporate criminal liability in the UK.

Its significance is twofold in that it not only amended the 'identification principle' in order to make it easier to prosecute companies and partnerships (organisations) for certain economic criminal offences, but it also introduced a new strict liability offence for the company of 'failing to prevent fraud'.

Despite being described as the largest and most meaningful change to corporate criminal liability in decades, just three weeks after the Act received Royal Assent, the Criminal Justice Bill was introduced to Parliament which seeks to replace sections 196 to 198 of the Act (which amended the identification principle).

If the Bill is passed, it would extend criminal liability from individual senior managers, to include their organisation. It would remove the requirement that an offence must be committed by the 'directing mind and will' of a corporation to trigger attribution to the corporate itself and put the identification doctrine on a statutory footing for all criminal offences.

For a more general overview of developments expected in 2024 in relation to the Economic Crime and Corporate Transparency Act 2023, please see our article in the Corporate section here. You can also read about the impact for limited partnerships in the Private Funds section here.

## Building Safety Act 2022

The Building Safety Regulator will operate a new statutory register for all Building Control professionals from April 2024. Building inspectors that carry out regulated building control activities must be registered by 6 April 2024. If by that date an inspector is not registered but continues to carry out building control activities, they will be committing a criminal offence.

To read more about the Building Safety Act 2022, please see our article in the Construction section here and our article in Property Litigation section here.

## Fire Safety

The Regulatory Reform (Fire Safety) Order 2005 will be amended in 2024 with the introduction of Article 9A. This will require the 'responsible person' to ensure that any person they appoint to assist with the completion of a fire risk assessment is competent. Originally due to come into force in October 2023, this has been delayed to ensure that the regime of competency is agreed by all parties. New official standards and guidance will be published once the amendment comes into force.

## CE/UKCA Marking

The Government intends to introduce legislation to extend recognition of goods that meet EU requirements, including the CE marking, indefinitely, beyond 31 December 2024 for many products. This will mean that certain goods that meet EU requirements can be placed on the GB market. Manufacturers will have the choice to use either the CE marking or other recognised EU markings (where permitted), or the UKCA marking to supply products to Great Britain in the following areas:

- Toys
- Pyrotechnics
- Recreational craft and personal watercraft
- Simple pressure vessels
- Electromagnetic compatibility
- Non-automatic weighing instruments
- Measuring instruments
- Measuring container bottles
- Lifts
- Equipment for potentially explosive atmospheres (UKEX)
- Radio equipment
- Pressure equipment
- Personal protective equipment (PPE)
- Gas appliances
- Machinery
- Equipment for use outdoors
- Aerosol dispensers
- Low voltage electrical equipment

For an update on the position with regards to CE marking for construction products please see our article in the Construction section here.

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# Construction

## LEGISLATION

### Building Safety Act 2022

The new regime is now in place, with only some legacy projects being finished off under the old regime (and there was a short extension to 6th July for some building inspectors to requalify as registered building control approvers). The whole regime is new and nobody really knows how it will work in practice or what teething troubles there may be. Virtually all projects need to appoint a Building Regulations Principal Designer and a Building Regulations Principal Contractor (although these titles are the same as for the corresponding CDM Regulations ones, they are in fact separate roles and at least for the time being not all CDM Principal Designers are willing to work as Building Regulations Principal Designers as a different skill-set is required). A particular concern in relation to Higher Risk Buildings (essentially tall residential buildings) is the new Gateway regime, in particular: Gateway 2, which some fear will create project delays if significant changes are required during the project because in that case a fresh Gateway 2 approval is required before the changed work can proceed; and Gateway 3, which some fear will create project delays on practical completion given that there is in theory a period of 8 weeks from practical completion for the pass/fail decision to be made.

### CE Marking for Construction Products

On a more distant horizon, 30 June 2025 is now set as the date on which the CE marking of construction products will cease to be recognised and construction products will have to use the new British equivalent markings. This date has been much extended already but the thinking is that the extension to the Summer of 2025 should be enough time to allow all construction products manufacturers to re-tool to use the new marks.

For an update on timescales for CE/UKCA marking for other products, please see our article in the Compliance and Regulatory section here.

### Construction Industry Scheme (CIS)

For more information on this topic, please see our article in the Tax section here.

## NEWS

### New JCT Suite of contracts

The new JCT 2024 suite of contracts, anticipated since 2022, are now starting to be published, and will be rolled out during the year. The Design & Build contract was the first to be released, in mid-April. Based on that, and the publicity from the JCT, the changes include (and the contracts not yet issued are expected to contain the same features):

- Very minor updates relating to the Building Safety Act, not covering Higher Risk Buildings which will require further amendment to the contracts
- Increased flexibility over electronic notices
- New relevant events to include epidemics and the exercise of statutory powers
- Legal updates to reflect changes since 2016 to insolvency law and case law relating to what happens following a termination
- The incorporation, reflecting the Construction Playbook, of previously optional provisions relating to dispute management, collaborative working, sustainability and environmental issues
- Gender neutral language
- The introduction of a new Target Cost Contract (with associated sub-contract)

## Force Majeure in a Changing World

The world has a huge programme of investment in infrastructure over the next 10 years - not only essential infrastructure in markets such as Africa and Latin America but also upgrades to dated infrastructure in the US and Europe. There are also the megaprojects and gigaprojects of nations seeking to diversify oil and gas revenue such as NEOM in Saudi Arabia.

The construction and engineering contracts typically signed to deliver major infrastructure projects remain resolutely traditional in nature. For example, the FIDIC suite remains the go-to form of contract for delivering projects in the Middle East - and not the updated 2017 editions, rather the original 1999 versions commonly subject to the bespoke amendments imposed by owners.

The times in which we live, and in which these projects will be delivered, is arguably not suited to contracts drafted at the end of the last century. Our world is increasingly uncertain and volatile most obviously in terms of climate change and geopolitics. In just the last three years the world has experienced an increased frequency of extreme climate events, the COVID-19 pandemic, and war in Europe and the Middle East.

This volatility has the potential to challenge the typical contractual force majeure provisions or 'exceptional events' clauses that remain a feature of today's contracts.

Global events are redefining what is exceptional and therefore parties must be prepared to redefine their contracts. The increasing frequency of events which were in the past exceptional renders them unexceptional. If the drafting does not change, the force majeure clause may not bite on an event which, although serious, is not exceptional yet which delays and disrupts the project. This means contractors may unwittingly take on more risk for events over which they have no control.

Parties involved in international construction and engineering projects need to assess the risk involved in project delivery in the widest sense to include climate and geopolitical risks and tailor the force majeure clause accordingly. Otherwise, parties may find that an event they believed could be relied upon as exceptional is anything but.

# CASE LAW

## Limitation and the Building Safety Act 2022

In addition to the changes to building safety regime, the BSA 2022 provided amendments to the Limitation Act 1980, some of which were clarified in the recent case of *URS Corporation Ltd v BDW Trading Ltd*.

The BSA 2022 introduced a 30-year retrospective extension of the time within which a claim needs to be made (called the limitation period) for claims in relation to the duty to build dwellings properly under section 1 of the Defective Premises Act 1972 (DPA 1972). This increased the previous limitation period of six years. The court confirmed that this retrospective extension should apply to ongoing proceedings at the time the BSA 2022 came into force which meant that a claim under the DPA 1972 could be added to existing proceedings.

The case also confirmed that developers can be owed duties under the DPA 1972. Contractors who design and construct defective buildings may be liable to their employers for the cost of remedial works, even if the employers have sold their interest in the buildings and have no legal obligation to carry out such works. Where there is defective design but no physical damage, the right to bring a claim in tort against designers of a defective building arises when the building is completed and not when the developers discovered the defect.

The likely ramifications of this judgment include an upturn in claims under the DPA 1972, particularly where defects have been discovered that may have previously fallen outside of limitation.

## Limitation in relation to designers

In the context of bringing claims against designers, the case of *Lendlease Construction (Europe) Ltd v Aecom Ltd (Rev1)* provided guidance on limitation periods. Lendlease claimed that Aecom breached its obligations under a Mechanical & Electrical and Fire Safety Consultancy Agreement. Aecom's signatories had purported to execute the agreement as a deed even though they were not Statutory Directors.

The court held that Aecom knew that these non-directors were signing as directors and so Aecom was 'estopped' from arguing that the document was not validly executed and so the agreement took effect as if it was a deed. However, estoppel is a discretionary remedy and so this cannot be relied on as authorising non-directors to sign deeds – for a document to be a deed it must be signed by at least one Statutory Director, unless a power of attorney is used which is itself signed as a deed by a Statutory Director.

The Aecom agreement expressly provided that no proceedings should be commenced after the expiry of 12 years from the completion date for the works, however the 12 years was a long-stop date and did not mean that the parties agreed to contract out of the statutory six year limitation period unless expressly stated. The court decided that the provision in question would be construed so as to give effect to the parties' intention.

In claims for breach of contract, limitation runs from the date of the breach. Although the agreement was held to operate as if it had been a deed, on the facts all the alleged defects were held to have occurred more than 12 years prior to the issue of the claim.

The case highlights the need to ensure that documents are properly executed by Statutory Directors if they are to be deeds. It also highlights the need to check that any express provision relating to limitation periods accurately reflects the parties' intention, given the difficulties in bringing a claim if there has been considerable delay from when the cause of action arose.


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# Corporate

## LEGISLATION

### The Economic Crime and Corporate Transparency Act 2023 (Act) reforms

The Economic Crime and Corporate Transparency Bill received Royal Assent on 26 October 2023, and the Economic Crime and Corporate Transparency Act 2023 has now been published.

The Act follows the Economic Crime (Transparency and Enforcement) Act, which was passed in 2022, and forms the second part of the legislative package aimed at counteracting abuse of UK corporate structures and preventing economic crime. The Act introduces a number of reforms to UK company law, with further reforms anticipated throughout the remainder of 2024 and beyond. Some of these reforms include:

- The introduction of a corporate offence of failing to prevent fraud
- A new requirement for companies to provide an appropriate email address to allow the Companies House to communicate electronically
- Reforms to the role and powers of the Registrar and enhanced powers for Companies House to investigate and enforce
- More control over company names, new requirements for company addresses, accounts and annual confirmation statements, as well as changes to record-keeping obligations
- Changes to the rules on company registers, including the abolition of the requirement for companies to keep their own copies of certain company registers

Whilst the Act is now law, most of the changes are being introduced in accordance with a Government timetable through secondary legislation. A number of reforms came into force on 4 March 2024 (such as the email address and registered office address requirements). Other changes relating to identity verification are expected to take longer to implement because of the need for further secondary legislation and system developments. The Department for Business and Trade's Progress Report, released 24 May 2024, notes that the identity verification process is anticipated to commence during the first half of 2025 (with various draft rules and Regulations released throughout 2024).

For more information on this topic, the Government has published a number of factsheets which provide details of the different measures contained in the Act which can be accessed here.

Companies House has also created a new website Changes to UK company law, which provides a wealth of information on changes to company law.

### Financial Services and Markets Act 2023 (Commencement No 4 and Transitional Provisions) (Amendment) Regulations 2023

The Financial Services and Markets Act 2023 (Commencement No. 4 and Transitional Provisions) (Amendment) Regulations 2023 (Regulations) were made in December 2023, providing various further provisions, and some revocations, which will come into force throughout 2024. This includes:

- The revocation from 1 January 2024 of certain retained direct principle EU law (these are on-shored EU regulations that provided for certain amendments to the original EU regulations), subordinate legislation, EU tertiary legislation and other EU-derived legislation; and
- The revocation from April 5, 2024 of the Data Reporting Services Regulations 2017 and related implementing legislation

### Retained EU Law (Revocation and Reform) Act 2023 (Consequential Amendment) Regulations 2023

The Retained EU Law (Revocation and Reform) Act 2023 (Consequential Amendment) Regulations 2023 (Regulations) were made on 19 December 2023. The Regulations make several changes to primary legislation, including:

- The removal of references to retained EU law and replacing them with the term 'assimilated law' to reflect changes made by section 5 Retained EU Law (Revocation and Reform) Act 2023 (REULA 2023)
- The removal of references to rights recognised in domestic law by virtue of section 4 EU Withdrawal Act 2018 (EUWA)
- The removal of references to general principles of EU law, to reflect the change made by section 4 REULA 2023 which abolished the general principles of EU law from the end of 2023

Alongside the Regulations, the Department for Business and Trade published an [Explanatory Memorandum]. The Regulations came into effect on 1 January 2024.

### Digital Markets, Competition and Consumers Act 2024 – A Corporate perspective

The new Digital Markets, Competition and Consumers Act (DMCCA) came into force on 24 May 2024, bringing wide-ranging reforms to strengthen UK competition and consumer protection law. From a corporate perspective, the CMA's specialist Digital Markets Unit will now have power to designate companies that exert significant control over digital markets as having 'strategic market status' in relation to specified digital activities.

Further, Part 2 of the DMCCA makes a number of changes to the existing thresholds under the UK merger control regime, which determine whether a transaction is within jurisdiction of UK merger control and subject to review by the CMA. The CMA will also have discretion to fast track a merger if requested by the parties involved, which will move the clearance process straight to a Phase 2 investigation.

More information can be found in the Government's press release.

## NEWS

### FRC releases new UK Corporate Governance Code

The FRC released an updated version of the UK Corporate Governance Code in January 2024 (applicable to financial years commencing 1 January 2025 onwards). In March 2024, further guidance was released for the 2024 Code providing advice and examples. The 2018 Corporate Governance Code remains in place until 1 January 2025.

### FRC review of Stewardship Code 2020

Following the publication of the revised Corporate Governance Code, the FRC is undertaking a review of the Stewardship Code 2020.

The review will be undertaken in three phases comprising (i) targeted outreach to issuers, asset managers, asset owners and service providers, (ii) public consultation to be launched after the 2024 AGM season; and (iii) publication (which is currently expected in early 2025).

### QCA Corporate Governance Code published

The Quoted Companies Alliance (QCA) has published a revised QCA Corporate Governance Code – The QCA which applies in respect of financial years commencing 1 April 2024 onwards.

### FRC revises UK and ROI accounting standards

The financial reporting standards, applicable in the UK and ROI, used by an estimated 3.4m businesses, have had significant changes made to them, such changes being released in March 2024. The amendments to the standards will in most cases be effective for accounting periods beginning on or after 1 January 2026.

### Implementation of Financial Reporting Council's (FRC's) principles for operational separation of the audit practices

In July 2020, the FRC asked the 'Big Four' accounting firms – PwC, Deloitte, EY and KPMG to agree to operational separation of their audit practices and released its principles. The 22 principles are part of the FRC's aim to improve the quality and effectiveness of corporate reporting and audit in the UK.

Iplementation plans were submitted by the 'Big Four' in October 2020, and it is expected that implementation will be complete by the end of June 2024.

For further details on the objectives of operational separation you can visit the FRC's website.

## Companies House fees increase from 1 May

Many Companies House fees increased on 1 May 2024. The new fees cover incorporation (now £78 for same day), change of name (now £83 for same day), registering a charge (now £15), reduction of capital (now £33 or £136 for same day) and more.

## Initial IFRS Sustainability Disclosure Standards agreed and policy paper on UK SRS released

The initial International Financial Reporting Standards (IFRS) Sustainability Disclosure Standards (SRS), S1 and S2 took effect from January 2024, as agreed by the International Sustainability Standards Board (ISSB).

IRFS 1 requires companies to make disclosures on governance, strategy, risk-management, metrics and targets. IRFS 2 requires companies to disclose information in these same areas but in regard to the companies' climate-related risks and opportunities. There is a one-year transition relief in relation to the implementation of IFRS S1. Individual jurisdictions will decide whether and when to adopt them.

To receive updates on IFRS S1 and IFRS S2, follow the IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures pages. Following the IFRS SRS, the DBT published a policy paper in May 2024, which explains how UK Sustainability Reporting Standards (UK SRS) will be developed and implemented in the UK. The government indicates that it aims to make endorsement decisions on the first two UK SRS by Q1 2025.

## PISCES – proposed new trading platform for private companies in discussion

The Private Intermittent Securities and Capital Exchange System (PISCES) is being proposed as a new trading platform for private companies. The Government is currently consulting on PISCES, which aims, amongst other matters, to assist employee shareholders realise gains. However there are a number of considerations that are in discussion, such as how employees buy shares through PISCES, tax considerations and ability to adhere to investment terms if using the platform.

## Revised Takeover Code and Practice Statement published

At the end of April 2024, the Takeover Panel announced the publication of a revised version of the Takeover Code as well as Practice Statement 31. Amendments to the Takeover Code include changes to Rule 24.4(a)(ii) to replace text deleted in error in the fourteenth edition of the Code issued in December 2023.

The updated version of Practice Statement 31, as published on the Takeover Panel website, describes a new practice that has been adopted by the Panel Executive with regard to private sale processes. Practice Statement 31 has also been restructured, and now describes in more detail the different types of sale processes and the Panel Executive's approach to the relevant provisions of the Code in each case.

## Takeover Panel consulting on narrowing the scope of companies to which the Takeover Code applies

The Code Committee announced at the end of April 2024 its proposal to narrow and clarify the scope of the Takeover Code. The new proposals outline a new jurisdictional framework under which a company registered in the UK, the Channel Islands or the Isle of Man would only be subject to the Code if it is 'UK-listed' or has been 'UK-listed' at any time during the previous three year period. This represents a significant shortening of the current ten year run-off period following a delisting. The residency test would also be abolished.

The proposed new regime would mean that the Takeover Code would also no longer apply to companies whose securities are traded solely using crowdfunding platforms, private markets and the PISCES platform.

Comments on the proposals are due by 31 July 2024, with the final policy position anticipated in Autumn 2024.

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# Data Protection

## LEGISLATION

### Data Protection and Digital Information Bill to reform UK data protection legislation

We begin this section by highlighting legislation that may not now become law.

The Government had proposed a new Data Protection and Digital Information Bill (the “Bill”) to reform UK data protection laws. Its aspiration for this law was to provide a “simple, clear and business-friendly framework that will not be difficult or costly to implement”. Its provisions were to include: (i) increased powers for the ICO to fine businesses for nuisance direct marketing; (ii) relaxation of the rules around placing of cookies on users’ devices; (iii) simplification of the use of legitimate interests as a lawful basis for processing; and (iv) reforms to the ICO itself.

However, following UK Prime Minister’s announcement of a General Election on 4 July 2024, the Bill did not survive the legislative “wash-up” period in the days leading up to the dissolution of the 2019-2024 Parliament.

Whether the Bill becomes law now largely depends on the result of the General Election. It is thought that the Labour Party would be unlikely to pursue the Bill further, in the event it forms the next government.

So, it is a case of “As you were” for UK organisations in relation to their data processing compliance, for the time being.

### EU Draft Artificial Intelligence Act (EU AI Act)

Artificial Intelligence (AI) has been in the news and public consciousness over the past 12 months. This will continue in 2024 (and well beyond). The UK is not currently proposing to regulate AI specifically, preferring (for the time being) a more ‘light touch’ approach and reliance on existing laws to cover this issue. By contrast, the EU is leading the way on the introduction of legislation that specifically covers AI, as part of a raft of legislative measures to regulate digital services and markets.

The EU AI Act has now been approved by the EU Council. It takes a risk-based approach to regulating AI systems. Systems that present an unacceptable level of risk will be outlawed. The EU AI Act has a similar territorial reach to GDPR. This means that it will not only regulate AI systems within the EU, but also those made available in the EU by organisations that are outside the bloc. The EU AI Act is therefore relevant to UK businesses that make such systems available in the EU. This leaves such businesses with the prospect of complying with two different regulatory approaches across the UK and EU. The legislation will not come into force immediately; there is now a two-year grace period before it applies. Nevertheless, UK businesses that intend to offer AI systems into the EU should review those systems against the requirements of the EU AI Act now, so that they are ready for its requirements on them.

## NEWS

### ICO Consultation on use of Generative AI

The ICO has launched a consultation on how aspects of data protection law should apply to the development and use of generative AI models.

The ICO recognises that the impact of generative AI could be transformative for people and businesses, provided that organisations develop and deploy it responsibly with the trust of the people whose data it is built on.

The ICO is taking views from consultation participants on a number of key data protection questions for the design, use and deployment of AI. These include:

- What is the appropriate lawful basis for training generative AI models?
- How does the purpose limitation principle play out in the context of generative AI development and deployment?
- What are the expectations around complying with the accuracy principle?
- What are the expectations in terms of complying with data subject rights?

The responses to the consultation will help shape the ICO's guidance and its other products in relation to AI.

The consultation closes on 10 June 2024. Retail organisations who are using (or intend to use) generative AI in their businesses should monitor the ICO's website for the publication of finalised guidance based on this consultation.

## New UK ICO guidance on Fines

The ICO has recently published its new guidance on its approach to calculating fines when enforcing against infringements of UK data protection legislation (the "**Guidance**").

With the aim of offering greater clarity and improved transparency to organisations, the Guidance outlines the ICO's ability to issue (and its methodology for calculating) fines resulting from breaches of the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA).

### How is the Guidance structured?

The Guidance comprises three sections:

- Statutory background: which provides a "refresh" of the overarching framework surrounding the ICO's enforcement powers, including the infringements under UK GDPR and the DPA, the maximum amount of a fine, restrictions on issuing fines, and the ICO's approach to multiple infringements
- Circumstances in which the ICO consider it appropriate to issue a fine: including the seriousness of the breach, any relevant factors and the effectiveness, proportionality, and dissuasiveness of a fine
- Calculating fines: which illustrates the ICO's 'five-step' approach to calculating the amount of a fine

The Guidance also illustrates more generally, the ICO's position and approach taken in relation to its enforcement powers, and which were identified during the period of consultation.

### How does the ICO calculate fines?

In a similar vein to the EDPB guidelines, the Guidance explains that where the ICO has deemed it appropriate to impose a fine, it will calculate the amount of the fine by following a five-step methodology:

- Assessment of the seriousness of the infringement
- Accounting for turnover (where the data controller or data processor is part of an undertaking)
- Calculating the starting point having regard to the seriousness of the infringement
- Adjustment to take into account any aggravating or mitigating factors
- Assessment of whether the fine is effective, proportionate, and dissuasive

The Guidance also explains that the ICO may, in its sole discretion (and in exceptional circumstances), reduce a fine where an organisation is unable to pay an imposed fine due to financial hardship. In such a situation, the ICO may grant a reduction where the organisation can demonstrate that their financial position merits such relief.

### Our views

The Guidance, which imparts greater certainty regarding how the regulator forms and can enforce its decisions surrounding fines will no doubt be welcomed by organisations.

It should be noted, however, that the ability to impose fines is only one of many tools at the ICO's disposal, some of which may have a far greater impact on organisations.

## New UK ICO guidance on Biometrics

The ICO has also recently issued guidance on how organisations may process biometric data in a compliant manner.

This guidance explains how data protection law applies when you use biometric data in biometric recognition systems. The guidance will be essential reading for organisations that process biometric data relating to peoples' physical, physiological or behavioural characteristics. Examples of such processing include facial and voice recognition, keystroke and handwriting analysis (amongst others).

As biometric systems are increasingly developed and adopted by organisations, this guidance should provide timely assistance to businesses that want to know how to enjoy the benefits of processing biometric data whilst avoiding harm to individuals and data compliance risk.

# Dispute Resolution: Commercial Dispute Resolution

## LEGISLATION

### UK application to join 2007 Lugano Convention

The UK's application to accede to the 2007 Lugano Convention has long been a bone of contention. As far back as 2021, the Commission recommended that the EU should not consent to the UK's application because the Convention is a 'flanking measure' of the internal market and for the EU's relations with the EFTA countries, and it is not the appropriate general framework for judicial co-operation with third countries. The Commission stated that the EU's approach is that the appropriate framework is provided by the multilateral Hague Conventions, such as the Hague Convention on Choice of Court Agreements, to which both the UK and the EU are contracting parties.

We understand that the final decision on whether the EU will approve the UK's application rests with the Council of the European Union. For the Council to approve the application, a qualified majority (15 of the 27 member states) must vote in favour of it.

In March 2023, the European Parliament published a study on ensuring cooperation with the UK on civil law matters. The study states that it is not currently 'politically feasible' for the UK to accede to the 2007 Lugano Convention because UK non-accession is perceived as a competitive advantage for commercial courts in EU states.

The issue currently remains unresolved.

### Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019)

The government signed the Convention on 12 January 2024. It will enter into force in the UK 12 months after the UK deposits its instrument of ratification (likely June 2024) and will only apply to judgments given in proceedings commenced after that date.

Hague 2019 is currently in force as between the EU (except Denmark) and Ukraine. It has also been signed (but not ratified) by several states including the Russian Federation and the USA.

The government decided to sign the Convention after concluding that the merits of joining outweighed any potential downsides. Although its scope is more limited than the Lugano Convention, it can still join the Lugano Convention in future.

The potential benefits identified included that the Convention would:

- Provide uniform rules for the recognition and enforcement of judgments between the UK and other contracting states
- Provide greater legal certainty that judgments from UK courts would be recognised and enforced in other contracting states. This could help promote the UK as a preferred dispute resolution forum
- Allow parties to agree non-exclusive or asymmetric jurisdiction clauses in the knowledge that judgments from courts chosen by these clauses will be enforceable
- Provide a firm base for the recognition and enforcement of judgments between the UK and EU member states now that the Recast Brussels Regulation (1215/2012) and other EU instruments no longer apply to the UK

## NEWS

### Extension of fixed recoverable costs regime (FRC)

The new FRC regime came into force on 1 October 2023. Where FRC apply, the successful party is only able to recover limited costs, unless the court orders otherwise. As a result, the reality is that parties may face a shortfall in the amount of costs that they can recover compared to the actual costs that they have incurred.

The key features of the new regime include the following:

- FRC are extended to all fast-track civil claims plus the new intermediate track (see below), with limited exceptions
- There is a new intermediate track for less complex claims valued at between £25,000 and £100,000
- There are updated arrangements for Part 36 offers

Following a consultation and judicial review, there are likely to be various amendments to the CPR as part of the next mainstream CPR update cycle in October 2024.

### Civil Justice Council: review of costs generally

Further changes are likely to costs, particularly costs budgeting, in the near future.

Some time ago the Civil Justice Council (CJC) created a Costs Working Group, led by Birss LJ, to consider costs budgeting, guideline hourly rates (GHR), costs under pre-action protocols and the digital justice system, and the wider impact of the extension of FRC.

On 10 May 2023, the Working Group's final report was published. Key recommendations included:

- Costs budgeting is retained but with a more tailored approach, both to test the benefit of a lighter approach to costs budgeting and with adjustments to facilitate the use of a staged approach to costs and case management
- GHR will be retained but with adjustments for inflation, with a detailed review in five years. As a priority, a new band for complex, high value, commercial work in London or elsewhere should be created, with a rate sitting above existing rates
- For new digital portals, there should be very limited costs recovery pre-action to encourage both compliance and pre-action resolution

At the CJC National Forum event on 17 November 2023, the Master of the Rolls confirmed that he endorsed all of the recommendations in the CJC report and that work would begin on their implementation. The minutes of the Civil Procedure Rules Committee (CPRC) meeting earlier that month indicated that a further Working Group has been formed to review the recommendations and would report further in due course.

The GHRs were uplifted for inflation as of 1 January 2024 in accordance with the Services Producer Price Index and we expect further developments in 2024.

### Review of CPR 36: Part 36 offers

At present, it seems that where a proposed amendment to a claim has not yet become part of the claim, it may not be possible to make a valid Part 36 offer in relation to that part of the claim. In this regard, the courts appear to differentiate between a claim or counterclaim which has not yet been pleaded at all and an amendment to an existing claim, although the case law is not entirely consistent.

The minutes of the CPRC meeting in May 2023 confirm that the CPRC is considering this issue. If the issue requires clarification, it will be referred to the CPRC Costs Sub-Committee.

### Pre-action protocols review

The pre-action protocols (PAPs) stipulate the conduct the parties should adhere to prior to the issue of proceedings and there are sanctions for non-compliance. There are both specific PAPs and a general Practice Direction on Pre-action Conduct (PD-PAC).

Since 2021, the CJC has been consulting on the role PAPs should play in the civil justice system in the 2020s, including in an increasingly digitalised justice system. On 21 August 2023, the CJC published Part One of its final report on PAPs. Recommendations included:

- Amending the overriding objective to include express reference to the need to comply with, and enforce, PAPs
- Making PAPs mandatory, with only urgent cases exempt
- Replacing the PD-PAC with a PD that contains the general PAP and creating a separate PAP for small claims worth £500 or less
- Requiring parties under the general PAP to engage in mandatory mediation if litigation is commenced

The second phase of the review will address whether any other litigation currently covered by the PD-PAC should be the subject of a bespoke PAP, including one for 'high value commercial litigation'.

## Small Claims Paper Determination (SCPD) Pilot – PD 51ZC

PD 51ZC provides for a pilot scheme to test a procedure that will enable the court to direct that a small claim will be determined without a hearing, without requiring the agreement of all the parties. The scheme is running until 1 June 2024.

The pilot applies in specified County Court hearing centres (Bedford, Luton, Guildford, Manchester, Staines and Cardiff) and does not apply to certain types of small claims (for example, personal injury and housing disrepair).

A substantive report will be presented before the pilot is due to end.

## Review of Small Claims

Alongside the SCPD (outlined above), the CJC has been reviewing small claims more generally. This has included recommending:

- Compulsory attendance at a mediation appointment (or such other form of dispute resolution as the court may order) after a defence is filed
- That the court may order (without the consent of the parties) (1) that the claim is determined by telephone or remote hearing or (2) is determined on the papers
- Unless otherwise ordered, that the final hearing will be no more than one hour in length to include judgment
- A restricted right of appeal

As well as the SCPD, it has led to the automatic referral to mediation for claims issued in the County Court on or after 22 May 2024 which are likely to be allocated to the small claims track, subject to limited exceptions.

## Reform of CPR 5.3 (Signature by electronic means)

The CPRC meeting in October 2022 noted that the Industry Working Group (IWG) on Electronic Execution of Documents, which is sponsored by the MoJ and overseen by Birss LJ, had been asked to consider a proposal to amend CPR 5.3, which deals with electronic signature of documents.

The IWG's Interim Report was published on 1 February 2022. It sets out the IWG's analysis of the current situation and identifies best practice guidance based on existing technology, including specific considerations for vulnerable individuals. It also makes recommendations for law reform and suggests areas for future analysis.

The IWG's Final Report was published in February 2023. The report considers challenges arising from the use of electronic signatures in cross-border transactions and how best to use electronic signatures to optimise their benefits when set against the risk of fraud. The Final Report also sets out the IWG's recommendations for reform including recommendations for enhanced certification and self-certification, and a uniformity of approach to e-signing and online identification.

At the CPRC meeting in April 2024, it was agreed that the matter would be revisited by two CPRC members, with the aim of publishing the proposed reforms for consultation and then reporting back to the CPRC for final determination.

## Online Civil Money Claims (OCMC) Pilot Scheme – PD 51R

PD 51R contains a pilot to test an online claims process for money claims in the County Court. It is aimed at providing a quicker, more user-friendly way to start an action in the County Court for Part 7 money claims by litigants in person of up to £10,000 against a single defendant in England and Wales or represented parties of up to £25,000 against other represented parties (up to a maximum of three parties).

The OCMC pilot was introduced for money claims in the County Court that would otherwise be made through the Money Claim Online (MCOL) system. The intention is that it will ultimately replace the service offered by MCOL and provide a full end to end process for dealing with eligible civil money claims.

Various amendments to improve functionality have been made since the pilot was introduced and we anticipate further changes as it develops. The scheme is running until 1 October 2024.

## Damages Claims Pilot (DCP) Scheme – PD 51ZB

PD 51ZB introduced a pilot to test an online claims process for County Court damages claims (subject to certain exceptions) where parties are represented by a legal representative. It is optional for litigants in person. Claims are managed using an online portal called the Damages Claims Portal. The scheme is running until 1 October 2024.

Various amendments have been made to PD 51ZB since it was introduced and we anticipate further changes as the pilot develops. The DCP initially provided a portal for the commencement of claims up to the point of filing directions questionnaires but has been expanded to include applications for default judgment and the provision of standard directions orders by the court. The DCP continues to be extended and will, going forwards, include the uploading of disclosure and evidence, and applications for orders.

## Law regarding operation of bailiffs and other enforcement agents

An HMCTS project to digitalise enforcement proceedings, originally proposed for Spring 2022 and subsequently said to be due to deliver in March 2023 and to be focused on warrants of control, is still awaited. There may be reform of procedure regarding enforcement of judgments in 2024 as, at the CJC's National Forum event on 17 November 2023, the Lady Chief Justice said that enforcement was *"as important as vindication of defence…it is perhaps beyond time when that subject received some detailed consideration"*.

Developments regarding bailiffs and enforcement agents are also expected. In January 2023 the MoJ opened a consultation to review the fees that bailiffs can recover when enforcing debts and fines. In July 2023, the MoJ responded to the consultation. It confirmed that it intends to increase fees for High Court and non-High Court enforcement and increase the threshold at which percentage fees can be added to specified fees. It also announced a further consultation on debt enforcement and fees.

A follow up consultation opened on 10 October 2023, seeking views on amendments to the relevant fees regulations themselves, as well as some other issues such as the period of notice that bailiffs must give before visiting a residential property and allowing them to accept repayment by instalments. The follow up consultation closed on 4 December 2023, and a paper summarising the responses is awaited.

## Law Commission review of contempt of court

The Law Commission has commenced a project to review the law on both civil and criminal contempt of court, following a request by the Government. The review will focus on whether the law of contempt should be codified and simplified, the scope of court powers in relation to contempt proceedings (including who should investigate and adjudicate allegations of contempt), the efficacy of the current law relating to contempt via publishing information on court proceedings, the aptness of contempt penalties, and whether there is scope for improving the relevant procedural rules.

The review has been prompted by concerns that the law on contempt has developed unsystematically, resulting in a regime that is sometimes disordered and unclear. Problems arise from the distinction between civil and criminal contempt and the multiple ways in which contempt can be committed. There are also growing concerns about the impact of social media and technological advancements on the administration of justice.

The Commission aims to publish a consultation paper in early 2024.

## Alternative dispute resolution (ADR)

In July 2022, the MoJ launched a consultation on its proposal to make mediation compulsory in small claims, with a view to later expanding this to other areas. As noted above, this was implemented for most small claims in May 2024.

The MoJ also reiterated their commitment to integrate mediation for higher value claims and to continue collaboration with the civil mediation sector in order to progress this policy.

In the meantime, the Court of Appeal's decision in Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 represented a turning point for ADR. In Churchill, the Court of Appeal held that the court can lawfully stay proceedings for, or order parties to engage in, any suitable form on non-court based dispute resolution process provided that the order does not hinder the claimant's right to proceed to trial and is proportionate to settling the dispute fairly, quickly and at reasonable cost.

Following this decision, the CPRC is consulting on proposed changes to the CPRs setting out the court's powers in relation to ordering parties to engage in some form of ADR.

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FREETHS

# Dispute Resolution: Property Litigation

## LEGISLATION

### Building Safety Act 2022

Also aimed at restoring the balance of fairness between landlords and long residential tenants and in direct response to the devastating tragedy of Grenfell Tower, the Act is part of a large and complex area of law that is coming into force on a piecemeal basis. It is anticipated that this will keep the sector very busy in 2024.

The Act came into force on 1 April 2023 and introduced new duties for the management of fire and building safety in high-rise residential buildings. It established two new important roles: the Building Safety Regulator and Accountable Person(s).

The Regulator is responsible for overseeing the safety of all buildings and will have appropriate powers to enforce the rules. This will be more severe for high-risk properties, and will extend to how such properties are designed, built, and managed once occupied.

The Accountable Person will be the building owner or management company. They have an ongoing duty to assess safety and provide a 'Safety Case Report' to prove how risks are identified and managed. In some cases with a complex title structure, such as large residential estates in a city centre, there may be more than one Accountable Person, with one party designated as the Principal Accountable Person.

Once registered, the Accountable Person must apply for a Building Assessment Certificate, which is anticipated to be available from around Apil 2024. To do so, they will need to provide information about the steps taken to ensure building safety. Accountable Persons should be acting now to collate this information rather than face the sanctions that will apply for those who are not ready and compliant. To read more about Building Assessment Certificates, please see our article in the Construction section here.

**Higher Risk Buildings**

From 1 October 2023, the Act ushered in a number of new requirements for higher-risk buildings, increased responsibilities for landowners, and amendments to fire safety legislation. It is focused upon the key areas:

- Building safety and standards
- Assessing and assuring the safety of higher risk buildings during and after construction
- Ensuring the competence of building managers and those carrying out works
- Implementing clear guidelines and standards for building management
- Placing residential occupiers firmly at the centre of the regime

It affects all building owners, managers and developers, including those who are involved in the design and construction as well as the subsequent running of the building. The Act defines 'higher risk' buildings as those that are over 18 metres high or include seven storeys or more and contain at least two residential properties. It also applies to care homes or hospitals, not just apartments.

The purpose is to clarify who is responsible for fire and building safety for a higher risk building. The Act does this by imposing obligations on the duty holders to plan, monitor and manage activities in respect of how the building is maintained and run, under the auspices of the Building Safety Regulator. There is to be a mandatory occurrence reporting system for each building so that the Regulator can oversee any risks that may affect the building or surrounding properties.

**Other Buildings**

The Act does not confine itself to higher risk buildings, but also contains some parts that will affect other properties of lower heights. The Regulator is to ensure that building standards are set and met for all developments and will be able to regulate construction products as well as builders. There will also be a New Homes Ombudsman scheme for new build properties.

A building safety charge will be introduced, so that tenants have transparency over what has been charged for the safety of the building, with a statutory cap on recoverable costs. The Act will have teeth in that sanctions of a prison sentence or unlimited fines can be imposed upon a party that fails to comply with its duties.

All buildings that are covered by the Act had to be registered with the Regulator by 1 October 2023. For new buildings completed after this date, the developer must obtain a certificate. The buildings must be registered before any residents are permitted to take up occupation.

In December 2023, the Regulator released an enforcement policy statement which established the enforcement methods, including:

- Written updates about the law and any breaches
- Verbal warnings; actions that can be taken to control risks or remedy non-compliance
- Recommending and bringing prosecutions
- Appointing special measures managers where the responsible person has failed

From 1 April 2024, the transitional provisions will come to an end. There will be new conduct rules for the Building Control Approvers and Inspectors, and the Regulator will be able to issue Building Assessment Certificates.

The Regulator also has a published strategy plan, which sets out its goals until 2026 and onwards, including inspection targets and implementation of works to remediate cladding or to ameliorate other fire risks.

There are some provisions in the Act that will operate to imply terms into long residential leases relating to building safety and the landlord's ability to recover those costs from tenants. It is anticipated that this might come into force in 2024.

It seems likely that the Act will be the subject of litigation in various forms and forums in 2024, following the first remediation order and a remediation contribution order last year. We also anticipate an increase in disputes over who is ultimately paying the bill, including tenants challenging service charge demands and recovery of payments that have already been made.

### Higher-Risk Buildings (Keeping and Provision of Info etc.) (England) Regulations 2023

This is part of the Building Safety Act 2022. The draft regulations set out the standards for the 'Accountable Person' to follow when maintaining 'golden thread' information, explaining when the information must be given, and how it must be formatted. It is anticipated that this will come into force in 2024, and all relevant landowners should be taking steps to ensure that they are ready and up to date.

The golden thread information was defined in 2021 by the Building Regulations Advisory Committee in its report that also set out the following key principles that should be adopted across all buildings, even where they are not tall enough to trigger the main obligations under the Building Safety Act 2022:

- Easy access for information which should be stored and structured in the right way
- Culture change to emphasise competency and co-operation
- Only relevant and proportionate information is to be stored, meaning regular reviews
- The information must be focussed and expressed clearly
- The details must be clear, understandable and presented in an easily accessible format
- The formatting must be done in a manner that the golden thread is easy to share
- There must be a clear audit trail so that the party who made any changes can be identified
- The information must be held securely and in a GDPR compliant manner
- The source must be accurate, trustworthy, and verifiable
- There must be enough detail to allow residents to feel safe in their own homes
- It must be a 'one stop shop' for information so that it can all be found together

## Energy Act 2023

This substantial and landmark Act came into force on 26 October 2023. It will overhaul the energy sector, but also has some elements that will have significant implications for property.

In particular, the Act gives the Government the necessary powers to change the way in which energy performance certificates (EPCs) are assessed and issued for both existing properties and new developments. Landowners will be restricted from property disposals if no EPC has been obtained and could be subject to sanctions if one is not provided when it is required by law.

Originally the Government had announced that EPC regulations would be tightened so that:

- Domestic dwellings would have to have a minimum rating of C or higher to be let to residential tenants
- Commercial and industrial properties were to have a minimum rating of C by 2027 and B by 2030 to be let

However, the costs of carrying out the necessary work may have encouraged some landlords to sell rather than do the works.

At present the above enhancements are on hold and remain under consideration by the Government.

## Fixed recoverable costs: rule changes under the Civil Procedure (Amendment No 2) Rules 2023

The new rules will implement substantial changes to the rules on costs recovery and will affect what parties whose claims fall under this regime are able to recover. You can read our article in the Commercial Dispute Resolution section here for a detailed discussion on this topic but insofar as it is likely to affect property matters, it should be noted that the new rules apply to all proceedings issued on or after 1 October 2023 in the fast or intermediate tracks save for housing claims. These matters have been excluded from the regime for a period of two years.

'Housing claims' will include claims or counterclaims relating to possession applications, cases of disrepair, and unlawful eviction unless it relates to a boundary dispute. Therefore, property matters that will most likely be caught by the new regime will be confined to matters such as:

- Trespass
- Commercial and industrial property possessions
- Straightforward boundary disputes
- Likely terminal dilapidations claims

For parties with these types of claims, the new rules will have a significant impact on budgeting, strategy and case management. However, at the moment, there is no guidance or case law to indicate that the new rules would override any contractual right to costs, for example as included in a lease.

The rules do seem geared towards money claims, which of course is not always the main part of a claim in property matters, and so it may be that more property issues are allocated to the multi-track. Notwithstanding this, it is clear that the courts intend to keep an ever closer eye on legal costs, and so the new rules are likely to have the effect of ensuring that parties do not necessarily incur costs on relatively low value claims.

## Law Commission – Review of Landlord and Tenant Act 1954

In 2024 it is anticipated that the Department for Levelling Up, Housing and Communities will open its consultation on business tenancies. The aim is to review the Act to see whether it is still adequate for the needs of the current commercial leasehold market, given that it has been in force since shortly after World War II, and that it was enacted to deal with the imbalance in bargaining power between landlords and tenants at this stage.

The review is awaited, but we expect that it might cover topics such as:

- Whether tenants should have security of tenure at all
- The current regime for contracting new leases out of the Act, including replacing warning notices and declarations/statutory declarations
- Redevelopment to allow landlords to oppose renewal to carry out works to meet ESG/MEES standards
- Tribunals/Alternative forums – removing the process from the court for all but the most complex cases would streamline the process and save time and costs
- Turnover rents – Allowing the court to order turnover rents would be more akin to the needs of the high street

For further information, you can visit the Law Commission website here.

### Financial Conduct Authority (FCA) rules on multi-occupancy building insurance

Tenants who have to contribute to a landlord's building insurance for a multi-let building will be interested in the new rules to be applied by the FCA.

From 31 December 2023, landlords will be subject to new disclosure rules on such policies so that tenants have more transparency into how such policies are sourced and whether landlords and agents receive any benefit. This will make it easier for tenants to challenge any costs that are discovered as a consequence.

Insurers and brokers will have to ensure that their remuneration does not conflict with the obligation to act in the best interests of tenants, including them in the target market for the product as well as landlords.

## CASE LAW

### Landlord and Tenant Act 1954 – Opposing Renewal

Sainsbury's Supermarkets Ltd v Medley Assets Ltd [2024]

Sainsbury's has successfully defeated the landlord's opposition to the grant of a new lease on the ground of redevelopment under Section 30(1)(f) Landlord and Tenant Act 1954 ("the 1954 Act") by reducing its operation into part of the property that was unaffected by the landlord's works. The case is important because it considers the extent of "the holding" under the 1954 Act and also the scope and quality of the evidence that the landlord needs to prove its case for redevelopment.

The property is a commercial building in north west London, which was laid out as a supermarket on the ground floor, with offices on the three upper floors. By the time the claim came to be issued, Sainsbury's was not using the offices, and these floors were vacant. However, it continued to trade from the ground floor. Towards the expiry of the lease, the landlord served a hostile Section 25 notice, citing ground (f) of the 1954 Act. The landlord's initial plans were to convert the upper storeys into residential flats, but this was revised subsequently to lowering the basement floor, carrying out alterations including widening the staircase, and refurbishing the offices.

Sainsbury's issued a claim to ask the Court to order the grant of a new lease, which was heard in January 2024.

A few days before the trial, Sainsbury's vacated the small part of the ground floor that would be required for the landlord's planned works.

This small, 26 metre square of ground floor, had a seismic effect upon the claim. To have the protection of the 1954 Act, the tenant must be occupying the property for the purpose of its business. The part that it is occupying is defined in the statute as "the holding". In order to oppose renewal under ground (f), the landlord must prove that it intends to carry out works to the holding that could not be done with the tenant in occupation. As Sainbury's was no longer occupying that area, it argued that the landlord's works were not to the holding, and therefore the landlord could not oppose renewal.

The landlord tried to counter-argue that Sainsbury's would, if a new lease were to be granted, be obliged to take a lease of the whole, which would therefore mean that the ground floor square and the upper floors were part of the holding, and therefore affected by the works. However, the Court agreed with Sainsbury's that this applied only to the terms of a new tenancy, and not to deciding whether or not the landlord had satisfied the requirements of ground (f).

By retreating tactically from a small part of the store, Sainsbury's was therefore able to defeat the landlord's opposition to the grant of a new lease for the rest of it.

The Court also found that there were some difficulties with the landlord's ability to prove its intention and capacity to carry out the works. There were some problematic issues with the scheme itself, and the Court did not consider that the occupation of the ground floor by Sainsbury's would have prevented the proposed works to the basement level. The landlord had not given the usual undertaking to the Court to carry out the works promptly after the termination of the lease, and the Court considered that it had been "evasive and disingenuous". The Court also took issue with the landlord's expert, finding him to be unreliable and unfamiliar with his responsibilities as an expert to the Court.

Although only a County Court decision, the case is nonetheless a useful reminder that the holding can change even shortly before the hearing, and that it is essential for both parties to be reliable and have quality expert evidence to support their case.

## Private Nuisance

*Manchester Ship Canal Company Ltd v United Utilities Water Ltd No. 2 UKSC*

On 17 January 2024, the Supreme Court is due to hand down the decision in this leading case on private nuisance.

The Court of Appeal held that the Manchester Ship Canal Company could not pursue private action in trespass or nuisance against United Utilities for discharge of foul water. A failure by United Utilities to enhance the sewer to reflect an increased population in the area did not give rise to an action for nuisance or negligence. This was on the basis that it would be inconsistent with the statutory obligations to hold the statutory undertaker liable in trespass or nuisance for unauthorised discharges into the water. This has been appealed further by the Company.

*Fearn and Others v The Board of Trustees of the Tate Gallery [2023]*

Nuisance was also the subject of another leading Supreme Court decision in 2023 which is likely to have implications for developers and property owners into 2024 and beyond. The case has been reported very widely, but it is worth considering the future implications for landowners and developers.

This case was highly unusual in that it involved a visual disturbance. After multiple rounds of litigation, the Supreme Court finally held that the viewing gallery at the Blavatnik Building at the Tate Modern interfered with living conditions at the claimants' nearby apartments at Neo Bankside.

The judgment contains a useful overview of how the courts will address the concept of nuisance, which is not set out in a neat modern statute, but rather is a creature of multiple judicial decisions, each based on specific facts. However, to be a common law nuisance, there must be a substantial interference with property rights, with the standard of what is an interference to be judged by reference to the standards of an ordinary reasonable person.

In this case, the Tate viewing platform was used by hundreds of thousands of visitors a year, who were attracted to the views over the city. The fact that local residents have now been successful in establishing that this overlooking constitutes a nuisance means that future uses and developments will have to bear this decision in mind. It will have to be factored into all future urban land use and development and could operate to restrain this in some cases.

This could even be the case where the overlooked property is a more recent development. This could be a significant risk for parties who own properties that rely upon views, such as top floor bars and roof top restaurants. We therefore anticipate that some parties may seek covenants from surrounding landowners to authorise explicitly specific uses with a view to avoiding future claims for nuisance.

For further information, the full judgment is available at [Fearn & Ors v Board of Trustees of the Tate Gallery].

## Final Injunctions and Persons Unknown/ Newcomer Injunctions

*Wolverhampton City Council and others (Respondents) v London Gypsies and Travellers and others (Appellants) [2023]*

In late 2023, the Supreme Court handed down judgment holding that a final injunction may be binding against a person who was unknown at the date of the hearing. This will be the case even where that person has not yet committed – or threatened to commit – the prohibited act. This is a novel area of law that would mean the applicant did not have to keep bringing repeated actions for the same issue.

The case related to newcomer injunctions obtained by councils who were looking to prevent trespass by Gypsies and Travellers, who were camping without consent. Given that the local authorities did not know the identities of the persons in the camps, the injunctions were by necessity addressed to 'persons unknown' who had not been given notice of the hearings.

Following a series of challenges, the Supreme Court finally held that newcomer injunctions are a new concept that will only be justified in certain circumstances. These are:

- The local authority has shown that there is a real need to protect civil rights or enforce the law and there is no other remedy
- The application and Court Order include safeguards, including the obligation to take reasonable steps to draw them to the attention of parties who are likely to be affected, and liberty to apply
- The local authority has complied with the strict duty to disclose any matter that a newcomer might raise to oppose the Order
- The injunctions are appropriate in terms of the period to, and area in, which they apply
- The court agrees that the order is just and convenient

Although this case related to applications for Traveller and Gypsy camps, it could also be highly relevant in protest situations, where groups of persons unknown might be blocking main roads or occupying properties. In the current climate, this type of protest is widespread, and so these principles may also be applied to a claim of a different nature. It is therefore very useful to have the guidance from the Supreme Court on this type of application.

For further information, the full judgment is available at *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors.*

## Alternative Dispute Resolution

*James Churchill v Merthyr Tydfil County Borough Council [2023]*

Following the very clear trend of the courts encouraging parties to explore alternative dispute resolution, the Court of Appeal has very recently confirmed that the courts can order the parties to stay proceedings to explore resolution. This is provided that there is no negative effect upon the claimant's right to a hearing, and the procedure being proportionate to the dispute. The decision recognises that mediation and similar procedures are often quicker and cheaper and emphasises that litigation should be a last resort.

The decision is interesting to all parties with an interest in property because it will have a significant impact upon disputes where one side is reluctant to engage in an alternative means of resolution. Whilst the Court of Appeal did not go so far as to set out fixed requirements as to when the parties should be compelled to undertake a resolution process, the judgment suggests that key factors could include:

- The appropriateness of the form of dispute resolution
- Legal representation and recovery of costs so as to avoid a hefty imbalance
- Whether the process is likely to be effective and suitable
- Whether it is made clear to the other party that if resolution is not achieved, litigation will remain an option
- The urgency of the case
- Any limitation issues
- Realistic prospects of the procedure proving successful

The decision goes above and beyond the existing costs penalties that all parties should be made aware are highly likely to be applied if they refuse to engage in a process such as mediation. It means that the courts are now more likely to use their powers to encourage active case management.

Any party with a dispute should therefore be aware of all options and should not disregard a request or requirement by the other side.

For further information, the full judgment is available at *Churchill v Merthyr Tydfil County Borough Council.*

review these provisions carefully.

For further information, the full judgment is available at *Kaushal Corporation v O'Connor*.

## Service Charge and Litigation Costs

*Kaushal Corporation v Maria Carmel O'Connor (By her son and Litigation Friend Justin Marciano) [2023]*

In 2023, the High Court considered the question of whether a landlord can recover its litigation costs under the service charge provisions in a commercial lease.

The lease contained a service charge provision that allowed the landlord to recover costs and fees incurred under the lease. In particular, the clause covered charges incurred by the landlord relating to any application for approval or consent required by the lease. The claim related to costs incurred following a claim that the landlord had unreasonably withheld consent to assign the lease to three proposed new tenants.

The court held that, notwithstanding the wording of the lease, litigation costs do not fall within the service charge clause. In situations where the wording would extend the liability of the tenant or its guarantor, it should be construed narrowly by the court. This meant that the costs for the application were recoverable, but the wording could not be stretched to cover the costs of litigating about that consent.

Whilst the facts in this case were relatively niche, given the issues facing the property sector in the current economic climate, particularly with factors such as rising energy prices, landlords may well look to pass more items to tenants via the service charge. Landlords and tenants alike will therefore have to review these provisions carefully.

For further information, the full judgement is available at *Kaushal Corporation v O'Connor*.

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FREETHS

# Employment

## LEGISLATION

### 31 March 2024 was the backstop for part-year and irregular hours workers

Following the Supreme Court's decision in *Harpur Trust v Brazel* and a Government consultation about the anomalous results it produced for certain categories of workers, the Government has published The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (Draft Regulations), which came into effect on 1 January 2024 and provide that:

For annual leave years commencing on or after 1 April 2024:

- Part-year and irregular hours workers will accrue annual leave at a rate of 12.07%
- Pay for such annual leave may be paid by way of rolled-up holiday pay

From 1 January 2024:

- Where any workers have been unable to take statutory holiday for certain reasons, they may carry forward holiday to the following leave year
- Where workers have been unable to take holiday during sick leave, they may carry forward such holiday, provided that it is taken within 18 months of the end of the holiday year in which the leave arose
- 31 March 2024 is the backstop for carry over of leave under the COVID-19 provisions

### Working Time Regulations – record keeping

The Regulations also clarify that employers need not keep records of the daily hours worked by each worker. Records must be kept showing compliance with:

- The weekly working limit of 48 hours
- Opt-out agreements
- Length of night work
- Health assessments for night workers

But

- The records may be created, maintained and kept "*in such a manner and format as the employer reasonably thinks fit*"
- An employer need not record each worker's daily working hours if the employer is able to demonstrate compliance without doing so

### TUPE

The Regulations provide that for TUPE transfers that take place on or after 1 July 2024, where there is no recognised trade union in place, employers will not need to elect representatives and will be able to inform and consult directly with individuals where either:

- The employer employs fewer than 50 employees

or

- There are fewer than ten transferring employees

### Duty to prevent sexual harassment

The Worker Protection (Amendment of Equality Act 2010) Act 2023 will come into force in October 2024, implementing the following changes:

- Employers will have a duty to take reasonable steps to prevent sexual harassment of their employees
- Where there is a finding of sexual harassment against an employer, the compensation can be uplifted by up to 25% if the employer has failed in its duty to take such reasonable steps

The EHRC will provide updated guidance before the legislation comes into force as to what might amount to 'reasonable steps'.

Whilst there is no mechanism within the legislation for individuals to bring a stand-alone claim that their employer has failed to comply with its duty, the EHRC can take enforcement action in such cases. The duty will likely become most relevant where there is a finding of sexual harassment and the claimant seeks to have their compensation increased.

### Right to request predictable working terms and conditions

The Workers (Predictable Terms and Conditions) Act 2023 is expected to come into force in September 2024.

It will give workers and agency workers the right to request (up to twice a year) a predictable working pattern.

The minimum service requirement is not yet confirmed but is expected to be 26 weeks to match with other rights. In the same way as flexible working requests, this right will only be the right to *make a request*, and not a right to have the request granted.

A draft Code of Practice and a firm implementation date is awaited.

## Changes to flexible working rights

The Employment Relations (Flexible Working) Act 2023 has received Royal Assent and came into force on 6 April 2024.

It makes some changes to the current flexible working rules in that:

- Employees will be able to make up to two requests in a 12-month period (rather than the current one request)
- Employers will have two months to respond to a request
- Employers are required to consult with employees before rejecting a request

## Equality Act clarifications

The Equality Act 2010 (Amendment) Regulations 2023 came into force on 1 January 2024 and clarify that certain principles of equality law will remain after retained EU law ceases to have effect on 31 December 2024, namely:

- The 'single source' comparator test in Equal Pay cases remains in place
- There is a right to claim indirect discrimination on the basis of an association with a protected characteristic
- The definition of disability will be amended to reflect case law, providing that judging an ability to carry out normal day to day activities is to include a person's ability to participate fully and effectively in working life
- Less favourable treatment on grounds of breastfeeding is direct discrimination on grounds of sex
- Employers can be liable for discrimination when they make a discriminatory statement about recruitment, even if there is no active recruitment process at the time of the statement

## Extended protection from redundancy in relation to family leave

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 extends protection for those facing redundancy in connection with family leave. Statutory protection in relation to redundancy currently applies only where the individual is not able to return to work from family leave due to redundancy (with the employer having in those circumstances to offer any suitable available employment to the employee). The new legislation came into force on 6 April 2024 and extends this protection beyond just the period of family leave (maternity, adoption or shared parental leave) and the protection will instead apply from when the employee informs their employer that they are pregnant until 18 months after the birth/adoption.

## Carer's Leave

The Carer's Leave Act 2023 has been passed and came into force on 6 April 2024.

It provides carers with a new and flexible entitlement to one week's unpaid leave per year and draft regulations which cover issues such as:

- Protection from redundancy or dismissal during carers leave
- Rights to return from carers leave
- Provisions about the notice to be given to employers

### Neonatal Care Leave

The Neonatal Care (Leave and Pay) Act 2023 will allow eligible parents whose new-born baby is admitted to neonatal care to take up to 12 weeks of paid leave, in addition to other entitlements such as maternity and paternity leave. We await the detailed regulations which will:

- Clarify conditions of entitlement
- Clarify the duration of leave (which must be at least one week)
- Define 'neonatal care'
- Set out rights in relation to return to work

Whilst not confirmed, a likely commencement date would appear to be April 2025 to allow time for updates to HMRC IT systems, payroll systems and with a convenient commencement at the start of a new tax year.

### Allocation of tips

The Employment (Allocation of Tips) Act 2023 has been passed and is now due to come into force in October 2024. The Act provides that employers will need to ensure that tips are allocated fairly to workers, including agency workers and paid within one month of the tip being received.

### Minimum Service Levels during Strikes

The Strikes (Minimum Service Levels) Act 2023 received Royal Assent in July 2023 and enables the Government to make regulations to set minimum service levels in the event of strikes in specific sectors, such as:

- Transport
- Health
- Fire and rescue
- Education
- Nuclear decommissioning
- Border security

If there is a minimum service level and an employer issues to a union a work notice identifying workers that are required to work, the union must take reasonable steps to comply with that notice.

The Government has consulted with trade unions about a Code of Practice to set out guidance and expectations on the reasonable steps they should take. The updated Code of Practice came into effect on 8 December 2023.

This Act will affect employers in 'important public services', and Rail, NHS ambulance and patient transport and Border Security sectors initially, with expansion to some of the other sectors possible. When strike notifications are received by such employers, they can now consider whether to seek to implement a minimum service level.

## NEWS

### Post-termination restrictions

In 2023, the Government consulted upon potential reforms to post-termination restrictions in employment contracts and stated its intention to introduce a cap of three months on non-competition restrictions, but no legislation has yet been tabled.

### Non-disclosure agreements (especially in harassment and discrimination cases)

The Government has previously announced an intention to legislate in this area, although no legislation has yet been tabled. It is an issue that remains on the agenda and the Higher Education (Freedom of Speech) Act 2023 which has received Royal Assent (but not yet been implemented) provides that higher education providers are prevented from entering into NDAs in relation to sexual harassment and other types of harassment and bullying. It is possible that the Government seeks to legislate to extend such protections in other sectors, or generally.

### Recording of Employment Tribunal hearings

With effect from 20 November 2023, the intention is that all Employment Tribunal hearings (save for mediations) will be recorded (where there are facilities in place to do so). Copies of audio recordings will not be freely available, and the intention is that they will only be used by the Tribunal when considering their decision (or made available as a reasonable adjustment in the case of some disabled parties). Parties may apply for a transcript of a recording. It will remain unlawful for any party themselves to record a hearing.

### ICO Guidance on DSAR provisions in Settlement Agreements

The ICO issued guidance this year stating that the right to make a data subject access request (DSAR) cannot be overridden by a settlement or non-disclosure agreement. Whilst it still appears possible to require an individual to withdraw an existing DSAR under a settlement agreement, a provision under which the individual agrees to make no future DSARs will be unenforceable.

### Fire and Rehire Code of Practice

The current Government has indicated that it does not intend to legislate on the issue of termination and re-engagement, but did issue a Draft Code of Practice on dismissal and re-engagement for consultation in 2023. Consultation ended in April 2023 and we await news of whether the Code will be implemented.

## CASE LAW

### Unlawful deduction claims and time limits

The Supreme Court has given its decision in *Chief Constable of the Police Service of Northern Ireland and another v Agnew and others*.

This case related to underpaid holiday pay to 3,500 police officers and staff. The PSNI accepted that holiday pay had not been paid correctly, and the key issue was therefore the period in respect of which a claim for unlawful deductions from wages could be made. Such claims have to be made within three months of the deduction, or if there is a series of deductions, within three months of the last in the series. Previous Employment Appeals Tribunal case law in relation to holiday pay established that if there was a break of three months between past unlawful deductions, that automatically broke the series of deductions and no claim can be made for deductions prior to that three-month gap.

The Supreme Court have now overturned this 'three-month gap' concept and found that whether there is a series of deductions is a matter of fact to be determined by the Tribunal and a three-month gap between deductions does not automatically break the series. In this case, it means that the employees are able to assert claims dating back to the commencement of their employment (rather than dating back to the first three-month gap between unlawful deductions).

The decision has less impact for employers in Great Britain as there remains in Great Britain (but not in Northern Ireland) a two-year limit on claims for unlawful deductions, but it does mean that for those bringing holiday pay claims in Northern Ireland (or other claims for unlawful deductions), they can now potentially look back for the full two years, rather than just back to the last three-month gap.

The decision does not affect holiday pay claims that have already been determined or settled. It also does not itself generate new claims for underpaid holiday: if an employer is now correctly paying holiday pay and has not received a Tribunal claim within three months of the date of its last underpayment to its workers, this decision does not enable a new claim to be raised now.

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# Sustainability Opportunities in Clean Energy and Reduction, Re-use and Recycling of your Waste

## NEWS: ENERGY

### Corporate Power Purchase Agreements

Corporate power purchase agreements (CPPAs) – where a business purchases electricity direct from a generator at a fixed electricity price over a relatively long term – are becoming increasingly popular. CPPAs can reduce the corporate offtaker's electricity bill (by avoiding expensive grid charges) and also bolster their ESG credentials (by buying genuinely green electricity and the associated green certificates). Our Clean Energy, Waste and Sustainability team frequently advise generators, offtakers and licenced electricity suppliers on the different structures for CPPAs (via physical private wires between the generating station and offtaker, 'sleeving' arrangements via the grid, or 'virtual' arrangements'). These CPPAs can be done on a single site basis or, more often for large corporates, on a portfolio basis, interacting with licenced electricity suppliers' supply terms and conditions.

Increasingly, we are seeing businesses procuring energy supply contracts through brokers or third-party intermediaries (TPIs), which may not necessarily lower energy bills because of commissions paid by energy suppliers to the brokers/TPIs which are passed through to the customer.

We are also seeing a large number of businesses looking to circumvent some of these issues by installing energy generation assets at their own sites – often lower carbon/higher efficiency assets such as solar panels, heat pumps, battery energy storage systems (BESS) and/or combined heat and power (CHP) plant, and usually alongside energy management systems. The initial capex for these schemes can be reduced through third party funding and selling surplus generated electricity via PPAs.

For more information on this topic please see our Sustainability-Solutions-For-Businesses explainer and our Quick Guide to Help Businesses Cut Costs.

# Legislation: Waste & Sustainability

There is plenty of change on the near horizon for all business because of forthcoming changes to every business' obligations in terms of how it deals with its waste.

We have set out below a summary of the legislation together with and overview of timescales for implementation and our view on likely challenges, steps to be taken by businesses to prepare for the changes and opportunities they may present. We appreciate that the General Election may impact timescales and content of the proposed new legislation but the waste industry has been working with retailers for years on these changes and our view is that many of these proposed legislative changes will still come into law even if there is a change in government.

| New Obligations | Simpler Recycling Reforms |
|---|---|
| **Overview** | The Simpler Recycling Reforms aim to standardise recycling across England, making it easier for people to recycle the same materials at home, work, or school. Therefore, while at first glance you may think that this is only relevant for local authority waste collectors and householders, in fact, it will affect all businesses that create waste aka all retailers and all businesses involved in retail supply chains. |
| **What businesses are affected** | All. |
| **Part of the UK affected** | England only. |
| **Timescales** | Collection of:<br>• Dry recyclable waste streams by 31 March 2025 (excluding plastic films which is by 31 March 2027)<br>• Food waste by 31 March 2025<br>Micro-firms (businesses with fewer than 10 full-time equivalent – FTE – employees), 31 March 2027. |
| **Challenges** | The reforms could lead to increased operational costs. Businesses may need to invest in new waste management systems and infrastructure to comply with the new recycling guidelines.<br>However, this is in the context of the reforms placing additional pressure on already overstretched trading standards teams, which will be required to enforce the new regulations. We have heard that similar reforms already in place in Wales are being ignored because there has not been enough time to put measures in place to comply with them. |

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| **Steps** | All businesses should prepare by understanding the new regulations, ensuring they have the necessary infrastructure for collection, and educating their staff and, in the case of retail businesses, also their customers, about the changes.<br><br>**How can retail businesses effectively communicate the changes brought about by the Simpler Recycling reforms to their customers**?<br><br>We would suggest retail businesses adopt a multi-faceted approach to communicate the changes brought about by the Simpler Recycling reforms to their customers.<br><br>• Firstly, in-store signage can be an effective way to inform customers about the new recycling rules. This could include posters, leaflets, and stickers placed near relevant products or recycling points<br>• Secondly, businesses could use their online platforms such as websites, social media, and email newsletters to reach a wider audience. These platforms can provide more detailed information, including the reasons behind the changes and the benefits of recycling<br>• Thirdly, staff training is crucial. Well-informed staff can answer customer queries and provide clear guidance on the new recycling rules<br><br>Remember, the key to effective communication is consistency and clarity. Make sure all messages are clear, concise, and aligned with the new recycling guidelines. This will not only help customers adapt to the changes but also reinforce your commitment to sustainability.<br><br>**What infrastructure changes might all businesses need to implement to comply with the Simpler Recycling reforms?**<br><br>We would recommend several infrastructure changes that retail businesses might need to implement to comply with the Simpler Recycling reforms.<br><br>• Firstly, businesses may need to update their waste management systems to accommodate the new recycling categories. This could involve purchasing new bins or modifying existing ones to separate different types of recyclable materials<br>• Secondly, businesses should consider improving their storage facilities for recyclable materials. This could involve creating designated areas for storing different types of recyclables before they are collected<br>• Thirdly, businesses may need to invest in training and equipment for their staff. This could include training staff on the new recycling guidelines and providing them with the necessary equipment to handle recyclable materials safely and efficiently<br>• Lastly, businesses should consider working with waste management companies that can handle the increased volume and variety of recyclable materials. This could involve renegotiating contracts or seeking new service providers |
| **Opportunities** | These changes may require upfront investment, but they can lead to long-term cost savings, improved environmental performance, and the crucial enhanced reputation among customers and stakeholders. It's important for businesses to view these changes not as a burden, but as an opportunity to build market share by showing that you are contributing to a more sustainable future. |

| New Obligations | Extended Producer Responsibility for Packaging |
| --- | --- |
| **Overview** | Extended Producer Responsibility (EPR) for packaging will introduce obligations for businesses selling, importing, and handling packaged goods. This policy is designed to improve efficiency by placing responsibility on businesses for the environmental impact of their packaging. In other words, under the EPR proposals, packaging producers will be responsible for the entire cost of recycling the household packaging they place on the market. The EPR reforms will also oblige those placing packaging on the market to ensure that from 1 April 2026, all packaging (except for flexible films) displays a label declaring either "recycle" or "do not recycle". |
| **What businesses are affected** | Businesses selling, importing, and handling packaged goods. |
| **Part of the UK affected** | UK. |
| **Timescales** | Deadlines for reporting packaging data (some of which has passed)<br>• Small organisations must:<br>o collect 2023 packaging data but do not have to report it<br>o collect 2024 data and have submitted it by April 2025<br>• Large organisations:<br>• England, Scotland and Northern Ireland must have submitted by:<br>o 1 October 2023 to report for January to June 2023<br>o 1 April 2024 to report for July to December 2023<br>• Wales, must have submitted data for July to December 2023 by 1 April 2024. Businesses in Wales can include data from January to June 2023 if they have it<br>No enforcement action will be taken about late submission of data if a business' data was submitted by 31 May 2024.<br>**Fees**<br>EPR for packaging fees have been deferred for 1 year. Fees were starting in October 2024. They will now start in October 2025. |
| **Steps** | Affected businesses will need to prepare for EPR for Packaging in the same way that they did for the Plastic Packaging Tax and should already be collating and reporting packaging data. You can also reduce your fees by reducing packaging and to the extent packaging cannot be reduced, ensuring it is made from recycled materials and capable of being re-used or recycled. |

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| **Opportunities** | It's important to note that EPR presents opportunities for businesses. By reducing packaging waste and improving recycling, businesses can enhance their sustainability credentials, attract environmentally conscious customers, and potentially save money in the long term. Therefore, while EPR may increase costs in the short term, it could also provide long-term benefits for businesses.<br><br>Like the Plastic Packaging Tax, EPR for Packaging will encourage businesses to use more recycled materials, which can contribute to circular economy objectives. By using more recycled materials, businesses can demonstrate their commitment to resource conservation and waste reduction.<br><br>In addition EPR for Packaging can drive innovation in packaging design. Businesses have an incentive to develop packaging that uses more recycled materials (and when combined with the affects of the Plastic Packaging Tax, less plastic overall). This could lead to new, sustainable packaging solutions that are both environmentally friendly and cost-effective. Businesses which tried to circumvent the Plastic Packaging Tax by using just as much packaging but less plastic will find themselves paying for that once EPR for Packaging is introduced.<br><br>**Businesses which tried to circumvent the Plastic Packaging Tax by using just as much packaging but less plastic will find themselves paying for that once EPR for Packaging is introduced.** |

| New Obligations | Deposit Return Scheme |
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| **Overview** | The Deposit Return Scheme (DRS) is a system where consumers pay a deposit on beverage containers, which is refunded when the container is returned. |
| **What businesses are affected** | Producers and retailers of in-scheme articles. |
| **Part of the UK affected** | Each nation will run its own scheme. |
| **Timescales** | The latest Government update was that the introduction of a DRS in all parts of the UK is now put back to October 2027 and the schemes will not now incude glass (although Wales still wants to include glass in its scheme). |
| **Challenges** | Fees payable by affected businesses to Scheme Administrators.<br><br>Space to store returned items (on which consumers have claimed back their deposit) and the cost of equipment such as reverse vending machines. |
| **Steps** | After what happened in Scotland the wasted costs that many retail businesses experienced, most affected businesses are adopting a wait and see approach. |

| New Obligations | Mandatory Digital Waste Tracking |
|---|---|
| **Overview** | The Government is to introduce a new system for digital waste tracking which will record information on waste from the point it is produced to the point it is disposed of. The initiative forms part of the Government's broader commitment to smarter regulation and sustainable growth, aligning with strategies like the 25 Year Environment Plan and the Clean Growth Strategy. |
| **What businesses are affected** | All businesses. |
| **Part of the UK affected** | UK. |
| **Timescales** | April 2025<br><br>Mandatory digital waste tracking will come into force from April 2025 – with the digital waste tracking service being publicly available to users on a voluntary basis in 2024. |
| **Challenges** | **Compliance:** Retailers must adapt to the new regulations by April 2025, ensuring their waste management practices align with the digital tracking requirements. As is currently the case, unless you are the person responsible for organising the waste movement, you will not have to create the waste movement record and DEFRA has confirmed that it does not intend the system to include producer verification of the waste they have generated because that would be likely to add time and complexity to waste management processess. It was also confirmed that if the producer and carrier are the same person,w then it will have the responsibility for creating the record. DEFRA also noted that the producer will always have the option to go into the system and check where its waste has gone.<br><br>**Operational Costs:** Transitioning to a digital system may incur initial costs for training and system integration.<br><br>**Data Management:** Retailers will be responsible for the accuracy of waste data entered into the tracking service, which could be resource-intensive. |
| **New Obligations** | EU Packaging And Waste Packaging Regulations Source European Commission – European Commission Proposal for a revision of EU legislation on Packaging and Packaging Waste (Directive 94/62/EC). Overview The proposed regulation updates the EU legislative framework for packaging and packaging waste and aims to harmonise national measures, protect the environment, and ensure a good functioning of the internal market. It requires Member States to ensure that packaging placed on the EU market meets a number of "Essential Requirements" related to the manufacturing and labelling of packaging, and its reusable and recoverable nature (through material recycling, energy recovery or composting). Part of the UK affected Northern Ireland. Businesses selling into the EU will also be affected. Timescales Under consideration. |

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| **Steps** | **Understand the Legislation:** Familiarize yourself with the details of the mandatory digital waste tracking and ensure you understand the scope, objectives, and the compliance requirements.<br><br>**Assess Current Practices:** Conduct a thorough assessment of your current waste management practices. Identify gaps between your current practices and the requirements of the new system.<br><br>**Plan for Integration:** Develop a plan for integrating digital waste tracking into your operations. This may include upgrading IT systems, adopting new software, or changing operational processes.<br><br>**Data Accuracy:** Establish procedures to ensure the accuracy and completeness of the waste data you will be required to input into the tracking service.<br><br>**Engage with Regulators:** Stay informed about the development of the waste tracking service and engage with regulators through user research opportunities and consultations.<br><br>**Pilot Testing:** If possible, participate in pilot testing of the new system to gain early insights and prepare for a smoother transition.<br><br>**Compliance Checks:** Regularly check the compliance status of your supply chain and subcontractors to ensure they are also prepared for the new requirements.<br><br>**Seek Expert Advice:** Consider consulting with waste management experts or legal advisors to ensure full compliance. |
| **Opportunities** | **Efficiency Gains:** Measuring your waste can have the consequence that when you see the composition of your waste, you can work out where your largest area of waste is and you are incentivised to do something about it. An example would be a large restaurant that realises it's throwing tonnes of chips away every year can therefore, put a few fewer chips on each plate, saving itself the cost of the wasted potatoes and helping it on its sustainability journey. Digital tracking can, therefore, result in streamlined waste management processes, leading to operational efficiencies.<br><br>**Circular Economy:** The system supports a move towards a circular economy, potentially opening up new business models based on resource recovery and recycling. What is waste to Company A may be a valuable resource to Company B that Company B is willing to pay for. Therefore, Company A not only saves money on waste removal but may have a new income stream and it is helping both companies on their sustainability journeys. |

### Ban on single-use plastics (England only)

This is not a new obligation as such as it was introduced in October 2023, banning a range of polluting single-use plastics in England, including single-use plastic plates, trays, bowls, cutlery, balloon sticks, and certain types of polystyrene cups and food containers.

It affects any business which previously supplied, sold or offered certain single-use plastic items in England.

People now cannot buy these products from any business - this includes retailers, takeaways, food vendors and the hospitality industry. The Government is also carefully considering further measures around other commonly littered and problematic plastic items, including wet wipes, tobacco filters and sachets, following the call for evidence on this issue.

### Plastic Packaging Tax (UK wide)

The Plastic Packaging Tax was introduced in April 2022 and applies to plastic packaging manufactured in, or imported into the UK, that does not contain at least 30% recycled plastic. It affects businesses which import or manufacture plastic packaging either for their own products or other businesses' products.

The tax will provide a clear economic incentive for businesses to use recycled plastic in their packaging. The rate of tax increased from 1 April 2023 to £210.82 per tonne of plastic packaging and £217.85 per tonne from 1 April 2024. On 21 September 2023, HMRC introduced its Plastic Packaging Tax penalties for non-compliance.

## NEWS: SUSTAINABILITY

### Green Agreements: Collaborating with competitors on environmental sustainability

For more information on this topic please see our article in the Competition section here.

### Sustainability Disclosure Requirements

For more information on this topic, please see our article in the Private Funds section here.

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FREETHS

# Environmental, Social & Governance (ESG)

## LEGISLATION

### The Retained EU Law (Revocation and Reform) Act 2023

The Retained EU Law (Revocation and Reform) Act 2023 (REUL Act) received Royal Assent on 29 June 2023, giving the Government significant power to revoke and repeal EU derived law which was carried over into domestic legislation following Brexit. This is a body of law known as 'retained EU law'. The REUL Act:

- Revoked 587 instruments of REUL listed in Schedule 1 at the end of 2023
- Facilitate domestic courts departing from retained case law
- Repealed directly effective EU law rights and obligations in UK law

Given that so much domestic environmental law is EU derived, the REUL Act has the potential to allow for extensive changes to existing environmental law from 2024 onwards.

## NEWS

### Mandatory Biodiversity Net Gain (BNG)

For more information on this topic, please see our article in the Planning section here.

### Marine Net Gain

On 9 December 2023 the Government published its long awaited response to the consultation on Marine Net Gain. The response, published to coincide with the Nature, Land Use and Ocean Day of COP28, sets out the steps being taken by the UK in implementing a strategy for nature recovery in the marine environment which will also address the climate crisis.

Key points from the Government's Marine Net Gain response include:

- Marine Net Gain is intended to become a mandatory requirement for new in-scope development activities in English waters below the mean low water mark, subject to a full impact assessment and further consultation
- Impacts on both habitats and species will be included within the Marine Net Gain assessment framework
- The Government intends to further explore options for a contributions-based approach alongside work to explore the applicability of biodiversity metrics to the marine environment
- Fisheries will not be included within the scope of Marine Net Gain requirements, however, it is recognised that the fisheries sector can contribute to the delivery of pressure removal and reduction measures
- Site-level and strategic interventions will be considered

Further work and consultation will now take place to develop the policy and seek appropriate legislative powers, as needed, to introduce Marine Net Gain requirements. This is some way off, but there is now more information about the direction of travel.

## Environmental Principles Policy Statement

On 1 November 2023, the Environmental Principles Policy Statement (EPPS) was implemented via the Environment Act 2021 (Commencement No 6) Regulations 2023 (SI 2023/381). Under section 19(1) of the Environment Act 2021, a Minister of the Crown must, when making policy (except that relating to the armed forces, defence or national security, taxation, spending or the allocation of resources within Government, or Wales) have due regard to the EPPS. This duty is not solely confined to environmental policy.

There are five principles in this policy statement, as set out in section 17(5) of the Environment Act:

- Integration principle
- Prevention principle
- Rectification at source principle
- Polluter pays principle
- Precautionary principle

The reason for the creation of EPPS is that these environmental law principles are incorporated into the Treaty of the Functioning of the European Union (TFEU). When the UK left the EU, it was felt that environmental protections would not be maintained unless the principles were incorporated into domestic law. The fact that the duty rests on Ministers (and policymakers) solely when making policy is at odds with the approach under the TFEU. Under the TFEU all institutions of the EU were required to ensure the integration of environmental protection (and thus application of the environmental principles) across all EU policies and activities. A narrower pool of decision makers is bound and a smaller scope of functions are caught by the EPPS.

The detail of the principles has been subject to extended deliberation across Government beyond Defra and we can see a measure of pragmatism and recognition of the need to not stifle innovation (especially in respect of the precautionary principle), so a business-friendly approach has been engrained into the EPPS. The most controversial of these principles is the precautionary principle, which some argue can stifle innovation or block new technologies. Under the EPPS, when considering the application of the precautionary principle, Ministers and policymakers should consider the need for outcomes to be cost effective in the face of plausible and real risk.

The impact of this EPPS will largely rest on the implementation of policy by Government Ministers. The establishment of these five environmental principles on a statutory footing offers the prospect of decision making against a consistent set of standards. If implemented well, businesses may see coherence and uniformity in policy making across Government. However, a risk does exist, at least in the short-term while the EPPS is first applied, that departments face legal challenge where Ministers and policymakers fall too short of these principles thereby undermining the opportunities for joined-up efficient policy making.

In any case, businesses and other stakeholders should keep in mind Ministers' duties in respect of the EPPS when engaging in or considering the policy sphere. This is a particular issue in an environmental law context where there is an emphasis on transparency in environmental decision-making.

### Corporate Governance

For more information on Corporate Governance topics please see the following articles in the Corporate section as follows:

- FRC UK Corporate Governance Code
- QCA Corporate Governance Code published
- Parker Review: Diversity in the Boardroom

# CASE LAW

### C G Fry & Son Ltd vs Secretary of State for Levelling Up Housing and Communities [2023] EWHC 1622 (CG Fry & Sons)

The position on the issue of nutrient neutrality was in a state of flux over 2023. Prior to the Government's unsuccessful attempts through amendments to the Levelling-Up and Regeneration Bill in the House of Lords, to remove the need for planning decision-makers to consider nutrient pollution from urban wastewater in their Habitat Regulations Assessments for new developments in England, the High Court heard the case of *CG Fry & Sons*.

*CG Fry & Sons* (the claimants in the matter) sought to argue that the effect of the additional phosphate loading from its development was not a material consideration and that it was legally irrelevant as it fell outside the remaining parameters of the outline planning permission and reserved matters approval.

The High Court confirmed that, despite the UK having left the EU, developers are still required to comply with Natural England's (NE) nutrient neutrality advice for reserved matters applications, even where the NE advice post-dated the outline planning permission for which no Habitats Regulations Assessment (HRA) had been required.

While provisions to alter the assessment positions concerning diffuse nutrient pollution in development may be brought forward, this case has suggested that, now that the REUL Act has come into effect and weakened the force of EU law, this sort of case may have a greater chance of success.

This case was heard by the Court of Appeal in March 2024, with judgment likely to be handed down this summer.

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# Immigration

A number of changes have taken place in the immigration system for January 2024. These changes are part of the New Plan for Immigration: Legal Migration and Border Strategy, which aims to create a 'fair but firm' system that attracts talent, deters illegal entry and removes those with no right to be in the UK.

The Government claims that the new immigration system will benefit the UK economy, society and security by attracting people who can contribute to the country, while preventing abuse and exploitation of the system. However, some critics have raised concerns about the impact of the changes on businesses, human rights, social cohesion and public services.

## LEGISLATION

### Increase to Immigration Health Surcharge

The cost of the Immigration Health Surcharge (IHS) increased by 66% on the 6 February 2024. The IHS is an upfront cost paid at the point of submission of most visa applications so that the individual is entitled to have full access to the NHS whilst in the UK. It is a mandatory cost which is charged per year and covers the duration of the visa applied for. The IHS fee increased from £624 to £1,035 for each year of the visa for adults, and from £470 to £776 for each year of the visa for students, Youth Mobility Scheme applicants and under 18s.

### Penalties for employing illegal workers

From 13 February 2024, the maximum civil penalty for employing an illegal worker increased from £20,000 to £60,000 per worker. The starting point for a first breach also increased from £15,000 to £45,000 per worker. The increase in penalties is not limited to just employers but extends to landlords found renting properties to those without a right to rent. For landlords, the fines have increased from £80 per lodger to £5,000 per lodger and from £1,000 per occupier to £10,000 per occupier for the first breach. Repeat breaches will be up to £10,000 per lodger and £20,000 per occupier.

## NEWS

On 4 December 2023, the Home Secretary James Cleverly announced a raft of immigration changes which caused much alarm and confusion. The initial changes were revised and took effect from April 2024. (The changes apply to initial applications only, in the relevant route) as follows.

- **Higher salary threshold for family visas:** On 11 April 2024, the Government increased the minimum income required to sponsor someone coming to the UK on a family visa from £18,600 to £29,000. This is an increase of more than 55%. The minimum income amount will increase further to £34,500 later in the year (date yet to be confirmed) and eventually to £38,700 by early 2025 bringing it in line with the new salary threshold for a Skilled Worker visa
- **Curbs on social care visas:** care workers are no longer able to sponsor dependents. Also, all care providers wishing to sponsor migrants under the Health and Care route will need to be regulated by the Care Quality Commission in order to sponsor
- **Higher salary threshold for work visas:** the general Skilled Worker salary threshold rose to £38,700 from £26,200, and the individual occupation 'going rate' thresholds have risen in line with the median full-time rise for equivalent jobs in 2023 (that is, from the current 25th percentile to the 50th percentile). Applications on the Health and Care visa route and education roles on national pay scales are exempt from the general salary threshold rise
- **Scrapping discount for shortage occupation:** From 4 April 2024, the Shortage Occupation List (SOL) has been withdrawn and replaced by the new Immigration Salary List. The Migration Advisory Committee has reviewed the new list against the increased salary thresholds in order to reduce the number of occupations on the list. As a result of this, the Immigration Salary List is a lot shorter than the Shortage Occupation List. Some longstanding shortage occupation roles like engineering professionals have been removed

- **Review of the Graduate Route:** In March 2024, the Home Secretary commissioned the Migration Advisory Committee (MAC) to conduct a rapid review of the Graduate route in the UK. The graduate route allows students to stay for 2 years (or 3 years for PhD students) after graduation. Following months of speculation, the MAC's report published on 14 May 2024, recommends that the route remains in place in its current form. The MAC found no evidence of widespread abuse of the graduate route by international students and cautions that restricting the route could severely damage the viability of UK universities

## Business visitors

From 31 January 2024, the rules for business visitors to the UK have been slightly relaxed. The business visitor regime has expanded, with wider coverage for the legal services sector and simplified arrangements for those undertaking paid engagements. The activities that can be undertaken in an intra-corporate setting have been broadened and clarified.

## Youth Mobility Scheme

From 31 January 2024 the Youth Mobility Scheme has been extended to eligible Andorran and Uruguayan nationals. The age of applicants applying from Australia and Canada has increased to include those aged between 18 and 35. Nationals of Australia and Canada can also stay in the UK for up to three years (previously two years).

## Digitalisation of the UK's Immigration System – eVisa

The Government is currently developing a fully digital immigration system. From 1 January 2025 it will no longer issue physical proof of a migrant's immigration status, such as a biometric residence permit, and will instead issue eVisas. In 2024, all migrants in the UK will need to use their UKVI account to access and prove their immigration status. The Government will issue guidance and information on how to do so throughout 2024. This technology will enable migrants to generate share codes from their UKVI account which they can provide to third parties and other Government departments to prove their immigration status. The UKVI account will be vital to all migrants as without access to their account, they will not be able to prove their right to work, right to rent, right to a UK driving licence, and right to a UK bank account.

## Electronic Travel Authorisation (ETA) scheme

The ETA application process opened on 1 February 2024, for nationals of Bahrain, Jordan, Kuwait, Oman, United Arab Emirates and Saudi Arabia only, who are travelling to the UK on or after 22 February 2024. An ETA is an advance travel permission required by specified non-visa nationals when coming to the UK as a visitor or transiting the UK, or as a Creative Worker. An ETA provides an individual with permission to travel to the UK but it is not permission to enter the UK. The holder of an ETA will still need to obtain permission to enter on arrival in the UK.

## Changes to the EU Settlement Scheme (EUSS) and EUSS family permit

The Home Office intends to take steps to automatically convert as many eligible pre-settled status holders as possible to settled status once they are eligible for it, without them needing to make an application. During 2024, automated checks of pre-settled status will establish their ongoing continuous residence in the UK.

## Sponsorship Management System (SMS) IT changes

The SMS IT changes have been in the pipeline for some time. It is expected that changes will be rolled out in tranches from 2024. The first tranche will include a streamlined customer journey for existing sponsors wishing to sponsor a worker. It aims to provide the functionality to invite the worker to make their visa application once the role details have been approved, and to pre-populate that visa application with role information provided by the sponsor. The second tranche aims to deliver improved online management system for all sponsors to carry out post licence activities, such as making it easier to add users to their licence. The proposal includes a provision for organisations with a view of their sponsored workers, their status and prompts to action at the appropriate time. The licence will share data with HMRC and Companies House. The final tranche aims to make it easier for prospective sponsors to apply for a sponsor licence. It will introduce automated data checks to validate whether a user is employed by, or is an office holder of, a sponsored organisation, and validate key details about the organisation.

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# Intellectual Property & Media

## LEGISLATION

### Brexit - Retained EU Law (Revocation and Reform) Act 2023

Key provisions of the Retained EU Law (Revocation and Reform) Act 2023 (REUL) came into force on 1 January 2024, including the abolition of the supremacy of EU law.

Further provisions are anticipated to come into force in early 2024, including:

- Giving appeal courts the power to depart from retained EU case law (and domestic case law influenced by retained EU case law); and
- Giving lower courts the right to refer questions of divergence to the relevant appeal court

These changes are particularly relevant to intellectual property law because so much UK intellectual property law is derived from or influenced by EU law.

There have been some notable instances where the EU position has conflicted to some degree with the UK national law. For example, the expansive view taken by the EU courts of which works qualify for copyright protection (in essence, any work which embodies the author's intellectual creation regardless of format) has recently caused some difficulty when interpreted in the context of the UK's 'closed list' of copyright works which must fit into a particular category to qualify for protection.

Another, more historical, example is the reluctance with which the Court of Appeal applied the CJEU's decision in *L'Oreal v Bellure*, a case which concerned the extent to which trademark owners can enforce their trademarks against third party use of trademarks where there is no consumer confusion. The case was decided in favour of the trademark owner, however in applying the CJEU's decision Jacob LJ stated: "I do not agree with or welcome this conclusion – it amounts to a pointless monopoly. But my duty is to apply it".

That said, the single case where Court of Appeal has departed from EU case law to date (using its pre-REUL powers to do so) was in Industrial Cleaning Equipment v Intelligent Cleaning Equipment. This was in respect of a fairly obscure aspect of trade mark law and where there was mixed EU authorities, so it may be that the Court of Appeal is reluctant to use the powers afforded to it under REUL.

Nevertheless, it is likely that at some point there will be a material divergence between UK and EU IP law, even without any further legislative action by Brussels or the Government.

The immediate practical effect of REUL is to complicate the interpretation of IP laws in litigation (as seen in the recent case of Advancetrack v Global Infosys Ltd) and add uncertainty when seeking to enforce IP. That said, there are also opportunities to be had from any changes following REUL, and 2024 may be a good time for rights owners to reassess their IP portfolios and procedures to make sure they are best placed to take advantage.

### Online Safety Act

The Online Safety Act, designed to protect children and adults from online harms, was finally passed as law on 26 October 2023. The Act places responsibility for keeping children safe on the social media companies, who had previously hidden behind the EU's safe harbour defences. Social media companies and other technology platforms will have to remove illegal content quickly, prevent children accessing harmful and age-inappropriate content including pornography, online abuse, cyberbullying or online harassment and material promoting or glorifying suicide, self-harm or eating disorders.

The platforms will have to enforce age limits and age-checking measures, publish risk-assessments, and provide parents and children with clear and accessible ways to report problems online when they do arise.

In parallel the EU has passed the Digital Services Act, which will apply to all platforms from 17 February 2024 (and has applied to platforms with more than 45 million users in the EU since the end of August 2023). The Digital Services Act aims to better protect users of social media whilst giving legal certainty to providers of digital services.

Brands advertising on social media can expect to see increased scrutiny in relation to advertising and sponsored content posted to these sites. The Digital Services Act bans targeted ads to minors on online platforms in the EU. Very large online platforms have taken steps to comply with these prohibitions. For example, Snapchat, Google, YouTube, Instagram, and Facebook no longer allow advertisers to show targeted ads to underage users. TikTok and YouTube now also set the accounts of users under 16 years old to private by default. Targeted advertisement on online platforms is also prohibited when profiling uses special categories of personal data, such as ethnicity, political views, sexual orientation.

These changes, combined with recent restrictions in the UK on the advertising of certain products and services (for instance the restriction on gambling ads from including any content likely to be of strong appeal to under-18s), mean brands will want to carefully consider how they target their online advertising.


FREETHS

# NEWS

## Updated Costs Rules for Patent Cases in Shorter Trial Scheme

The Civil Justice Council produced its final Report on Costs in May 2023, following various consultations across four areas that included extending the scope of fixed recoverable costs. Of note to SMEs that are interested in patents is the proposal for a capped costs regime of £500,000 to be introduced into the current Shorter Trials Scheme (STS) for patent cases. The STS currently offers a designated judge for less complex cases where the trial will last no longer than four days, alongside various other limitations that apply to the steps taken to prepare a case for trial. These limitations are one method of trying to improve access to justice by reducing the ability of dominant businesses to leave no stone unturned on the way to trial. However, in practice this still leaves uncertainty over the potential exposure to an adverse costs award – patent cases can still cost over £1m per party to reach trial even using the STS.

There is therefore a significant gap between the current costs cap of £60,000 at the liability stage in the Intellectual Property Enterprise Court (IPEC) and an open-ended liability for cases in the Patents Court. This leaves the UK with nothing to offer in competition to the recently introduced Unified Patent Court (to which it is not a signatory) where there is a costs capping regime in place.

Notably, the IP Federation (which represents the view of UK industry in intellectual property rights policy and practice in the UK and international) supports a pilot scheme where the overall recoverable costs would be capped at £500,000 in patent cases. It should also be a relatively simple pilot to adopt, with calls for only an overall cap to be introduced (as opposed to the phased costs capping regime in IPEC).

The Civil Procedure Rule Committee is currently considering a proposed draft pilot Practice Direction (setting out the rules that would apply to court cases within the pilot) following on from the Civil Justice Council's report. We are now waiting to see the final draft of this and when the pilot is likely to start. As is generally the case with this type of change, much of the work and consultation has been done already and we can expect that any pilot will be turned into a permanent feature of the English legal system at some point in the future.

The proposed pilot will be very welcome news to many SMEs who want certainty over their overall costs exposure when litigating a patent case. It has been reported that the introduction of the IPEC's costs capping regime led to a surge in new cases (damages are limited to £500,000 in IPEC), but this did not lead to a decrease in the number of High Court patent cases. The IPEC clearly met a pent-up demand for non-patent cases, and it may be that the new costs rules in the STS also prompts a flurry of new patent cases.

### Copyright and AI - Latest Developments

Generative AI programs will continue to be in the legal spotlight in 2024. The key legal questions, for which no jurisdiction has yet established an answer, is whether use of copyright protected material in the training data for generative AI, amounts to copyright infringement. In 2024 we are expecting to see progress from the Government and the EU on its position regarding exceptions to copyright infringement (which presupposes that at least some forms of generative AI training may infringe copyright). There are also a number of test cases in the US and one in the UK, which it is hoped may establish some precedent if they proceed to trial.

### Awaiting final decision from the Government on text and data mining exception for generative AI learning

The Government has recently considered whether to expand the current text and data mining exception under the Copyright, Designs and Patents Act 1988 to permit scraping of copyright material to train AI models (that is,  text and data mining for commercial as well as non-commercial research). At the time the proposal received substantial pushback from the creative industries and the current position is that the Culture, Media and Sport Committee has recommended that the Government abandons the expansion of this exception. However, it is unlikely that this is the last word on a UK exception to copyright to allow for training of generative AI.

### Proposed EU Artificial Intelligence Act

On 21 May 2024, the EU announced final approval of the EU Artificial Intelligence Act.  The EU AI Act largely deals with risk and governance issues relating to AI and does not go into any detail on how creation, use or protection of AI might interact with IP law.

You can read more about the impact of the proposed EU AI Act in the context of Data Protection law here.

### Test litigation in the UK and US

There are a handful of cases currently working through the courts in the UK and the US, which concern use of copyright artwork in the training data of generative AI models. We summarise the latest developments in the case before the UK courts in the 'case law' section below, but the ongoing cases before the US courts will also likely have some persuasive value in the UK as far as the relevant copyright laws overlap in each jurisdiction.

### Greenwashing – Advertising and CMA Developments

On 6 December 2023, the Advertising Standards Authority (ASA) issued three decisions, each banning an airline ad for giving a misleading impression of the advertiser's environmental impact. Air France claimed its customers could "travel better and sustainably", Lufthansa also referred to flying "more sustainably", while Etihad Airways used the phrase "environmental advocacy". None of the airlines were able to substantiate their claims.

This comes as no surprise as both the ASA and Competition and Markets Authority (CMA) have publicly clamped down on greenwashing. The focus on the airline sector is also not surprising as it is known to be a carbon intensive sector. However, businesses operating in less polluting sectors should not rest on their laurels: brands across all industry sectors want to shout about how sustainable they are, and the greenwashing rules apply to all.

Companies looking to make green claims need to consider the ASA's CAP and BCAP codes as well as the CMA's Green Claims Code.

Fundamentally, businesses should not mislead their consumers, either by making claims they cannot substantiate, by exaggerating green claims or by using unclear language or jargon. Environmental claims must be clear, transparent, and substantiated with real world data.

More than that, businesses need to consider the net impact of their actions on the environment. Focussing advertising only on the sustainable part of a business can also be misleading, as HSBC and Shell found out at their cost last year. HSBC had issued posters at bus stops, one featuring trees and the other a shoreline.

One poster explained how much HSBC was investing to help its clients transition to net zero, the other said how many trees HSBC was planting. The facts on the posters were accurate and could be substantiated, however the ASA was concerned that HSBC was continuing to significantly finance investments in businesses and industries that emitted high levels of carbon dioxide and other greenhouse gasses. The ASA said that consumers would not necessarily know this. As it was material information that was likely to affect consumers' understanding of the ads' overall message, it should have been made clear in the ads, which were banned.

Similarly, the ASA took issue with Shell's TV and poster ad which highlighted Shell's investment into renewable power. Again, the wide-ranging claims were all accurate and could be substantiated. However, the ASA found that the ads gave the impression that low-carbon energy products comprised a significant proportion of the energy products Shell invested in and sold in the UK in 2022, or were likely to do so in the near future. It was not clear that large-scale oil and gas investment and extraction comprised the vast majority of Shell's business model in 2022 and would continue to do so in the near future, and so the ads were banned for being misleading.

Most companies are alive to the risks of greenwashing and carefully consider the environmental claims they make. However, the recent ASA decisions involving Air France, Lufthansa and Etihad Airways – large organisations operating in what is known to be a highly polluting industry – show that greenwashing continues to be an issue.

Recently the ASA has gone further, and branded Toyota's ad, which showed their SUVs driving at speed across an off-road landscape, as irresponsible. While Toyota was not making environmental claims in its ad, its disregard for the impact of the vehicles in their ad on nature and the environment was enough to get their ad banned. To read more about this decision please see our article on the Freeths website here.

Brands should learn from the recent ASA decisions and take a critical look at advertising concepts and any other public-facing claims (made anywhere, from social media to annual reports) from all angles, at an early stage.

They should objectively consider whether their messaging could be interpreted to be greenwashing, and also whether it could be irresponsible, harmful or misleading, bearing in mind the ASA's very narrow interpretation of its own rules. The reputational impact of getting it wrong should not be underestimated. Additionally, although there are currently no financial repercussions in the UK for greenwashing, under the Digital Markets, Competition and Consumers Bill, which is covered in the Competition section here the CMA is likely to get the power to levy fines of up to 10% of global turnover for breaches of consumer law. This will be the real driver for change in this area.

## Advertising Guidance - Don't Gamble on your Betting Ads being Compliant

In August 2023 the ASA put out a guidance note on gambling ads. This comes after a spate of rulings engaging rule 16.3.12 which was updated in October 2022 and states as part of the rule "Marketing communications must not include a person or character whose example is likely to be followed by those aged under 18 years or who has a strong appeal to those aged under 18".

Following a ruling against Ladbrokes in December 2022 for its ads featuring Philippe Coutinho, Jesse Lingard and Kalidou Koulibaly, this year the ASA has investigated various ads featuring current and former football players. These include TV ads for Paddy Power featuring Peter Crouch, promoted tweets for Skybet featuring Micah Richards and Gary Neville and a Facebook ad for BetVictor featuring an image of Jordi Alba and Sergio Busquets playing for FC Barcelona.

Perhaps unsurprisingly the ASA have sometimes been prepared to draw distinctions between former football players and those still playing professionally at the time the ads are seen. However, in addition to considering the dates of the respective footballers' playing careers, other factors such as their age, how regularly they played during their career, their social media following, their other endorsement deals, demographic appeal and their current roles are considered.

This is demonstrated by the ASA not upholding complaints about the ads featuring Peter Crouch, and Micah Richards who both retired in 2019 but upholding the complaints about the ads featuring Gary Neville, Jordi Alba and Sergio Busquets. Whilst Gary Neville retired from football in 2011, across his active social media accounts he had over 135,000 followers under 18 which the ASA considered a significant number and him to be "of inherent strong appeal to under-18s".

With regard to the Betvictor Facebook ad, at the time it was seen (January 2023) both Jordi Alba and Sergio Busquets were still playing for FC Barcelona and although not a UK club, the ASA considered FC Barcelona to be one of the most widely supported and successful clubs in the world. Due to this and the fact that both players had represented (and been captains for) Spain in high profile tournaments, the ASA felt they were likely to be admired by and have a strong appeal to under-18s.

Therefore, advertisers wanting to use footballers or other well-known sports stars to promote gambling will need to carefully consider who they can use without falling foul of rule 16.3.12 in addition to the wider framework of section 16 which includes not featuring anyone under the age of 25 to promote gambling ads.

For further details, you can read the full guidance note on the ASA website here.

### Advertising Guidance - Avoiding racial and ethnic stereotypes likely to cause harm or serious or widespread offence

In May 2023 the ASA issued the above guidance note to help advertisers comply with the requirements of the CAP and BCAP rules and avoid the depiction of racial and ethnic stereotypes likely to cause harm, or serious or widespread offence.

The guidance explains the distinction made by the ASA between harm and offence and states:

"In a general sense, harm refers to the real-world damage that is linked to certain forms of content or portrayal. That may include social, moral, mental or physical impacts".

"Offence can generally be understood as the contravention of accepted moral, social or cultural standards, which some may consider upsetting, hurtful or insulting".

The guidance makes clear that in regulating offence it must be considered likely to cause 'widespread' offence and ads that are simply 'distasteful' may not breach any rules. However, with harm the regulation attempts to prevent any harm from occurring.

The guidance follows a revised ruling on 6 May 2023 concerning a Facebook ad for the Ministry of Justice (MoJ) which featured an image of a white prison officer talking to a black male prisoner. The MoJ explained that it was a real life prisoner and prison officer shown in the ad and that this particular ad was part of a wider campaign advertising job roles in prisons that had used various images of actual prison officers and other prison staff from a range of ethnic backgrounds. The ASA upheld the ruling. In doing so they considered that the ad would be seen in isolation and not along with the wider campaign. The ASA also considered the fact that the prisoner's face could not be seen, only his afro hairstyle and afro pick comb which emphasised his race and that the ad therefore perpetuated a negative ethnic stereotype about black men as criminals.

For further details, you can read the full guidance note on the ASA website here.

## CASE LAW

### AI as Patent Inventor: Thaler v Comptroller - General of Patents – Appeal to the Supreme Court

In September 2021 the Court of Appeal unanimously held that an artificial intelligence machine (DABUS) could not be the inventor of two UK patent applications. Birss LJ suggested that that the patent applications in question could nevertheless proceed with Dr Thaler as the applicant and without any named inventor and would have allowed the appeal on this basis, however Laing LJ and Arnold LJ disagreed, and the appeal was dismissed. This decision was appealed to the Supreme Court, which heard the case in March 2023. On 20 December 2023 the Supreme Court handed down its decision, unanimously dismissing the appeal.

## Factual Background

DABUS created two new inventions, a flashing light to attract attention and a food container. Dr Thaler subsequently submitted two new patent applications and stated on the application form that DABUS, as opposed to himself, was the inventor of the inventions. On the same form, Dr Thaler stated he had the right to be granted the patent "by ownership of the creativity machine DABUS". The IPO stated Dr Thaler had not complied with s13(2) of the Patents Act 1977, which required him to identify a person as the inventor, and to indicate how he had derived his rights from that person. In response, Dr Thaler filed a Form 7 which declared that he could not identify any person(s) who were the inventor as the invention was solely conceived by DABUS. The IPO refused Dr Thaler's applications on the basis that:

- the machine DABUS was named as the inventor; and
- there was an absence of a rule of law granting property rights to Dr Thaler for the inventions

As such, the patent applications did not meet the requirements of the Patents Act 1977.

## Supreme Court Reasoning

In forming their decision about whether the patent applications should be granted, the Supreme Court examined various references to "inventor" in the Patents Act 1977 and concluded that these required an 'inventor' to be a natural person, and not an artificial intelligence machine.

Further, the Supreme Court held that Dr Thaler had not established any rule of law that permitted him to be entitled to the property of the inventions. He could not rely on section 7(2)(b) or section 7(2)(c) of Patents Act 1977 because both sections required that the inventor (DABUS) must transfer the right to apply for the patent to the applicant (Dr Thaler) which DABUS could not do because DABUS is not a person. The Supreme Court stated that the doctrine of accession, which permits the owner of existing tangible property to also own new tangible property created by their existing tangible property (the owner of a tree owns its fruit) does not apply to new intangible property produced by existing tangible property, that is, Dr Thaler did not own property in the inventions created by DABUS irrespective of the fact that he created and owned DABUS because there was no property in information.

He was also not entitled to apply for patents for inventions he did not create.

## Take-aways and work arounds

The Supreme Court noted that wider policy considerations as to whether an AI machine should as a matter of principle be capable of being the inventor of a patent fell outside of the scope of appeal, and so for now patent applicants must operate within the current framework of the Patents Act 1977.

In his dissenting opinion in the Court of Appeal, Lord Justice Birss noted at paragraph 81 that "…if only Dr Thaler was not such an obsessive and, instead of calling DABUS the inventor, he named himself…none of these problems would arise", which suggests had Dr Thaler applied for the patent under section 7(a) of the Patents Act 1977 and named himself as the inventor, the applications may have been successful.

The Supreme Court was less supportive of this position as they noted Dr Thaler's own statement on the application form that he was not an inventor. Nevertheless, had Dr Thaler adopted a less rigid approach and framed the circumstances of the inventorship differently (for example, had he listed himself the sole inventor or even as a joint inventor alongside DABUS) the patent may well have been acceptable, albeit still with the caveat that an AI machine cannot be an inventor.

For further information the full judgment is available at Thaler v Comptroller General of Patents Trade Marks And Designs.

## Patentability of AI: Emotional Perception AI vs Comptroller - General of Patents

In November 2023, the High Court gave guidance for the first time on whether AI inventions, specifically artificial neural networks (ANNs), are excluded from patentability in the case of Emotional Perception AI Ltd vs Comptroller-General of Patents, Designs and Trademarks (2023).

UK patent legislation has long excluded 'computer programs as such' and 'mathematical methods as such' from patentability, affording machine learning inventions little to no protection to date. However, in Emotional Perception, Sir Anthony Mann found that an invention trained to perceive semantic similarity or dissimilarity between media files before recommending media files to end users was capable of being patented on the basis that it was not a 'computer program'.

Sir Anthony Mann went further, stating that even if he was wrong and the invention was a 'computer program', the invention would not be 'a computer program as such' due to its technical effect outside the computer, again escaping the exclusion to patentability.

This decision is positive for AI innovators and will likely have wide-ranging consequences in 2024 for inventions that incorporate ANNs, specifically inventions concerning AI-based recommendations communicated within a computer network such as shopping cart recommendations or targeted ads.

That being said, the Emotional Perception decision does directly contradict the established approach of the European Patent Office (EPO) and fails to consider the 'mathematical methods as such' exclusion to patentability in the UK. In addition, the updated UKIPO guidance on the patentability of ANNs is fairly narrow in scope, and does not amount to a green light for applicants.

The case is also subject to appeal, with a Court of Appeal decision expected later in 2024.

For further information, the full first instance judgment is available at Thaler v Comptroller General of Patents Trade Marks And Designs.

## A New Definition of Bad Faith in Trade Mark Disputes?: Sky v Skykick – Appeal to the Supreme Court

In June 2023 the Supreme Court heard the appeal by Skykick in the long running Sky v Skykick saga. The key issue is whether applying for a wide range of goods and services with no intention to use all such goods and services amounts to bad faith and so renders the trademark invalid.

If the appeal is allowed it could have significant implications for trademark proprietors, as there are undoubtedly a large number of trademarks on the register with overly wide specifications of goods and services which could become wholly or partially vulnerable to invalidity.

For further information, the full judgment under appeal is available at: Sky Ltd & Ors v Skykick, UK Ltd & Anor (Rev2)

The Supreme Court's judgment is likely to be handed down in 2024.

## Battle of the Logos: Lidl v Tesco – Appeal to the Court of Appeal

In December 2020 Lidl sued Tesco for its use of a yellow circle against a blue square as part of its Tesco club card logo. Lidl relied on registered trademarks for its LIDL logo and for the background of the logo (a yellow circle with a red border within a blue square). Lidl also relied upon these devices in relation to passing off and copyright infringement.

In February 2023, the High Court found for Lidl on all grounds of infringement. A number of invalidity attacks against Lidl's trademarks for the background device were also successful, but its most recent trademark for the device was held to be valid.

It is fair to say that the finding of passing off took many practitioners by surprise, as the misrepresentation alleged was not the usual case of consumer confusion or deception as to trade origin. Instead, Lidl successfully relied on misrepresentation as to equivalence – in particular that the similarity of the Tesco club card device to the Lidl device meant consumers would believe that the relevant Tesco products were equivalent in price to equivalent Lidl products, when this was not the case. This is a novel approach to passing off, and one that could have wide ranging implications if upheld on appeal.

Tesco was also found to have infringe Lidl's trademarks, on the basis that it had:

- taken unfair advantage of "the distinctive reputation which resides in the Lidl Marks for low price (discounted value)" even though the judge accepted there was no subjective intention on Tesco's part to take unfair advantage; and
- caused detriment to the distinctive character of Lidl's marks, as evidenced by the fact that Lidl found it necessary to pay for so-called 'corrective advertising' which featured the Lidl trademarks

Both Tesco and Lidl appealed different elements of the High Court decision, and on 19 March 2024 the Court of Appeal handed down their decision. In summary, Lidl's appeal on the invalidity attacks was unsuccessful. Tesco's appeal on copyright infringement was successful, but their appeal in relation to the findings of trade mark infringement and passing off was unsuccessful.

It is worth noting that the Court of Appeal's decision was not necessarily a seal of approval of the first instance decision, but rather a reminder of the high bar of overturning a first instance decision on appeal, as it must be rationally insupportable. Accordingly, while all the appeal judges found the findings of fact "surprising", they were not wholly rationally insupportable and so not liable to be overturned on appeal.

For further information, the Court of Appeal's decision is available at: Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor.

### Fictional Character as Copyright Work: Shazam Productions v Only Fools The Dining Experience

The claimant, Shazam, is owned and run by the family of the late writer of the scripts for the TV show 'Only Fools and Horses' (OFAH), John Sullivan. Shazam owns and exploits the rights in OFAH on behalf of Sullivan's estate. The defendants produced and marketed the 'Only Fools The (cushty) Dining Experience' (OFDE). The actors in the OFDE show used the appearance, mannerisms, voices and catch phrases of various OFAH characters, including Del Boy.

This first instance decision dealt with a variety of copyright infringement allegations and defences. However, for present purposes it is particularly notable because of the judge's finding that literary copyright subsisted in the fictional character, Del Boy. In doing so, for the first time an English court found that a fictional character could be protected as a literary work, subject to satisfaction of the EU test for originality and the work fitting within one of the closed categories of work under the UK Copyright, Designs and Patents Act 1988 (CDPA). Following the CJEU decision in Cofemel the judge found the Del Boy character was protectable as a literary work because:

(a) he was sufficiently original – a great deal of thought and attention had been given to the creative choice of how and why Del Boy would express himself (for example, his backstory, clumsy use of the French language, relationships with the other characters);

(b) these features were such that he was identifiable with sufficient objectivity; and

(c) it followed from this reasoning that Del Boy was protectable under EU law and he could be subsumed under the concept of a literary work under the CDPA

This part of the judgment shows how the closed list of categories of protectable works under the CDPA may be expanded, creating a level of uncertainty for practitioners and authors alike. Whether EU law will continue to be applied in this way in copyright cases is yet to be seen following Brexit (and the Retained EU Law (Revocation and Reform) Act 2023 in particular). The judgment is of significant interest to those dealing with fictional characters, particularly in regard to how they may be protected by copyright or, alternatively, how existing derivative works may now pose a risk of infringement.

For further information the full judgment is available at Shazam Productions Ltd v Only Fools The Dining Experience Ltd & Ors (Rev1).

## Does training AI amount to copyright and/or database right infringement?

*Getty Images (US) Inc v Stability AI Ltd*

Getty Images (Getty) has been given permission by the English High Court to progress all of its claims against Stability AI (Stability) following a failed reverse summary judgment application by Stability. Getty's main case concerns, inter alia, whether generative AI output can infringe copyright works, and whether using copyright works in the training and development of a generative AI model is an infringement of Getty's copyright and database rights in the source material. There are also issues of trademark infringement and passing off, which we do not consider further here.

The reverse summary judgment application dealt with Getty's claim of copyright and database right infringement in respect of the training data and Getty's claim for secondary infringement. Getty also made an application to amend its Particulars of Claim to include a claim of copyright infringement in respect of Stability's image-to-image feature, which is said to permit users to make 'essentially identical copies of copyright works'. The application to amend Getty's Particulars of Claim was approved and adds another dimension to the case.

**Training data:** This issue is of particular interest to many in the field. However, Stability's application in respect of the training data was brought on grounds that the alleged infringements had not taken place in the UK and, accordingly, took rather a narrow approach. Following consideration of witness evidence by Stability's CEO as well as an expert witness for Getty, the judge found there was evidence to suggest the activities may have happened in the UK and the summary application failed on this basis.

**Secondary infringement:** Here, Getty is alleging that Stability AI is importing the pre-trained Stable Diffusion software into the UK and that this amounts to secondary infringement of copyright. Whether the secondary infringement provisions under the CDPA apply will turn on whether the term imported 'articles' is to be interpreted to include intangible articles, such as software. Stability argued the CDPA is not meant to be interpreted in that way. However, a decision on this point will have significant consequences in the field of AI and beyond.

It is perhaps unsurprising then that the judge refused Stability's application, noting that this appeared to be a novel question of law, which would be better resolved once all the facts had been ascertained at trial.

Finally, it is also of note that Stability put in a Request for Information seeking additional particulars of the infringements. The parties agreed, during the hearing, that Getty could provide examples of copyright works that are alleged to have been infringed by Stability. It was further agreed that the details of the internal work carried out in order to produce the examples would remain privileged and, accordingly, non-disclosable in the course of the proceedings.

While the summary judgment decision tells us the judge at the hearing considers Getty's claims to have a real prospect of success (that is, more than merely a fanciful chance of success), the decision also highlights the breadth of issues to be tackled in this arena. It is hoped that at trial the judge will have the opportunity to get to grips with how this generative AI model works and, importantly, how copyright and database right can be applied to it.

For further information, the full decision on reverse summary judgment is available at: [Getty Images (US) Inc and others v Stability AI Ltd.]


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# Pensions

## LEGISLATION

### Pensions Extension of (Automatic Enrolment) Act 2023

The Act gives the Secretary of State scope to widen the scope of automatic enrolment by:

- Reducing the lower age threshold for employees to be automatically enrolled into a qualifying pension scheme
- Reducing or abolishing the lower limit on qualifying earnings

The changes will benefit younger and lower paid workers in particular but could also affect other workers whose pension contributions are based on qualifying earnings.

Employers will have to pay more in pension contributions.

The Act received Royal Assent in September 2023 but we don't yet know when the changes will take effect.

### Finance (No. 2) Act 2023

The Act received Royal Assent on 11 July 2023 and implements the Chancellor's announcement and abolishes the Lifetime Allowance Charge for the 2023/24 tax year and subsequent tax years. When the Lifetime Allowance was introduced in 2006 it was £1,500,000 and subsequently rose to a high point of £1,800,000 before successive reductions brought it down to £1,073,100.

The Government stated its policy objective was to encourage economically inactive individuals over the age of 50 back into work.

From 6 April the Lifetime Allowance has been replaced by new allowances in relation to tax-free lump sums on retirement or death and an overseas trasnfer allowance. The maximum tax-free lump sum which can be taken at retirement, i.e the maximum tax free lump sum is £268,275 unless the individual has some form of protection.

The Act also implements the changes the Chancellor announced to the Annual Allowance (increased to £60,000) and the Money Purchase Annual Allowance (increased to £10,000).

There is a provision to benefit low earners whose employer's pension scheme operates under the net pay arrangement for tax relief. Before 6 April 2024 employees in such a scheme whose earnings did not exceed the personal allowance for income tax would not have benefited from tax relief on their contributions to a pension scheme. That isn't the case for personal pension schemes where the provider adds an amount equivalent to basic rate tax relief to the net contribution and reclaims the amount from HM Revenue & Customs. The legislative change levels the playing field between the two types of arrangement.

## NEWS

### Governance of occupational, personal and public service pension schemes; TPR General Code of Practice

The Pensions Regulator (TPR) has finalised its long awaited General Code of Practice (GCOP) which came into force on 28 March 2024.

The GCOP consolidates and updates 10 existing codes of practice into 'one set of clear, consistent expectations on scheme governance and administration'. The GCOP (with its shorter, focused modules) is intended to be used by those with responsibility for pension scheme governance (Governance Bodies) to benchmark their performance against TPR's expectations. TPR is clear that where those standards are not being met, action must be taken and as TPR observes in the related press statement: *"…there is no excuse for failing to know what TPR expects of them."* Governance Bodies will need to consider whether their pension schemes are being operated in a manner which meets the standards set out in the GCOP and, if not, formulate a plan to address any governance shortfalls and / or 'gaps'.

### Funding Defined Benefits Scheme; TPR Code of Practice

The much anticipated Code of Practice which was expected to come into force from 1 April 2024 has been further delayed and is now expected to take effect from 22 September 2024.

The Code reflects the changes to the funding legislation by the Pension Schemes Act 2021. Schemes will need to have a funding and investment strategy aimed at achieving a low-dependency funding basis by the time the scheme reaches 'significant maturity'.

There is a tension between the focus on risk reduction for defined benefit (DB) schemes and the Chancellor's Mansion House reforms aimed at increasing pension scheme investment in private equity which may have more relevance for defined contribution (DC) schemes. In relation to DB schemes, it seems it may be restricted to consolidator vehicles such as superfunds (the first superfund transaction – to 'Clara- Pensions' - completed in November) or potentially a public sector consolidator such as the Pension Protection Fund (the Chancellor's Autumn Statement confirming the Government's support for 'opening the PPF as an investment vehicle for smaller defined benefit pensions').

### Value for Money and DC Consolidation

During 2023, the Department for Work and Pensions issued a joint consultation with the Pensions Regulator and the Financial Conduct Authority aimed at improving value for money for pensions savers. The purpose of the consultation was to seek views on the metrics, standards and public disclosure required under the proposed value for money framework. Policy is switching from a narrow focus on charges to a more holistic approach to assessing value for money. There needs to be a consistent approach to allow comparisons between schemes and hopefully to drive up standards. A by-product of this is expected to be further consolidation in the DC pensions market and the winding up of smaller schemes.

### One to watch; changes to the Pensions Regulator's notifiable events framework

The notifiable events framework is intended to provide the Pensions Regulator (TPR) with advance warning of activity (including corporate activity) which could potentially lead to calls on the Pension Protection Fund. Since 1 October 2021, in line with the broader strengthening of the TPR's powers under the Pensions Schemes Act 2021, there are more onerous sanctions for failing to comply with the notification duty, including civil penalties of up to £1 million.

In October 2021, the Department for Work and Pensions (DWP) concluded a consultation on The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021 (Draft Regulations) which would change the requirements to notify TPR of certain transactions. The Draft Regulations introduce two new 'employer-related notifiable events' - a decision in principle to sell a material proportion of its business or assets or to grant (or extend) security which ranks ahead of the pension scheme. The new events along with an existing event (a decision by a controlling company to relinquish control of an employer company) will be required to be notified to TPR at an earlier stage, that is, following a 'decision in principle'.

There will also be a further requirement placed on the 'appropriate person' (including the employer or persons connected or associated with the employer) to then provide further details of the transaction once 'the main terms have been proposed' (and then to update the TPR if those details should materially change). This notice, which must also be sent to the pension scheme's trustees, must be accompanied by a statement setting out the principal details of the transaction, any adverse effects on the pension scheme or employer and any steps take to mitigate those adverse effects.

Following the conclusion of the consultation on 27 October 2021, the intention was for the Draft Regulations to come into force on 6 April 2022. However, the Draft Regulations were delayed following concerns expressed by pensions industry participants (including professional bodies) that certain aspects of the Draft Regulations may be ambiguous or uncertain – including the meaning of 'decision in principle'. The Draft Regulations then seem to have fallen victim to DWP time/resource constraints.

The DWP is understood to be progressing the regulations to resolve the various concerns raised. The timing for the publication of the finalised regulations remains unknown, with the DWP having committed to do so 'in due course'. It is possible that 2024 may be the year!

While there is no firm date for the revised Draft Regulations, once enacted they will have a significant impact on the way corporate transactions which involve a defined benefit occupational pension scheme are managed.

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FREETHS

# Planning

## LEGISLATION

### Levelling-Up and Regeneration Act 2023

The Levelling-Up and Regeneration Act 2023 received Royal Assent on 26 October 2023. The scope of the Act is wide-ranging covering planning, infrastructure, environment, property and public sector law. While the Act is now in force, secondary legislation will be required to implement the provisions.

Key areas covered by the Act include:

- A New Infrastructure Levy to replace the Community Infrastructure Levy and section 106 contributions for most developments
- A new route to amend a planning permission via Section 73B, where the effect of the changes *"will not be substantially different from that of the existing permission"*
- The requirement for local planning authorities to have a design code in place covering their entire area
- A new duty on local authorities to prepare infrastructure delivery strategies to outline how they intend to spend the Infrastructure Levy
- Replacing environmental impact assessment (EIA) and strategic environmental assessment (SEA) with Environmental Outcomes Reports
- Local plans, minerals and waste plans, supplementary plans and neighbourhood plans will all be required to take account of new local nature recovery strategies
- A power for LPAs to prepare 'supplementary plans', where policies for specific sites or groups of sites
- The introduction of a 'Street Votes' system that permits residents to propose development on their street and hold a vote on whether it should be given planning permission
- A new duty on decision-makers to make planning decisions in accordance with the development plan and national development management policies unless material considerations strongly indicate otherwise
- A duty on sewerage undertakers whose area is wholly or mainly in England to secure that 'nitrogen significant' and 'phosphorus significant plants' meet specified nutrient pollution standards by 1 April 2030 where designated in the 'initial period' (or later if designated at a later time). This has been included as a measure to try to address the obstacles to new development caused by the need to achieve 'nutrient neutrality' in certain river catchment areas. See the summary of *CG Fry & Sons* in the ESG section for more on the recent case law concerning nutrient neutrality

For further information on this topic in the context of Real Estate law please see our article in the Real Estate section here.

### Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2023

The Regulations were laid before Parliament on 20 July 2023. They amend the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 and increase planning application fees by 35% for major applications and 25% for all other applications from April 2024. The cost of Prior Approval applications will rise to £120 from £96; Householder applications will rise to £258; applications for dwellings will start from £578 per dwelling but the fees will be dependent upon the number of dwellings proposed and site area. The full list of fees is set out in the Schedule to the Regulations.

The Regulations also introduce an annual inflation-related increase. Planning fees will not be ring-fenced, so this means that the increased revenue from planning fees may not necessarily be realised into additional resources in local planning departments.

The 'free-go', fee exemption for repeat applications (that is, the ability to submit a second planning application free of charge) will also be removed. However, an applicant will still be able to benefit from a free-go if their application was withdrawn or refused in the preceding 12 months, subject to all other conditions for the free-go being met.

For further information on this topic, you can visit the Government guidance page here.

# NEWS

## Mandatory Biodiversity Net Gain (BNG)

BNG became mandatory on 12 February 2024. Developers in England will be required to by law to deliver at least 10% BNG when building new housing, industrial or commercial developments approved under the Town and Country Planning Act 1990. Developers will be able to deliver this minimum 10% BNG through enhancing habitats on-site within the redline boundary of their development, by purchasing registered off-site biodiversity units from third parties or, if neither of these options are available, by purchasing statutory BNG credits from the Government for a fixed price. A register will be created, administered by Natural England, which will record where off-site biodiversity units are available and whether these have been purchased. Developers will need to set this information out in Biodiversity Gain Plans which must be submitted to the Local Planning Authority after planning permission has been given for a development and must be approved before that development can commence. The Government has confirmed that mandatory BNG will only apply to new applications for planning permission for 'major development' from the date that mandatory BNG comes into force. From April 2024, mandatory BNG will also apply to 'small sites' (residential sites with less than 10 dwellings where the site is less than 1ha, or an unknown number of dwellings on a less than 0.5ha site; or for non[1] residential developments development with a floorspace less than 1000m2, or a site less than 1ha)

For further information on this topic, you can view the BNG draft secondary legislation and guidance which was published by Defra on 21 February 2023 here.

## Sustainable Drainage Systems

Government has confirmed that it intends to implement Schedule 3 to Flood and Water Management Act 2010 (FWMA 2010) in England to require sustainable drainage systems (SuDS) in new construction.

Though Government has not yet issued the promised consultation on a full regulatory impact assessment before its final decision on scope, threshold and process, we expect Schedule 3 to be implemented in 2024.

Under Schedule 3 of FWMA 2010, SuDS will be mandatory for most new construction in England and will require a SuDS-specific authorisation by the SuDS Approval Body (SAB) prior to construction starting (even where planning permission is not required). The SAB will sit within the unitary authority or, if there is not one for the area, within the county council. There will be two approaches for approval: a 'free-standing application for approval' will be made for construction that does not require a planning application (but may still be used if a planning application is to be made) or a 'combined application' to accompany an application for planning permission. Schedule 3 will also modify the normal right under section 106 of the Water Industry Act 1991 to connect both foul and surface water drainage to the public sewer system. Schedule 3 prohibits a SuDS from being connected to the public surface water sewer or combined sewer unless the SuDS has been approved.

FREETHS

## National Planning Policy Framework

On 18 December 2023, the Government published an amended National Planning Policy Framework following a consultation. The Government stated that this will *"help deliver the right homes in the right places"*.

The main amendments are as follows:

- Preparing and maintaining up to date plans should be seen as a priority to meet the objective of providing sufficient housing
- Councils are no longer required to identify a five year housing land supply if (a) their adopted local plan is less than five years old and (b) that adopted plan identified at least a five year supply of specific deliverable sites when the examination of that plan concluded
- For local planning authorities which have an emerging local plan that has been submitted for examination or has reached regulation 18 or 19 stage, that local planning authority will only be required to identify a four year supply
- The standard methodology for housing need is an 'advisory starting-point' and there may be demographic characteristics which justify an alternative approach to assessing housing need
- Local planning authorities should seek opportunities, through policies and decisions, to support small sites to come forward for community-led development for housing and self-build and custom-build housing
- Setting out a plan for local planning authorities should their housing delivery fall over three years
- No requirement for green belt boundaries to be reviewed or altered

You can access a copy of the updated NPPF here.

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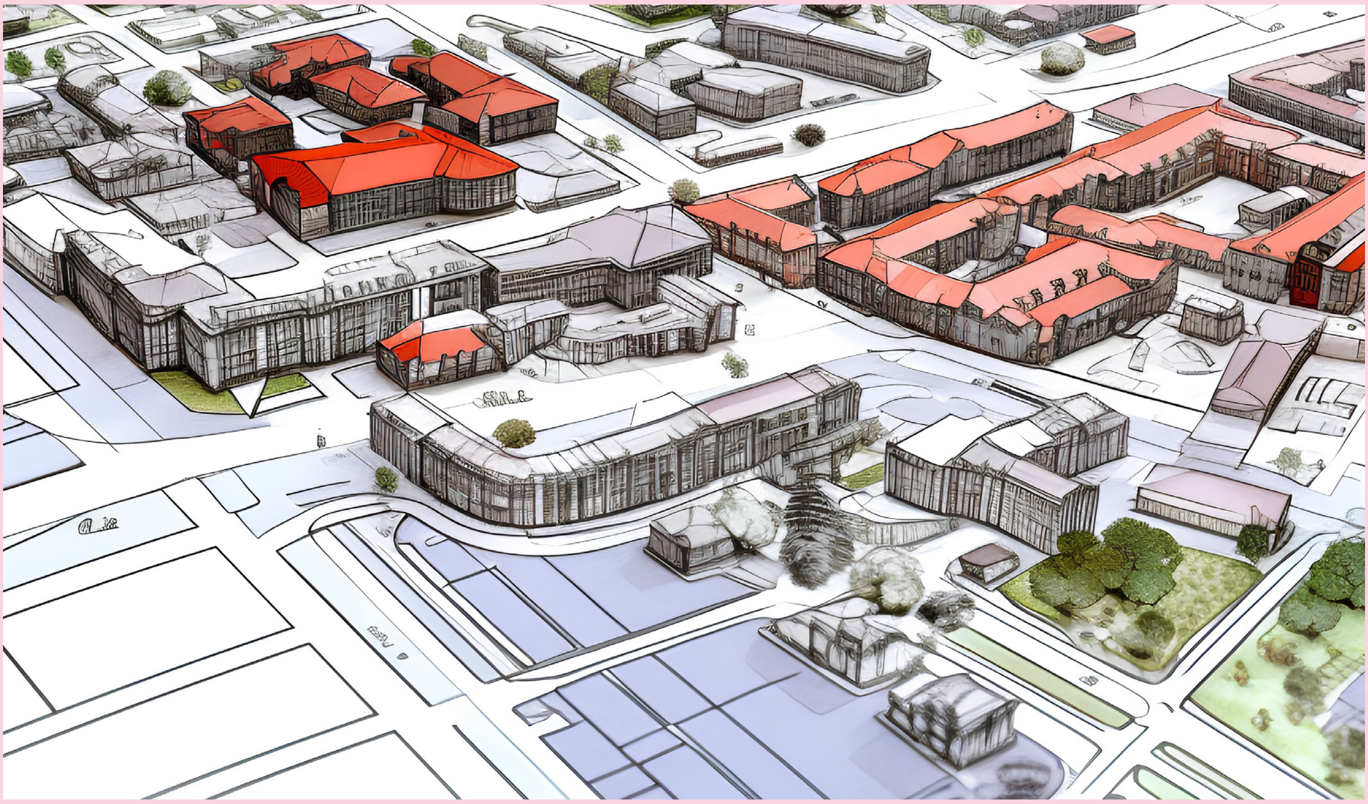

# Real Estate

## LEGISLATION

**Sale of newbuild houses under leasehold**

When the bill was published on 27 November 2023 it did not include any clauses which prevent the sale of newbuild houses under leasehold. Officials have stated that these measures will be inserted into the bill via an amendment, so we will need to keep an eye on this going forward.

For a more detailed analysis on the Leasehold and Freehold Reform Bill, please see our article in the Property Litigation section here.

### Levelling Up and Regeneration Act 2023

**Information about interests and dealings in land (England and Wales)**

The Act received Royal Assent on 26 October 2023, and will come into force in stages. Part 11, which came into force on the same date, introduces new requirements to provide information to the Government (most likely the Land Registry) about interests and dealings in land in England and Wales. The aim of Part 11 is to facilitate a better understanding of who ultimately owns, controls or has an interest in land that may otherwise be available for new housing development.

The detail of the regime will be set out in secondary legislation, which is yet to be published. However, the framework as set out in the Act appears to be very wide in scope

The Act gives the Secretary of State the power to require parties to provide information if it is within the scope of one of three 'permitted purposes' (beneficial ownership, contractual control or national security). The required information may include transactional details such as the terms of any contractual arrangements, the source of money paid and copies of the transactional documents such as contracts, agreements for lease, options and pre-emption agreements. The extent of the transactional information that might be required could be of concern to parties who want to keep commercially sensitive information confidential, particularly if that information ends up being part of a public register or database.

The information requirements may also be retrospective and impose obligations to provide details of transactions entered into before the Act came into force.

Failure to comply will be a criminal offence punishable by a fine or imprisonment or both, and will prevent the registration of sales, leases and other dealings with land by the Land Registry.

There is potential overlap with the beneficial ownership information requirements of both the Economic Crime (Transparency and Enforcement) Act 2022 (which relates to the registration of overseas entities owning land in England and Wales) and with HMRC's Trust Registration Service. At this stage it is not apparent that information submitted under either of these will be synchronized with the Part 11 requirements, so certain entities may find they have to submit and maintain information under multiple regimes.

**Infrastructure Levy**

Of particular relevance to parties involved in the development of land are the provisions which relate to the replacement of the Community Infrastructure Levy (CIL) and Section 106 Agreements with the **new** Infrastructure Levy. The new Infrastructure Levy is very similar to CIL, but it will be linked to the value of developments as opposed to square footage.

**Letting by local authorities of vacant high-street premises (England only)**

Part 10 of the Act is not yet completely in force (this is due in mid-2024 but with an election that seems unlikely), but in short, it empowers local authorities in England to hold rental auctions and contract to let vacant high street and town centre premises without the owner's consent.

The local authority can serve notices on the owner of unoccupied premises that are deemed suitable for high-street use and ultimately designate them for rental auction. The local authority can hold a sealed bid auction and bind the owner to a contract to let the premises to the successful bidder.

The contract to let (effectively an agreement for lease) and the lease itself will have certain prescribed terms, such as the rent, the use and the duration of the term (which can be between one and five years). The local authority may also require the owner or the tenant to carry out works on the premises.

Any superior landlord or mortgagee will be deemed to have given consent to the arrangement, a provision which potentially removes important protections for those parties, who would normally have a say in who actually occupies a property they ultimately own or have security over.

The new powers are intended to revitalise the high streets and town centres by reducing vacancy rates and promoting local benefits. However, the powers are not yet fully in force and the details are subject to secondary legislation. The owners of high street premises should be aware of the potential impact of these provisions on their interests.

For more information on the Levelling Up and Regeneration Act in the context of Planning law, please see our article in the Planning section here.

### Terrorism (Protection of Premises) Bill

To read more about this bill, known as 'Martyn's Law', which proposes new safety duties on owners and occupiers of certain types of publicly accessible buildings, please see our article in the Compliance & Regulatory section here.

### Building Safety Act 2022

For further information on this topic please see our article in the Property Litigation here.

### Carbon Emissions (Buildings) Bill

This bill is currently progressing through Parliament and will require reporting of whole-life carbon emissions of buildings. It will also set limits on embodied carbon emissions in the construction of buildings.

### Flood Management Act 2010 (Schedule 3)

As discussed in more detail in the planning section here, the Government has confirmed that it intends to implement Schedule 3 to Flood and Water Management Act 2010 (FWMA 2010) in England to require sustainable drainage systems (SuDS) in new construction We expect that Schedule 3 will be implemented in 2024.

For any sites under development, it will be an extra hurdle to address. Developers should be trying to agree deals that are conditional on the new SuDs approval so that they are note left with a site they have planning permission for, but no SuDs consent.

## NEWS

### Mandatory Biodiversity Net Gain (BNG)

For more information on this topic, please see our article in the Planning secion here.

### Minimum Energy Efficiency Standard (MEES)

Part 3 of the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 prohibit landlords continuing to let sub-standard non-domestic private rented property on or after 1 April 2023. There are additional proposed increases in requirements to C ratings (proposed 2027) and B ratings (proposed 2030).

Commercial property owners should review their portfolios to ensure they can meet regulatory targets in accordance with these proposed timings.

### Consultation on Landlord and Tenant Act 1954 Reform

For more information on this topic, please see our article in the Property Litigation section here.

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# Restructuring & Insolvency

## NEWS

### The Rise of Corporate Insolvencies

Businesses continued to battle financial pressures throughout the course of 2023, with many having to face repayment of COVID-19 support loans, a lower demand from consumers due to the cost-of-living crisis and high inflation rates, high energy prices, and high interest borrowing rates.

Not surprisingly therefore, 2023 saw a significant increase in the number of corporate insolvencies compared to previous years. The Insolvency Service's analysis of corporate insolvencies demonstrates an upwards trend, to the extent that as at the end of Quarter 3, insolvencies were at their highest since the Global Financial Crisis in 2009. You can access further details on The Insolvency Service's statistics here.

It is anticipated that the present economic pressures will continue to prevail throughout 2024. If interest rates remain high, or worse, continue to increase, the burden of debt repayments will become unmanageable for some businesses, pushing them to the brink of insolvency and/or into either a restructuring or insolvent process. Consequently, the level of corporate insolvencies will remain high.

Of course, it is possible that The Bank of England may start to reduce interest rates during 2024. However, even if that does take place, it is extremely unlikely that interest rates will reduce to the same sorts of levels that existed pre-2022 and therefore we expect that it will still take some time for businesses to bounce back before feeling the benefits of lower borrowing rates.

## CASE LAW

### Restructuring Plans

As part of the COVID-19 measures taken, in June 2020 the Corporate Insolvency and Governance Act 2020 introduced restructuring plans by way of implanting a new Part 26A in the Companies Act 2006 (CA 2006).

They aim to offer a solution to companies that are, or are likely to be, facing financial difficulties that threaten their viability and provide the court with the power to approve a restructuring plan even if some creditors disagree with it (the 'cross-class cram down' power), so long as the conditions in section 901G CA 2006 are met. This power applies to secured and preferential creditors, including HMRC who became preferential from 1 December 2020.

Since their introduction in 2020 to the end of 2022, the number of restructuring plans proposed and sanctioned were relatively low and other than one SME (Houst) the 'plan companies' consisted of larger business enterprises. There were two restructuring plans proposed and sanctioned in 2020 (Atlantic and Pizza Express), seven proposed in 2021, six of which were sanctioned by the court, and five proposed and sanctioned in 2022. However, 2023 saw a significant increase to those numbers, resulting in thirteen restructuring plans proposed, with eleven of those being sanctioned.

Amongst the restructuring plans brought before the court, various challenges were made by different classes of creditors, some of which were successful. HMRC, appeared to actively oppose a variety of plans that were proposed. The key cases involving the proposal to cram down HMRC were:

**Houst Limited** which related to the restructuring plan of a property management company which had become insolvent as a result of COVID-19. HMRC had voted against the plan on the basis of its preferential status. However, the court held that all creditors would be worse off if it refused to sanction the plan, including HMRC, and therefore proceeded to give sanction.

**Nasmyth Group Limited** in which three creditors (HMRC and two unsecured creditors) opposed the sanction of the proposed restructuring plan. The court refused to sanction the plan, on the basis that it would have been unfair to do so, considering the amount of the debt and that HMRC's proposed share of the restructuring surplus was small in comparison with the share proposed to be paid to the company's subsidiary, and on absolute terms.

**[Great Annual Savings Company Ltd](#)** (GAS) in which, following two classes of creditors (including HMRC) voting against the plan, the court refused to sanction the proposed restructuring plan. It was generally accepted that condition B of section 901G CA2006 was satisfied. The main challenge related to condition A and in this respect, the court said that the plan company had not provided sufficient evidence to support that HMRC would not have been any worse off under the plan. The court also said that HMRC had a valid reason to vote against the plan, given its status as an 'in the money creditor'. The court noted that HMRC had strongly expressed its opposition to the plan, not only based on the facts of this case, but also because of its important public duty to collect taxes and therefore HMRC's views deserved to be given considerable weight.

**Prezzo Investco Limited** in which the court departed from Nasmyth and GAS and sanctioned a restructuring plan proposed by the parent company of the chain of restaurants, and which included the cram-down of HMRC debt, as the allocation of restructuring surplus under the plan was fair.

Cost implications, timing issues and creditor challenges are all possible factors that may have affected the number of companies, particularly SMEs, in proceeding with a restructuring plan.

However, the plans sanctioned in the last 3 years, particularly in 2023, where there has been an increase in sanctioned plans, brings with them more legal certainty and defined parameters which will assist companies, including SMEs, going forward into 2024 when evaluating their restructuring options.

What may also positively impact restructuring plans going forward into 2024, specifically where the 'plan company' is carrying debt due to HMRC, is the new guidance issued by HMRC on 1 November 2023 which provides companies with guidelines that HMRC will apply when considering whether or not to support a proposed restructuring plan.

Generally, we expect that we will see a continued use of restructuring plans during 2024. However, considering HMRC's new guidance, it is also possible that we may see fewer plans being actively opposed by HMRC, which may give companies, including SMEs, greater confidence in considering the use of the restructuring plan tool.

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# Tax

## LEGISLATION

There are a number of key tax changes on the horizon in 2024 - we have prepared a summary of the key upcoming legislative changes to help you plan for the year ahead.

### Personal Tax

**Capital Gains –**

- The CGT higher rate for residential property gains will be reduced from 28% to 24% taking effect from 6 April 2024
- The lower rate will remain at 18% for gains that fall within an individual's basic rate band

**National Insurance Contributions –**

- Reduction in the main rate of Class 1 National Insurance contributions by 2 percentage points. The rate will reduce from 10% to 8%
- Class 4 National Insurance contributions also reduced from 6 April 2024 by 2 percentage points, the main rate will now be 6%
- There has also been a commitment to abolish Class 2 NI contributions by the end of the year. The requirement to pay them was removed on 6 April 2024

**Non- UK Domicile tax rules –**

- The aim is to abolish the remittance basis of taxation for non-UK domiciled individuals and replace it with a simpler residence-based regime. The intention is that this will take effect from 6 April 2025
- Overseas Workday Relief will also be reformed, with eligibility for the relief based on the new regime

**Furnished Holiday Lettings –**

- The government will abolish the Furnished Holiday Lettings tax regime, eliminating the tax advantage for landlords who let out short-term furnished holiday properties over those who let out residential properties to longer-term tenants. This will take effect from April 2025

### Corporate Tax /Companies

**Corporation Tax –**

- No changes to the rates of corporation tax
- Main rate of 25% and small profits rate at 19% will be maintained

**Additional support for independent film –**

- The credit rate will be 53% of qualifying expenditure. Qualifying expenditure is capped at a maximum of 80% of a film's total core expenditure; the most taxable credit a film can receive will be £6.36 million
- The changes will take effect for films that commence principal photography from 1 April 2024 on expenditure incurred from 1 April 2024. Claims may be submitted from 1 April 2025

**Theatre Tax Relief, Orchestra Tax Relief, and Museums and Galleries Tax Relief –**

- The government will introduce legislation in Spring Finance Bill for permanent 40/45% headlines rates of relief for the above
- These are expected to take effect from 1 April 2025

**Economic Crime Levy –**

- The government will increase the charge paid by very large business with UK revenue greater than £1billion (which are regulated for anti-money laundering purposes). This will rise from £250,000 to £500,00 per annum
- There will be no change to the charge to small, medium, or large entities

**Energy Profits Levy –**

- The end date of the Levy will be extended to 31 March 2029

**Freeport Tax Relief sunset date extension**

- The window to claim tax reliefs available in Freeport special tax sites has been increased from 5 to 10 years. The sunset dates will be extended to:
  - 30 September 2031 – English Freeports
  - 30 September 20234 – Scottish Green and Welsh Freeports

### SDLT

**Abolition of Multiple Dwellings Relief (MDR)–**

- MDR will be completely abolished
- Relief can no longer be claimed where transactions have an effective date on or after 1 June 2024

**Acquisitions by Registered Social Landlords and Public Bodies–**

- Remove public bodies from the SDLT 15% higher rate charge with changes taking effect from 6 March 2024
- First Time Buyers relief: Leases and Nominees
- Relief will be available where individuals who purchase new leases use bare trust or nominee arrangements
- The above applied for 6 March 2024

## Indirect Tax –

**Vaping Products Duty–**

- A new duty on vaping products will be introduced. This is expected to come into force on 01 October 2026 alongside a proportionate increase in tobacco duties

**Alcohol –**

- The government will freeze alcohol duty from 1 August 2024 until 1 February 2025. This extends the six-month freeze announced at Autumn Statement 2023
- There will be no revisions to existing legislation and no new legal provisions will be introduced
- End of the Alcohol Duty Stamp Scheme that applies to many retail containers for spirits, wine and other fermented products

**VAT**

- The VAT requirement to register thresholder ill be increased from £85,000 to £90,000
- The turnover thresholder for when a person may deregister for VAT will be increased from £83,000 to £88,000

**Fuel Duty –**

- The government will introduce legislation by Statutory Instrument to extend the cut in the rates of Fuel Duty introduced at Spring Statement in March 2022, and extended at Spring Budget in March 2023, for a further 12 months
- The changes will take effect from 23 March 2024

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FREETHS

# Retail at Freeths

Retail is one of the firm's most important and vibrant sectors; our National Team work with over 400 Retailers and Brands in the UK and internationally. Our dedicated team of lawyers specialising in this fast moving sector understand not only the demands that Retailers face, but also the opportunities the sector presents.

We also recognise the Retail Sector encompasses many types of business, which is why we have a number of key sub-sectors, all with specialist teams who truly understand the relevant opportunities and challenges and can tailor advice accordingly. We have specialists in luxury and high street brands, health and beauty, home, fashion, grocery, sports and betting and gaming.

Whether you're a luxury brand, a high street favourite, a fast growing start up or an e-commerce business, we can offer you tailor-made guidance to help you thrive in your field.

We have an active retail community, running regular events and sharing industry know how, including via our 'The Future of Retail' webinars and roundtables, and our 'Trending Now' vlog series. All of which is supported by horizon scanning, thought leadership and regular update reports on the latest sector trends.

**Click here** to subscribe to our mailing lists to keep up to date with the latest information and seminar invites for your sector.

Want to know more? Speak to a member of our Retail Team.

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# Awards and accreditations

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