LEWIS SILKIN

Digital, Commerce & Creative

A look ahead to the 2025 legal landscape

Annual report - January 2025

Contents

Introduction

We are delighted to present the 2025 Digital, Commerce, and Creative Report, a short handbook to help you navigate the changes that lie ahead in the legal landscape.

Our challenge was to distil the legal and regulatory changes for 2025 into short, user-friendly checklists, timelines, and summaries. We've split these into four broad categories to help you focus on the issues most relevant to you.

Section 1 focuses on the AI journey which continues to evolve - most respondents to our Legal Counsel Insights Survey told us that they're concerned about the legal risks associated with creating and using AI. We take a look at why AI matters and how you can best plan for and manage its deployment.

In Section 2, we look at how 2025 brings a focus to implementing new online safety measures (via the Online Safety Act) to achieve a safer digital world for consumers, including from a cyber perspective. As with AI governance, developing and implementing compliance frameworks will evolve as we start to see new Ofcom guidance and how Ofcom uses its powers.

In Section 3, we look at what's new in protecting and using intellectual property, including from an AI-generated content perspective. The UK remains a key player on the international innovation stage (fifth according to WIPRO) with Cambridge, Oxford, and London remaining key science and technology clusters. We take a special look at the role of Standard Essential Patents (SEPs), standards, and the latest licensing developments.

In Section 4, we look at the changes that businesses will need to make, including under the Digital Markets, Competition and Consumers Act (DMCC), in respect of consumer protection and advertising requirements, such as pricing practices, green/ethical claims and online targeting, all against the backdrop of brand new DMCC powers, enforcement resources, and GDPR-style fines.

At the end of the Report, we have included links to some practical '101 guides' on a range of commercial and technology topics, which we hope you find useful.

Looking to future trends, we anticipate more businesses turning regulatory compliance into efficiency and marketing opportunities – examples of this include using compliance as a marketing tool to build consumer trust and goodwill, and reshaping B2C and B2B contracting journeys through the use of 'legal design' to reduce friction and the time to contract conclusion. Most respondents to our Survey highlighted that ESG considerations remain a 'high priority' which we expect to see manifested in supply chain demands and audits. As ever, there's lots to do, especially for in-house teams, some of whom we predict will explore the use of 'legal ops' to help them deliver their advice and work to stakeholders in a cost efficient manner.

We're very excited about supporting you in 2025. Please do call or drop in to see us, whether in London, Manchester or Belfast. We always love to see and hear from you. Of course, we're always happy to visit you too.

James & Alan

Find out more

For more information about our DCC knowledge offering, training, legal design or legal ops, please do get in touch: Fiona Vickerstaff and Helen Hart

James Gill
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Alan Hunt
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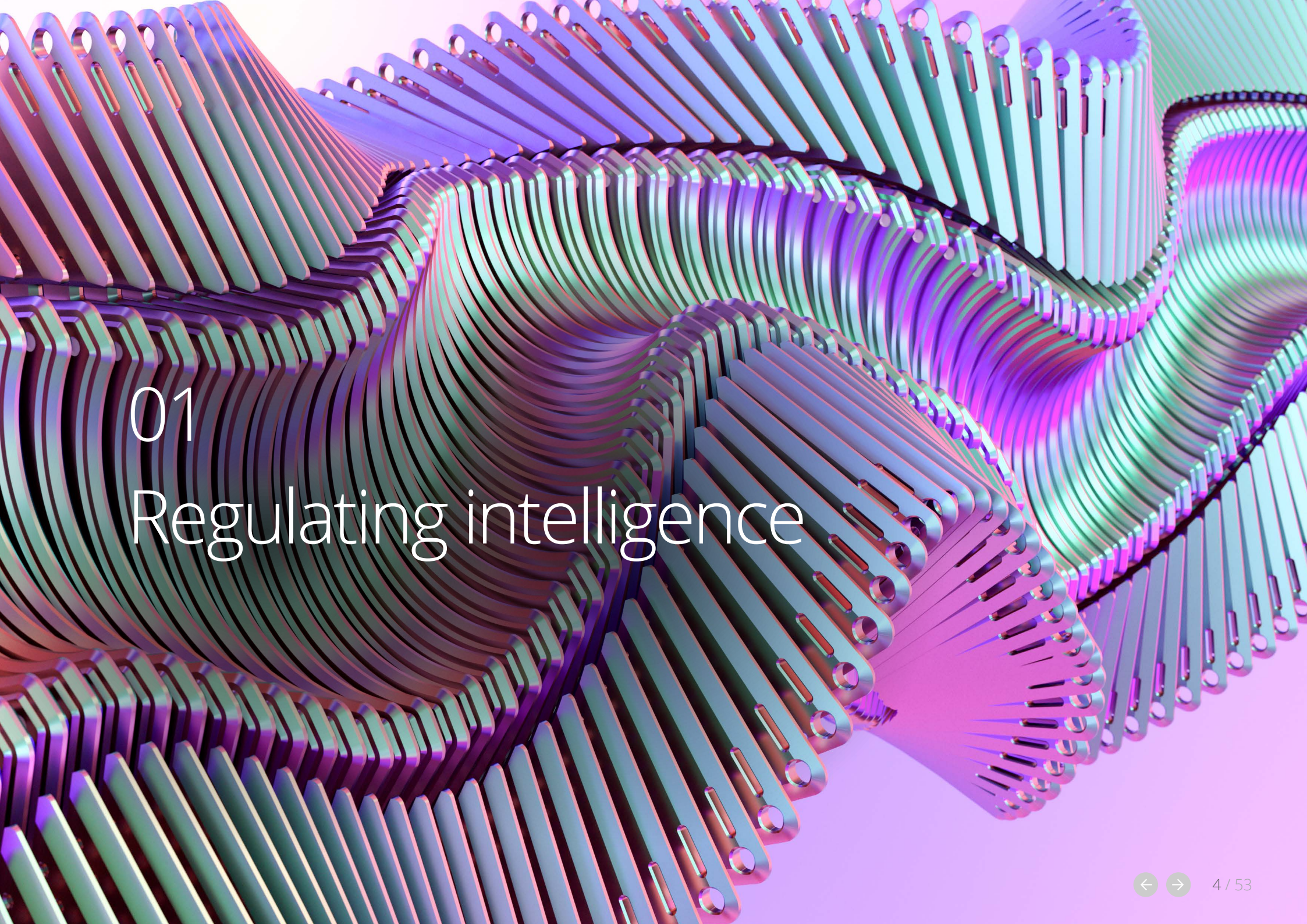
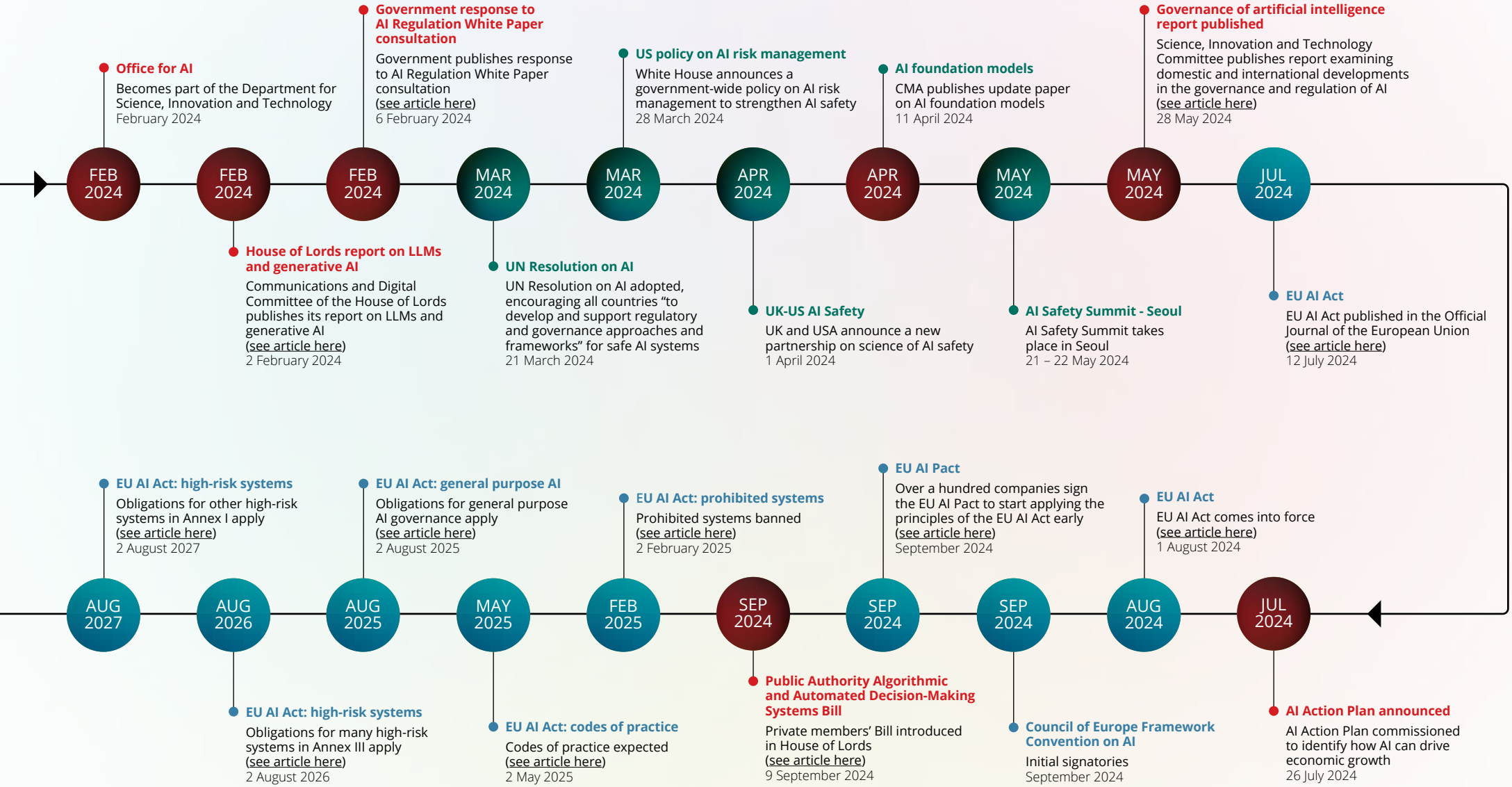


01
Regulating intelligence

Timeline

UK EU Worldwide



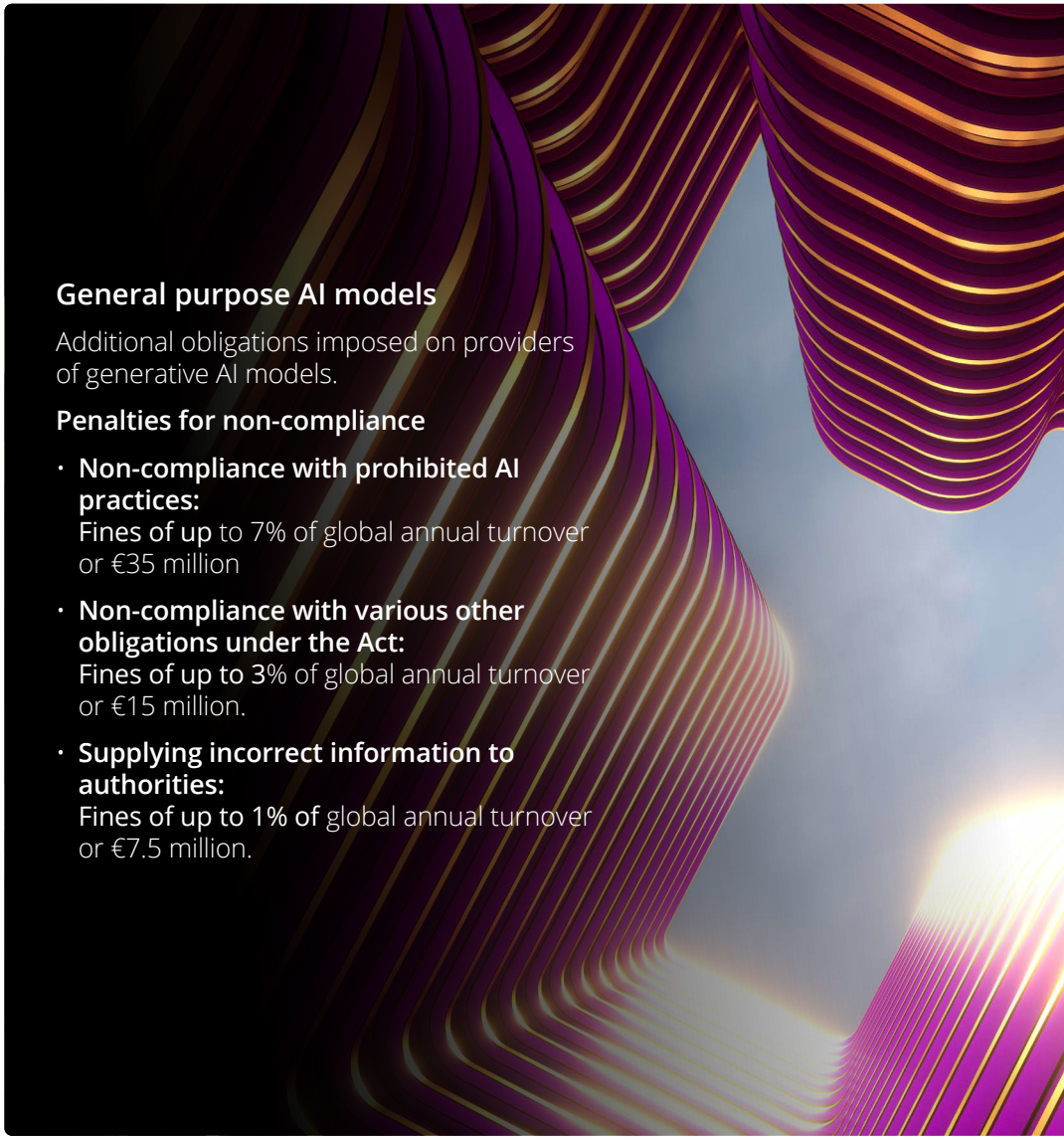
EU AI Act summary

(for more information, please see our analysis here)

- **Applies to:** "providers", "importers", "distributors" and "deployers" of AI systems which are placed on the EU market or which affect those located in the EU.
- **Categories of AI systems:** "An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment."

Categories

- **Unacceptable risk**
  Explanation: Systems "considered a threat to people"
  Example: Social scoring systems, biometric identification and categorisation of people, etc.
  What it means: Banned by 2 February 2025.
- **High risk**
  Explanation: Systems which "negatively affect safety or fundamental rights" (see Annex I and Annex III).
  Example: Systems intended to be used in recruitment or employee monitoring or evaluation, etc.
  What it means: Various obligations apply depending on whether you are a provider, deployer, etc.
- **AI systems with additional transparency obligations**
  Explanation: Systems which impose "risks associated with lack of transparency in AI usage" (often referred to as "limited risk").
  Example: Chatbots, content generators, etc.
  What it means: Various obligations apply depending on whether you are a provider, deployer, etc.
- **Minimal risk**
  Example: AI-enabled video games, spam filters, etc.
  What it means: No additional obligations.



How to navigate the AI procurement maze

In the rapidly evolving landscape of artificial intelligence, businesses are increasingly looking to integrate AI tools and systems to enhance their operations.

However, procuring AI solutions is not straightforward. To help businesses navigate the complexities, we have outlined some key issues that legal teams might consider when their business teams are procuring AI. Broadly speaking, these fall into three categories: questions for the business, questions for the supplier, and legal questions.

01 Questions for the business

Businesses need to ensure that the AI tool aligns with their needs and goals. This requires understanding, from the outset, about how the supplier's offering interplays with the business' expected results and what is required by each party for successful implementation. So, consider posing the following questions:

- Who is the supplier and what is their track record?
- What is the purpose of the AI tool?
- How will the AI tool integrate with existing systems and processes?
- What sort of data will we be providing to the system?
- What are the expected outputs of the AI system and who needs to own what?
- What sort of human oversight may be required and who is responsible for that?
- Is this a pilot project, and will there be an opportunity to test the tool prior to full roll-out?

02 Questions for the AI supplier

Understanding the technical infrastructure and requirements of the AI tool (including how data will be sourced, managed and used) as well as the level of control and support over the AI tool's capabilities will help to maximise the tool's effectiveness and value. So, you might ask the supplier the following:

- What does the AI tool "run on" – the supplier's proprietary AI model/algorithm or a third-party model such as OpenAI's GPT-4?
- What has the AI tool been trained on?
- Is data input into the tool used for further training purposes and is there an opportunity to opt out?
- What are the hardware and software requirements for the AI tool?
- How does the supplier handle data security and privacy risks?
- What sort of support are we getting from the supplier for the operation of the AI tool and resolution of incidents?
- What are the supplier's lessons learnt on maximising effective use of the AI tool and successful user adoption?

Find out more

- Artificial Intelligence (AI) – your legal experts
- Drafting AI clauses: five tips

03 Questions for the legal team

Once the business has a clear understanding of the nuanced aspects of the AI tool they seek to implement, these nuances must be adequately reflected in the contractual arrangements between the parties. Additionally, adequate safeguards must be in place to address the evolving legal and regulatory landscape. Therefore, the legal team should consider the following questions:

- How should the responses to the above questions for the business and the AI supplier be reflected in the contract?
- Does the contract include an appropriate acceptance testing procedure to ensure the AI tool works as intended?
- How are data rights and intellectual property ownership issues addressed?
- How does the contract address the evolving regulatory requirements?
- Are there specific regulatory obligations that need to be included, such as record-keeping or informing users that they are speaking to a chatbot?

These lists are a basic starting point. Naturally, these questions will need to be tailored and expanded based on the nuances of each AI procurement process and should complement any standard due diligence questionnaire.

Practical example: HR recruitment tool

To illustrate how some of these considerations play out in practice, let's consider an HR team looking to implement an AI chatbot for pre-screening candidates.

1. **Questions for the business:** The HR team will need to understand the supplier's offering, the data inputs (e.g. CVs, candidate profiles), and the outputs (e.g. shortlisted candidates). They should ask about how data is processed and secured, and assess the level of human oversight required for reviewing AI-generated recommendations.
2. **Questions for the AI supplier:** The HR team should ask the supplier how the tool has been trained and what measures are in place if the chatbot does not understand candidates' accents. The supplier might offer an integration solution to re-route conversations to a human operator when the AI encounters difficulties.
3. **Questions for the legal team to consider:** The legal team will need to ensure that the contract includes appropriate obligations relating to data processing, security and confidentiality, and reflect the functionality to re-route candidates to human interviewers in the contract (likely in the services schedule). Under the EU's AI Act, HR recruitment tools may be considered high-risk, so the agreement may need to comply with regulatory requirements.

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Managing Associate

Cristiana Barone
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James Gill
Partner & Co-Head of Digital, Commerce & Creative

What stage are you at in your AI product lifecycle?

Pre–procurement development

Here are the practical things you need to think about next

- Regulatory and legal analysis
- Risk and impact assessments
- Pre-due diligence preparatory work
- People, tech, IP and data acquisition
- Employee engagement and management
- Project management
- International considerations
- AI governance
- AI literacy

During procurement development

Here are the practical things you need to think about next

- Regulatory and legal analysis
- Risk and impact assessments
- Due diligence
- People, tech, IP and data acquisition
- AI assurance
- Contract negotiation and review
- Rights clearance and data governance
- Cybersecurity
- Employee engagement and management
- International considerations

Pre–deployment

Here are the practical things you need to think about next

- Regulatory and legal analysis
- Risk and impact assessments
- Acceptance testing
- People, tech, IP and data acquisition
- AI assurance
- Approval process and accountability
- Cybersecurity
- Employee engagement and management

Operation

Here are the practical things you need to think about next

- Regulatory and legal analysis
- Risk and impact assessments
- Employee engagement and management
- People, tech, IP and data acquisition
- AI assurance
- Acceptance testing (updates)
- Cybersecurity
- Contract management, monitoring & feedback
- Employee engagement and management
- Disputes

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AI and IP: creative world under siege

What has been happening?

Generative AI has exploded and is starting to excel at producing high-quality content, including articles, blogs, music, art, and videos.

However, its rapid adoption by the creative world – including ad agencies, video games developers and brand marketing teams – to produce content at scale has ignited a wave of intellectual property concerns. The use of AI to generate creative output means grappling with uncomfortable questions: who owns the resulting work and who should be liable if the work infringes third-party rights?

Meanwhile, publishers have launched a series of high-profile legal claims, alleging that AI companies have unlawfully scraped their content to train machine learning models. Actors and performers are also taking to the stand, voicing concerns about the misuse of their likeness and voice by AI tools. As the pace of AI adoption accelerates, the creative industries find themselves at the forefront of a legal battleground that may reshape the IP landscape.

The AI copyright conundrum

Generative AI is testing the boundaries of copyright law, particularly in defining authorship and ownership. Under English law, copyright can (in theory) subsist in "computer generated works" and authorship is attributed to "the person who made the necessary arrangements to create the work." However, when an AI system generates complex content based on a simple user prompt, it is unclear who, if anyone, meets this test. Is it the user who provided the prompt, the developer of the AI model, or no one at all?

Further complicating matters, generative AI models are trained on vast datasets containing massive amounts of third-party material. This creates significant IP infringement risks if AI-generated content borrows too heavily from these sources, meaning brands and agencies using such tools could face liability for unauthorised use of copyright-protected materialIP risk when it comes to AI-generated materials, although agencies and brands are yet to settle on an industry standard approach.

Find out more

- Artificial Intelligence (AI) – Your legal experts
- AI 101: What are the infringement risks of using AI-generated works

Publishers take the fight

Publishers are increasingly challenging AI companies over the unauthorised use of their content for training AI models. High-profile US lawsuits such as The New York Times v OpenAI and Dow Jones v Perplexity highlight the growing tension between AI companies on the one hand (who rely on high-quality content to train their models) and publishers on the other (who want to protect their IP from being used without permission). This tension is heightened in the publishing sector because generative AI poses an existential threat to the current publishing business model. By generating detailed responses that are directly drawing from publisher content, AI tools risk driving traffic away from publisher websites where traffic is typically monetised through display advertising.

In the UK, the government is grappling with how to balance these competing interests. Recently, it proposed updating existing copyright law to allow "text-and-data mining" (TDM) by AI companies unless publishers or rightsholders explicitly "opt out". However, this raises further challenges: should opt-outs to TDM be implemented (and respected) via machine-readable methods, such as robots.txt files? How would this system work in practice, and who would enforce it? These questions remain unresolved, as lawmakers seek to reconcile technological innovation with adequate protection of media rightsowners.

Performers – or reformers?

Actors are increasingly concerned about the impact of AI on their profession, particularly regarding the unauthorised use of their performance, likeness, and voice. In the US, these concerns culminated in the 2023 SAG-AFTRA Film & TV strike, where actors demanded protections against AI's encroachment into their work. The strike led to an agreement to promote the ethical use of AI by requiring studios to (amongst other things) obtain informed consent to use AI in connection with an actor's work and to fairly compensate the actor for that use. The video games industry soon followed suit with SAG-AFTRA members voting to go on strike earlier in 2024. The strike is still ongoing and the negotiations around AI are proving to be challenging given the nature of the industry and the prominent role of AI in the development of video games.

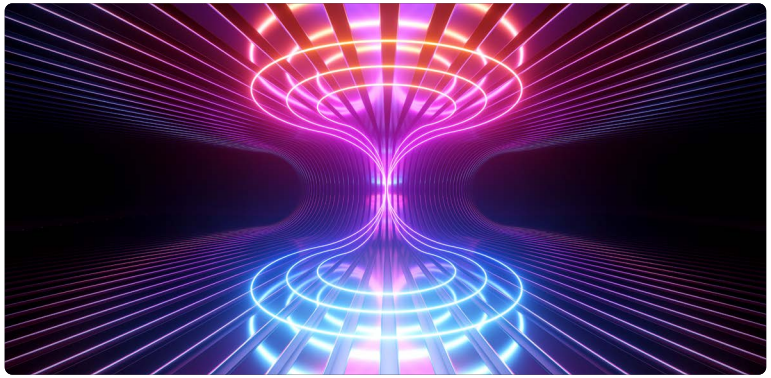
In the UK, the actors' union Equity has launched separate "Stop AI Stealing the Show" and "Game On." campaigns in solidarity with SAG-AFTRA to address similar issues. These initiatives reflect a growing movement among actors to safeguard their creative contributions in an era where AI technologies are rapidly advancing and studios can expect to see performers trying to exert more control in contracts over the use of AI in connection with their work.

Find out more

- How to 'opt-out' your images from use in AI training: German court considers the EU text and data mining copyright exceptions
- AI 101: Who owns the output of generative AI?
- AI & the music industry: "fair use" arguments take on a new tune in the US

What's happening in 2025?

In December 2024, the UK Government launched a consultation to address the tension between copyright law and AI. The consultation aims to balance the rights of publishers and content creators with the needs of AI developers. The Government's preferred option is to align with the EU by adopting a new TDM exception to copyright which would allow AI companies to mine copyright-protected works unless the rightsholder has opted out. We await the outcome of this consultation but it does appear to be a step in the right direction to reach a workable compromise between AI companies and the creative sector.



As generative AI evolves, this year promises to bring exciting opportunities for creativity and innovation. However, these advancements are likely to exacerbate the existing uncertainties for the creative and media sectors. Questions around copyright ownership, liability for infringement, and ethical use will remain at the forefront, with further legal challenges and regulatory developments expected to shape the conversation.

At Lewis Silkin, we are working closely with clients across the creative industries to help them navigate this complex environment. Whether it's drafting bespoke clauses in template contracts to address AI usage, assessing copyright ownership and potential rights of action, or developing balanced AI strategies that mitigate risk while unlocking reward – we are here to guide you. As the legal and regulatory framework around AI continues to take shape, our expertise ensures that your business is well-prepared for the challenges and opportunities ahead.

JJ Shaw
Managing Associate

Gemma Jones
Senior Associate

James Gill
Partner & Co-Head of Digital, Commerce & Creative

Find out more

- UK Government Consultation: Copyright, AI and the Proposed "Opt-Out Model"

The secrAlt sauce for open source?

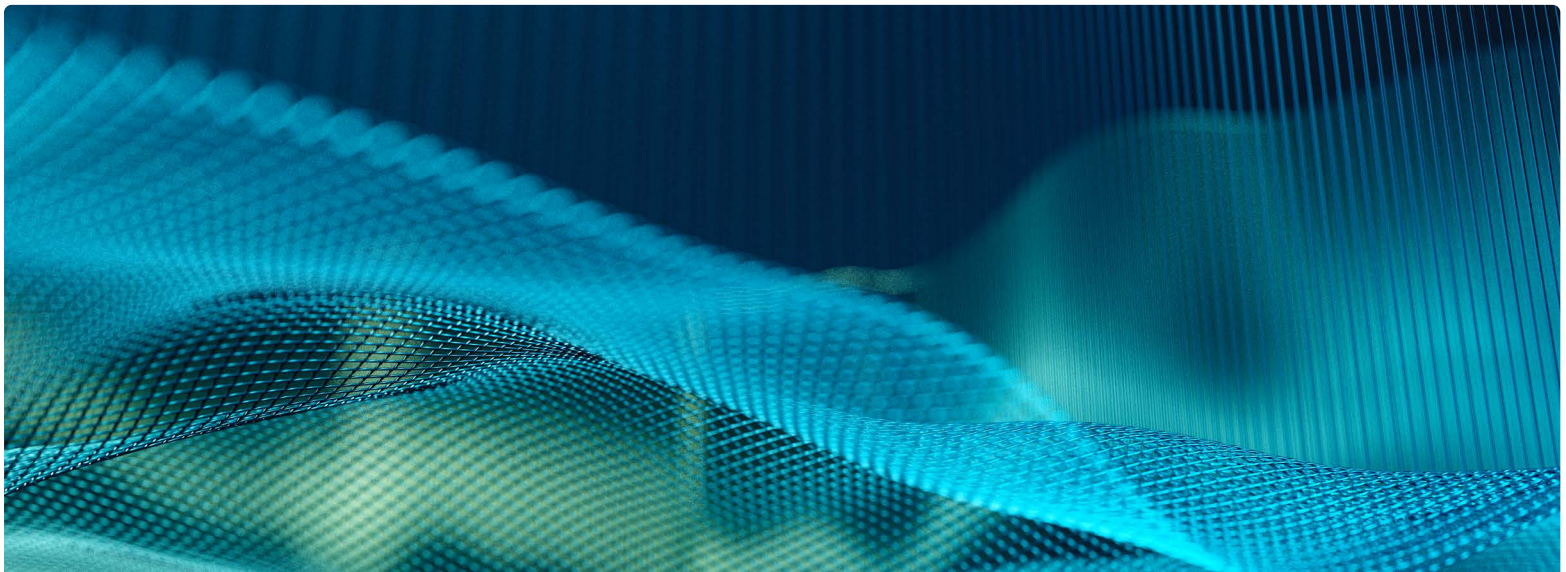
What's the latest news?

Free Open Source Software (FOSS) is regularly used to provide a collaborative approach to software development as the source code is 'freely' available for anyone to view, modify, and distribute.

This model of developing software contrasts with proprietary software where the source code is typically restricted. FOSS licences, such as the popularly used MIT, GPL, and Apache Licences, govern the use, modification, and distribution of the software/code. These licences are typically distinguished between two key categories – "copyleft" ("restrictive") licences which require that any derivative works also be open-sourced, ensuring that the software remains freely available; and "permissive" licences which impose minimal restrictions on the modification or redistribution of OSS and often allow for commercial use without the obligation to open-source derivative works.

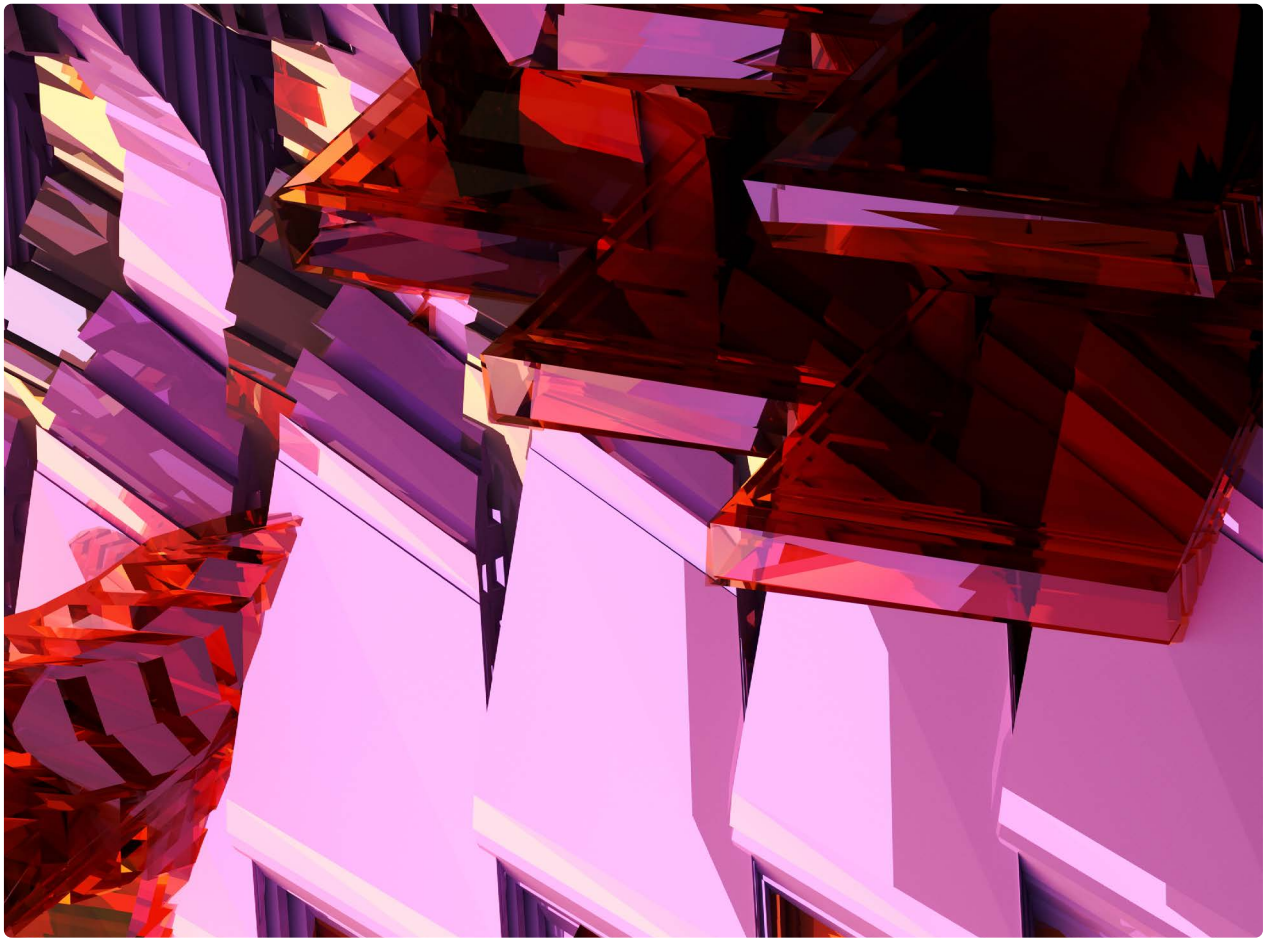
FOSS integration in AI models and the associated risks

Given the rapid development and use of AI tools where breakthroughs often build on previous work, the strong intersection between FOSS (which relies and thrives on community-driven, incremental development) and AI, is of no surprise. AI tools, such as GitHub Copilot and OpenAI Codex, leverage FOSS to train their models. These models use machine learning algorithms to analyse patterns within publicly available code databases, generating or optimising code automatically. The use of FOSS to train AI models reduces the costs associated with software development and fosters innovation by allowing developers to build on existing code.



However, this integration raises significant legal concerns. The FOSS code used for training these models may have licences attached to the code, limiting how the models are distributed by requiring the code of the AI model to be freely released under the same licence terms. This may limit the AI model provider from obtaining and enforcing its IP rights on the particular embodiment that includes the FOSS code. Alternatively, if an AI model has been trained on FOSS code and its tool generates code in response to a user's prompt, there's a risk that the AI-generated code includes FOSS under a copyleft licence and, therefore, that the entire codebase may need to be open-sourced. These issues have emerged in practice as GitHub Copilot has faced legal challenges in the US where it has been alleged that the Copilot tool reproduced open-source code in violation of FOSS licensing requirements and copyright laws.

Since this legal dispute began, Github Copilot has implemented measures to avoid such violations, including offering business and enterprise services that offer better control over code suggestions and integrate with organisational policies to ensure adherence to licensing terms. Other organisations that depend on AI tools can mitigate the risks of using tools that train on FOSS code (or integrating AI models that train on FOSS code into their own in-house tools) by implementing robust due diligence processes (for example, by using automated code scanning tools to detect FOSS components and ensure compliance with licensing terms), establishing clear policies for FOSS usage and providing training to developers on the legal implications of FOSS.



What will things look like in 2025?

While we anticipate greater engagement with courts as they seek to address the IP issues related to AI-generated code and the training of AI models on FOSS code, it is unlikely that we will receive definitive guidance on these issues for some time. Litigation in this area may be prolonged and the parties involved could be inclined to reach a settlement before a final judgment is rendered. So, it may be a while before a significant test case is decided by court judgment to provide guidance.

In terms of regulatory developments, the EU's AI Act mandates that providers of general-purpose AI models (GPAI) must observe intellectual property rights. This includes the requirement to draft and publicly disclose a sufficiently detailed summary of the content used for training these AI models. Some hope that the forthcoming Code of Practice for GPAI will impose detailed transparency obligations concerning training data. However, the recently published first draft of the Code, which is expected to be finalised in the second quarter of this year, includes only high-level transparency requirements for the time being. Although the Act states that the regulation does not apply to AI systems released under free and open-source licenses, in practice, this exception is quite limited. Consequently, it remains to be seen how the GPAI Code and its associated transparency obligations will impact FOSS development.

We shall watch keenly for trends in how future AI model projects are positioned and whether developers lean towards proprietary or open-source frameworks. Proprietary models like Github Copilot operate in closed ecosystems, offering streamlined, polished tools but often at the expense of transparency and adaptability. On the other hand, AI models like Meta's Llama empower the developer community by making the model architecture available, enabling experimentation, customisation and transparency. That said, even Llama is doubted as being truly open-source - Meta has released the trained model, but hasn't shared the training data or code. This limits developers and researchers from fully understanding and modifying the model, despite third parties creating applications based on it.

Finally, there may be an increase in the development of AI-specific OSS licences that address the unique challenges of AI-generated code (e.g. the Responsible AI Licence (RAIL)) and guide the ethical use of AI technologies. These licences allow developers to set specific conditions on how their AI models, code or datasets can be used, aiming to prevent misuse and promote responsible deployment.

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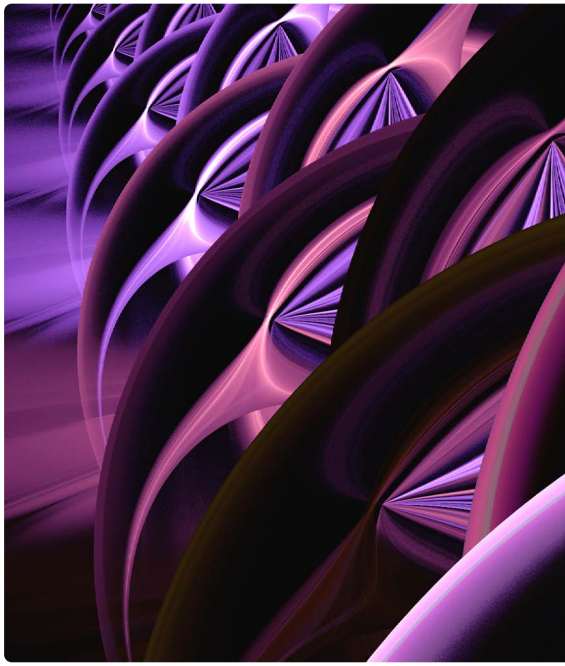
Find out more

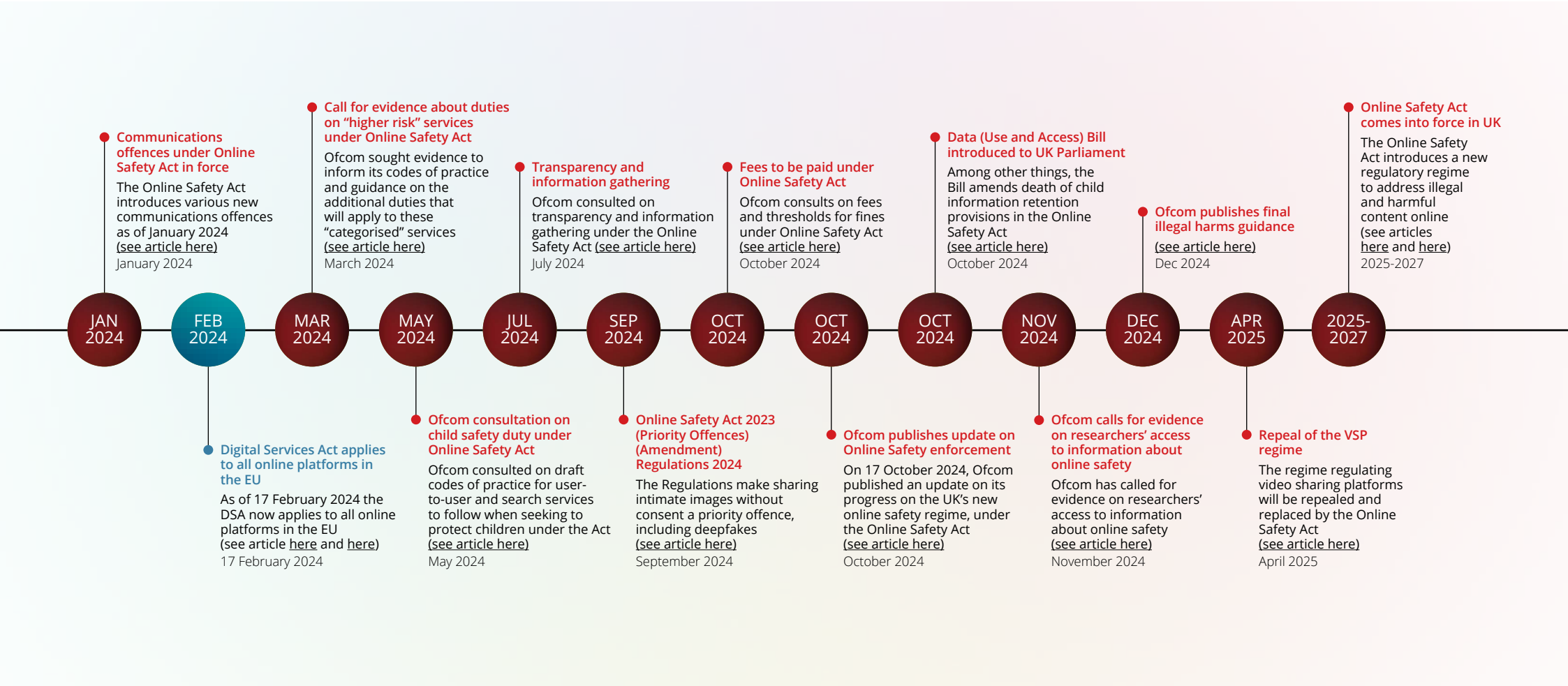
- Artificial Intelligence (AI) – Your legal experts



02
Staying safe in the online world

Timeline

UK EU



A checklist for online safety compliance

The Online Safety Act 2023 (OSA) puts the onus of ensuring a safer internet on online platforms.

Under the OSA, user-to-user and search platforms must protect all users from illegal content, as well as shielding children from harmful legal content. With illegal harms codes and guidance effective from December 2024, and children's access assessment guidance to be published in Q3 2025, all in-scope platforms need to understand their obligations now to ensure they are ahead of the curve.

01 Risk assessments

From March 2025, platforms must carry out and finalise suitable and sufficient OSA risk assessments. Platforms should pay attention to Ofcom's December 2024 illegal harms codes and guidance in designing risk assessments: this is a constant and evolving duty. This guidance may well be updated. Platforms must carry out further risk assessments if Ofcom makes a significant change to a relevant risk profile or before they significantly change their design or operation.

02 Notice and takedown

In-scope platforms must incorporate systems and processes for users to efficiently and effectively report illegal content or, if the service can be accessed by children, content that is harmful to children. Ofcom's final guidance on children's risk assessments is due in April 2025 and is likely to contain a requirement for platforms that are accessible by children to implement reporting functions that are easy for children to use and understand.

03 Age assurance

If a platform has many child users or is likely to attract a significant number of child players, it should implement "highly effective" age assurance methods, such as photo-ID matching, facial age estimation and reusable digital identity services. Ofcom says that payment methods that do not require the user to be over 18, self-declaration of age (e.g. an 'I am over 18' tick box), and general contractual restrictions on the use of the service by children are *not* "highly effective" age assurance methods.

04 Terms of service

In-scope platforms need to update their terms of service to specify how users will be protected from illegal content (and, if relevant, how children are being protected from harmful content). The terms of service must expressly incorporate certain information including details of any proactive technology being used, relevant complaint handling policies, and new breach of contract rights for wrongfully banned users or users whose content is wrongfully taken down.

Before the safety duties come into force, platforms should prepare to comply. A first step is to check whether the platform or service is in scope. All in-scope platforms should then take the following steps:

- Having a named person accountable for compliance with the OSA
- Having an effective content moderation function that allows for the swift takedown of illegal and harmful content
- Using highly effective age assurance to prevent children from encountering the most harmful types of content where this is allowed on the platform
- Implementing user-friendly reporting and complaints processes
- Begin their illegal content risk assessments by collating the required information and evidence

Given the short timeframes within which the OSA duties will come into force following the publication of guidance, platforms should keep up to date with the work of Ofcom.

Pearl Aggrey
Associate

Bronte Cullum
Associate

Laura Harper
Partner

Find out more

- What are Ofcom's online safety priorities?
- Update on latest developments in online safety
- Digital, Commerce & Creative 101: Online Safety Act navigation for the video games industry
- The Online Safety Act
- Legal considerations in spatial computing and associated immersive technologies

Using regulatory pain for gain

What has been happening?

Supply chain attacks remain a major concern for 2025 due to the complexity and involvement of multiple suppliers in the chain.

Vulnerable supply chains can suffer significant disruptions, with evolving threats from third-party software providers, data stores, website builders, and watering hole attacks. As a result, regulators are introducing new UK and EU laws:

- **UK's Cyber Security and Resilience Bill** proposed for this year aims to strengthen the UK's cyber defences and protect essential public services and supply chains by enhancing reporting requirements and empowering regulators to investigate vulnerabilities. The Bill will apply to digital service providers and their entire supply chain.
- **EU Digital Operational Resilience Act ("DORA")** is designed to improve the cybersecurity and operational resilience of firms in the financial services sector. It sets single standards across the EU for operational resilience, including cybersecurity measures. DORA covers all information and communications technology providers that supply within the (regulated) financial sector.
- **EU's NIS2 Directive** aims to enhance the security and resilience of critical infrastructure and essential services like energy, health and digital infrastructure. The Directive also extends to entities supplying critical services, emphasising the importance of securing the entire supply chain.

What do affected businesses need to do?

- **Update information strategy:** Adopt a risk-based approach to protect critical assets, such as network, application, information, and operational security, including maintaining GDPR compliance by ensuring personal data held is adequately protected from a data breach.
- **Audit third party supply chain:** Understand and communicate security needs to suppliers, by reviewing third-party agreements to assess whether the cybersecurity clauses and data protection responsibilities are fit for purpose and adapt them accordingly (using addenda as appropriate).
- **Update cybersecurity questionnaires:** Conduct stringent audits using cybersecurity questionnaires, both for new and existing suppliers and as an ongoing process.
- **Arrange cyber insurance:** Ensure adequate cyber insurance coverage is arranged for data breaches and cyber incidents.
- **Update incident response strategy:** Establish a suitable incident response plan, identify reporting requirements and implement a reporting process that can be invoked.
- **Implement NIS2 and DORA requirements:** Identify if the business operates with entities in critical sectors and adapt risk management requirements and new incident reporting obligations, including creating and implementing new addenda in relevant supply contracts.

These are (of course) time consuming and costly changes to implement. But for some, the regulatory developments may present an opportunity to adopt industry best practices, improve their cybersecurity stance, resilience and supply chain security, which might just be used as a clever marketing USP.

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Associate

Bronte Cullum
Associate

James Gill
Partner & Co-Head of Digital, Commerce & Creative

Find out more

- As the NIS2 national implementation deadline looms, is your cyber security posture NIS2 ready?
- Cyber crime, cyber security, cyber resilience
- New EU draft Implementing Regulation lists prescriptive NIS2 related cybersecurity controls & clarifies “significant” incident reporting criteria

Getting your ads online

What is media buying?

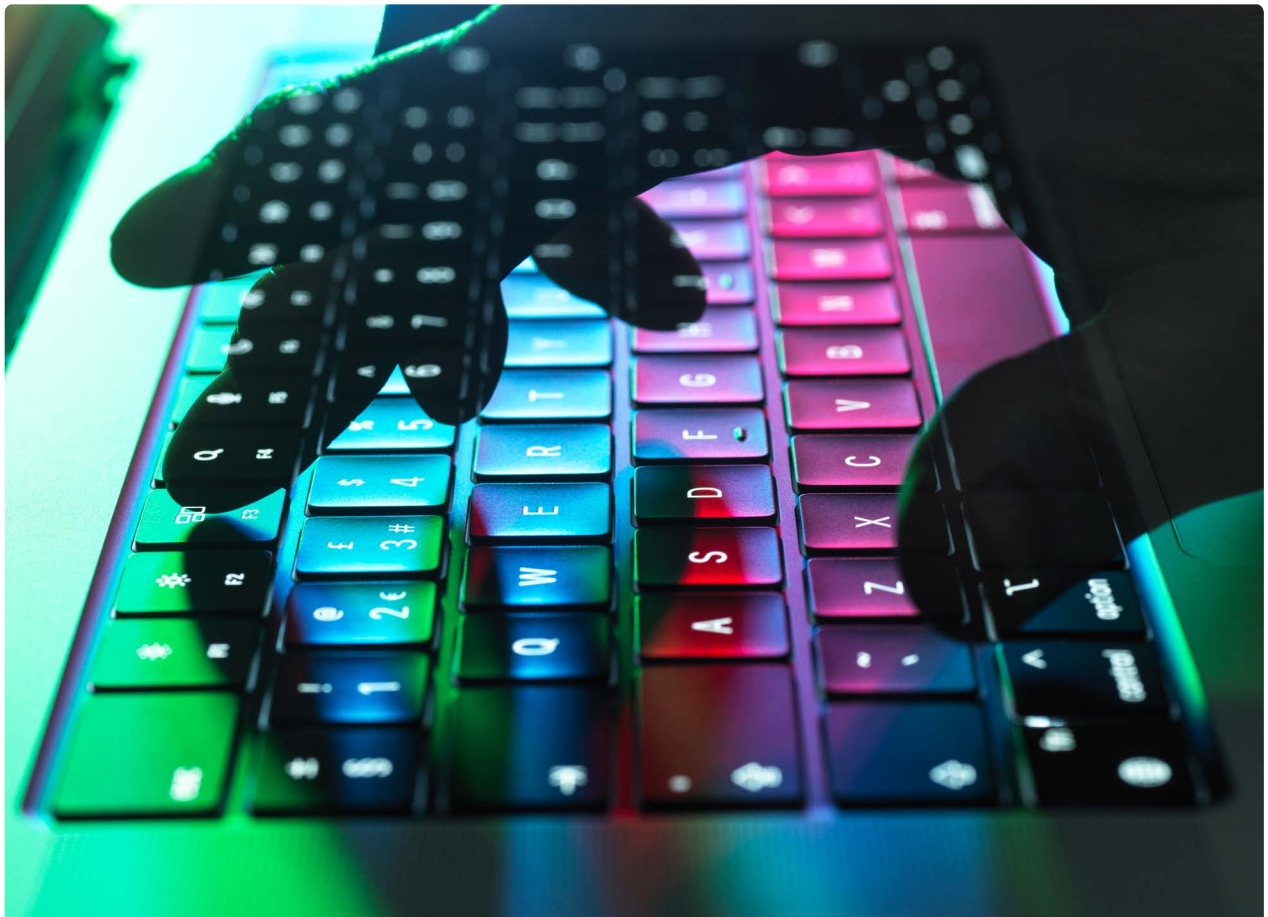
This is buying advertising inventory across digital and traditional media channels.

Digital media includes websites and social media platforms, while traditional media includes TV, print, radio, and out-of-home (e.g. billboards). Advertisers engage media agencies to negotiate with publishers to buy inventory, manage budgets, and optimise their advertising campaigns.

How does it happen?

Media buying generally occurs in two ways:

- **Direct:** buying inventory directly from the media owner or its sales house e.g. a buyer might work directly with a newspaper publisher to buy inventory in its print and/or digital editions.
- **Programmatic:** this is now the predominant approach in digital advertising and uses technology to automate the purchase of inventory and placement of ads.



Find out more

- Game-changer? CJEU rules on targeted advertising in Schrems v Meta
- UK data reform – Data (Use and Access) Bill receives first reading in the House of Lords
- Amazon ordered to Disclose Advertising Information in Online Archive

What developments are there ahead?

Over 2025, we expect to see:

- **Increased use of AI:** A key use case for AI is predictive analytics. By analysing vast data sets, AI tools can identify patterns and predict future trends, helping advertisers create targeted campaigns that resonate with their audience. Consequently, advertisers and media agencies need to consider how to address the use of AI and agree principles around its use in their agreements and what impact (if any) its use should have on remuneration. Whilst the EU AI Act came into force in August 2024 and should be considered, most of the use cases for AI in advertising are unlikely to involve high risk AI systems.
- **Continued move away from using third-party cookies:** In 2020, Google announced it would disable the use of third-party cookies in its Chrome web browser within two years. Following various delays, in July 2024 Google clarified that third party cookies would remain for the foreseeable. However, there has been a general move away from relying on third party cookies, to a focus on contextual advertising (ads based on the content of a webpage rather than on the user's past behaviour) and using advertisers' own first party data. Further, a CJEU ruling against Meta about the use of personal data in the context of targeted online advertising will probably cause Meta (and other platforms) to revisit their data cleansing and retention policies. It may also make advertisers nervous of Meta's usual position that advertisers are joint controllers with Meta as until now the regulatory focus has been on the tech platforms.
- **Sustainability and ethical advertising:** Due to increasing climate concerns, advertisers are focusing on how to meet their science-based target commitments through their supply chain. They may buy ad space from media owners who adhere to ethical standards and carbon offsetting measures. That said, the elephant in the room is the fact that AI itself consumes substantial amounts of energy.
- **Politics and the impact on tech platforms:** 2024 saw X effectively force the not-for-profit Global Alliance for Responsible Media (GARM) to close after it sued GARM for alleged breaches of US competition law. With Trump making strategic cabinet appointments with a possible view to deregulation (while the EU and UK push for greater regulation) and to dismantling the so-called 'censorship cartel' (Facebook, Google, Apple and Microsoft) while also vowing to strip broadcasting licences from TV channels that he considers biased, time will tell how this may affect advertisers' use of media channels which may be considered "risky" from a brand safety perspective.

Elizabeth Burton
Managing Associate

Simon Entwistle
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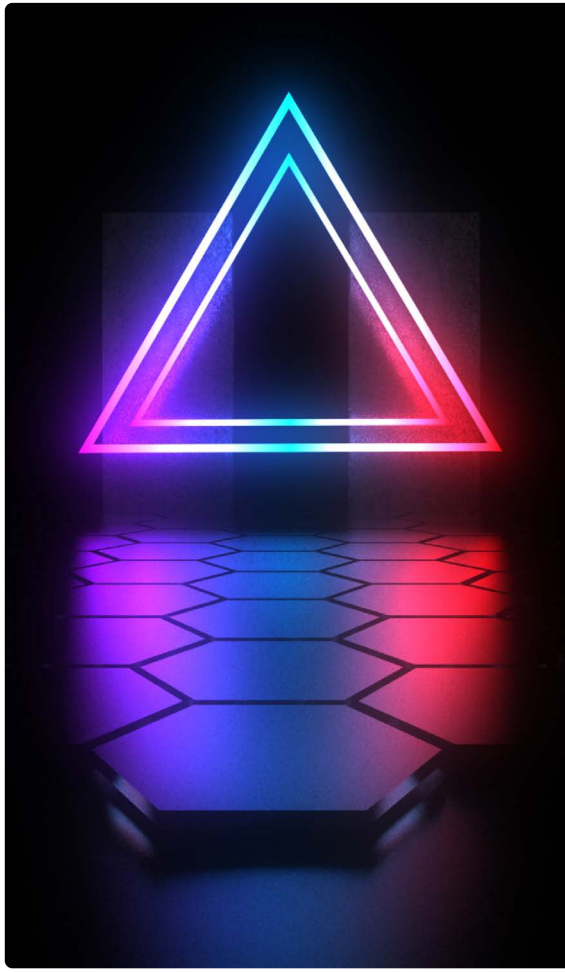
Jo Farmer
Managing Partner



03
Harnessing and exploiting IP

Timeline

UK EU

JAN/FEB 2024

Case law on lookalike products

Two UK decisions *(Thatchers Cider v Aldi* and *Marks & Spencer v Aldi)* considered IP infringement in the sale of lookalike products (see articles here and here)

January and February 2024

FEB 2024

AI Copyright Code

Government confirms the IPO working group has been unable to agree a voluntary AI copyright code

6 February 2024

FEB 2024

SEPs

European Parliament votes in favour of proposed new SEP regulation (see our latest article on FRAND/ SEPs here)

28 February 2024

MAR 2024

Case law on the use of UK trade marks in cross-border sales of goods

The decision in *Lifestyle Equities CV v Amazon UK* found that the sale of certain products on Amazon's US store infringed UK trade marks when such products could be sold and shipped to UK customers

March 2024

MAY 2024

Media Act

Media Bill receives Royal Assent and becomes the Media Act (see article here)

24 May 2024

2025

Getty Images and Stability AI

Judgment expected in the case of Getty Images and Stability AI concerning the use of copyrighted images to train AI tools (see article here)

Early 2025

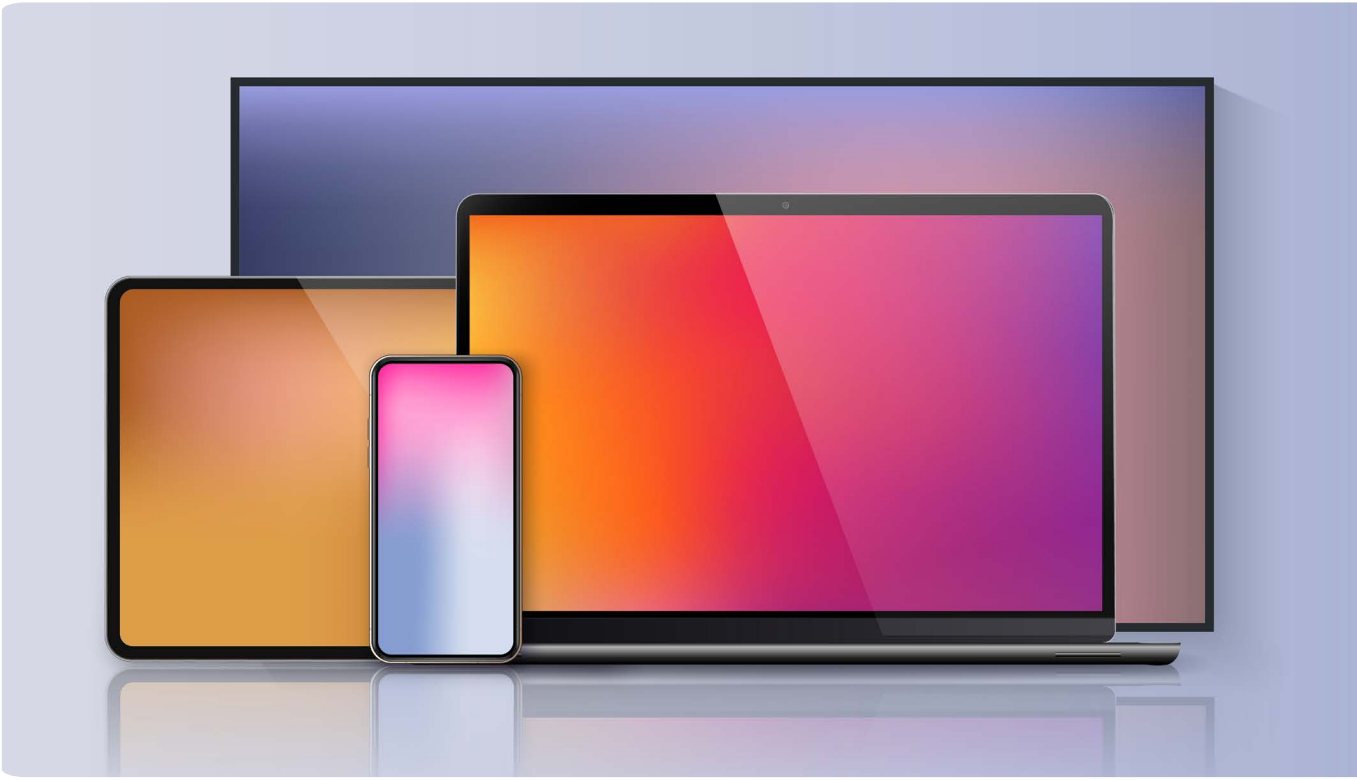
The art of protecting your intellectual property (patent pending)

What's been happening?

Protection of technical IP is essential for innovative tech businesses to gain competitive advantage and preserve future growth.

In 2023, 19,966 patent applications were made to the UKIPO alone – a 2.5% rise compared to 2022 – with 27.7% of those applications made by the top 50 applicants. Similarly, in 2023, 199,275 applications were filed at the EPO (which also covers the UK) representing a rise of 2.9% on the previous year, with UK applicants representing the largest relative growth compared to 2022. While the WIPO reported a 1.8% decline in international patent filings in 2023, the R&D expenditure of the 50 top-spending companies worldwide increased by an estimated 6% in the same year. Having a co-ordinated IP strategy, with a consistent approach across registration, management, commercialisation, defence, and enforcement of IP assets has never been more critical: particularly with the UK holding third place in the WIPO's top three innovation economies in Europe for 2024.

Early stage considerations are essential when it comes to new products and technology. This checklist focuses on confidentiality and patent considerations.



What do I need to know?

Confidentiality: know-how, including trade secrets

Protecting confidential know-how is essential in maintaining its value. The laws of confidentiality are useful to protect patentable inventions prior to publication, unpatentable improvements to a product or process, and other commercial information.

- Ensure contractual protection (whether through use of NDAs and other confidentiality agreements or provisions).
- Ensure sufficient physical security of confidential information (including use of appropriate technology and prioritising awareness of policies and procedures).
- Take action against anyone you believe to be acting in breach of confidence (failure to do so may prejudice your ability to do so in future).
- Is there commercial merit in licensing or selling elements of your business' know-how? When considering this, we recommend paying attention to the following:
  - The prospective licensee's: (i) financial status, (ii) proposed security measures (and ability to implement the same) in order to preserve the confidentiality of the know-how; (iii) trustworthiness; (iv) current or future business specialism and direction (avoiding sharing know-how with a third party that could compete with your own business, whether now or in future).
  - For what purpose will the licensee be permitted to use the know-how?
  - A contractual liability cap on the licensee that is sufficient to cover the risk of disclosure.

Patents

Patents can be extremely valuable assets, helping your business to commercialise an innovation and protect itself from competitors through a monopoly right.

- Put in place a process to determine whether to apply for patent protection prior to public disclosure of an invention. Patent protection involves:
  - Preparing documents which describe your new invention and submitting them as a patent application at the patent office of each territory of interest to establish 'patent pending' protection.
  - Having the patent application searched by those patent offices as to whether your invention is new and inventive.
  - Publication of your patent application.
  - Having each patent office undertake 'substantive examination' of your patent application.
  - Submitting arguments and amendments to address any objections raised in substantive examination to secure granted rights.

- Policies to record new inventions and disclosure of the same internally are also useful. We would expect these policies to include, for example, requirements to record new inventions on a daily basis and identification of managerial staff to whom reports should be made.
- Ensure that a freedom to operate search is carried out before investing heavily in an invention.
- If competitor patents are identified, investigate where they are in force and consider if you can challenge their validity, acquire them, or obtain a licence.
- Be aware of timing - any overseas applications or international patent applications for the same invention need to be filed within a year of the first 'priority' application for that invention.
- Is it worth investing in patent insurance?
- Is there commercial merit in licensing your patented technology where your business no longer uses the relevant invention or in sectors or territories you aren't commercially interested in? Our top licensing considerations are:
  - Pay careful consideration to the scope of the patent licence – in more ways than one. Be as clear as possible about the purpose for which the licence can be used, the exclusivity of the licence, and the extent to which it uses associated know-how.
  - Future-proof the licensee-licensor relationship by discussing the licensee's anticipated technical assistance needs – at the outset and conclusion of the licence, as well as throughout the term – and ensure that this is expressly stated in the licence. Remember, the patent licence can provide an umbrella for other commercial terms including consultancy support and the development of future improvements.
  - Licensors should consider the extent to which they want to control the quality of any products which use the patents, including with respect to any inspection rights, sampling procedures, and patent notices. Consider provisions related to compliance requirements, reporting obligations, and minimum order provisions.

Francesca Mack
Senior Associate

Bronte Cullum
Associate

Alan Hunt
Partner & Co-Head of Digital, Commerce & Creative

Tom Gaunt
Partner

Ex-SEPs-tional innovation: the role of SEPs in modern technology

Why should I be interested?

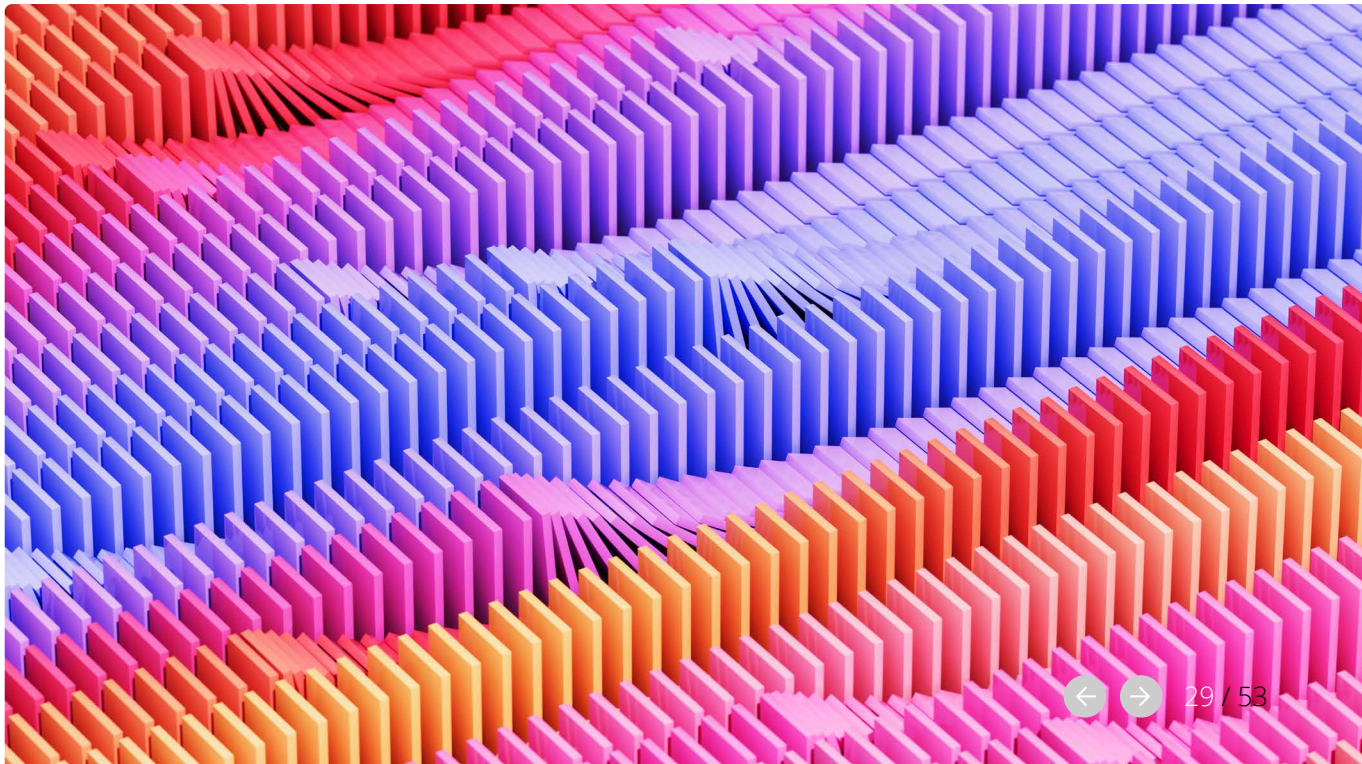
Have you ever wondered how technologies inter-operate across different products and brands?

For example, how mobile phones seamlessly communicate between different brands and across borders, or how broadcasting technologies can be relayed on different television products? Well, this is all thanks to the multitude of technical standards that underpin these technologies and the rules around how related patents are licensed.

Standard essential patents **(SEPs)** protect technology essential to the implementation of a "standard", which is a technical description for a collectively agreed technical solution. As many as 250,000 SEPs can be used to claim ownership of technical specifications or design elements in a single smartphone. SEPs have to be licensed to third parties under FRAND terms **(Fair, Reasonable, and Non-Discriminatory)** to prevent tech developers exploiting the monopoly power they gain as a result of the standard.

What's been happening?

The access to technology that the SEP/FRAND regime provides has allowed for the increasing rates of innovation diffusion and converged technologies that the world has witnessed over the past quarter of a century, as standards-related technologies (ranging from wireless and wired communications to video and audio streaming, from block-chain or other security mechanisms to health-data sharing, and from AI to robotics) expand beyond IoT and into other areas. It is no understatement to say that SEPs have been a critical part of the ICT revolution.



What do I need to do?

SEP licensing is notoriously litigious, and courts in key markets have increasingly become a theatre for defining the practices for FRAND licences.

It is a complex and nuanced area and SEPs apply to many fields of technology other than telecoms.

Given these complexities, companies relying on digital interconnectivity technologies must be vigilant in their approach to SEP licensing. Our top 3 tips are:

- **Conduct comprehensive due diligence:** understand the landscape of SEPs relevant to your technologies and review any SEP owner's portfolio, market relevance, and history of licensing. Ensure that the patent is genuinely essential to the standard.
- **Understand the FRAND licensing commitment made by the SEP owner:** the commitment will be tied to the relevant standards body (e.g. ETSI, IEEE) and will determine the terms of the SEP licence to which the patent owner is obliged to agree. What is a "Reasonable" royalty rate is often one of the most negotiated aspects of a SEP licence - transparency around these rates and how they are calculated is key.
- **Avoid litigation where possible:** engage in good faith negotiations keeping communication open and professional, with a view to avoiding dispute. Where dispute is inevitable, use mediation or arbitration as a means of resolution, rather than litigation which can be incredibly costly and time-consuming.

Sally Hughes
Senior Associate

Liam Mayet
Trainee Solicitor

Alan Hunt
Partner & Co-Head of Digital, Commerce & Creative

Find out more

- An ex-SEP-tional week for FRAND disputes
- FRAND another thing... IPO agrees objectives for SEPs whilst European Parliament seeks to progress proposed SEP Regulation

Hitting the right notes: music and social media

What has been happening?

"Where words fail, music speaks". The words of 19th-century author, Hans Christian Andersen, are relevant now more than ever.

As audience attention spans contract and the demand for shorter - but more engaging - content grows, brands have turned to music to better connect with existing audiences and reach new ones. In 2024, we saw more brands use trending, viral tracks to elevate social campaigns. Following the experiential trend, brands have put music centre-stage by hosting live events for their audiences to launch new products and campaigns. It has also been exciting to see more brands embrace emerging artists to front social campaigns, helping them to position themselves at the cutting edge and champion new creative talent.

What do I need to do?

To help you embrace music online (without hitting any bum notes), here are our top tips:

- **Make sure you are in sync:** If you wish to use music in branded content or advertising, you need to agree a 'synchronisation' ('sync') licence with the owners of the rights in the song. This will typically be the publishers that represent the songwriters who wrote the song (note, there may be multiple songwriters – and, therefore, multiple publishers!) and the record label of the performing artist. Alternatively, you may be able to leverage music libraries on social platforms that are pre-cleared for branded use (such as TikTok's Commercial Music Library). If you use unlicensed music, you risk a claim from the rightsholders for copyright infringement (which could lead to having to pay out damages – as well as some negative PR as a result).

- **#Ad:** If you want to use digital content creators (or 'influencers') in your campaigns, it is important that they too use licensed music. Even if posts are published on a creator's channel (not yours), if the content is in partnership with your brand in any way, it is still considered to be advertising (which requires a sync licence). There have been copyright infringement claims from rightsholders against brands where creators engaged by the brand have used unlicensed music in posts promoting the brand.
- **Read the small print:** As well as obtaining sync licences from the relevant rightsholders, you also need to ensure that you comply with the terms of use of the social media platform on which you are publishing your content. Each platform has its own terms and conditions that set out if and how brands can use music. If you do not comply, your content could be removed from the platform or your account may be restricted or blocked.
- **Picking your platform:** It's also important that the platform that you use has appropriate licensing arrangements in place to host music - either as a blanket licence with the relevant collecting societies, or as individual arrangements with the rightsholders directly. However, this is not the case for all platforms. Some platforms do not have any such arrangements in place (so you should avoid using music in content posted on those platforms).

What else do I need to know?

We touched on the considerations for licensing music when you partner with digital content creators in your marketing but what about creators with whom you do not have a relationship? A prime example is where creators who are part of affiliate networks post about your brand. The important point to note here is that if you engage with these posts in any way (such as liking or commenting or re-sharing) – and those posts feature unlicensed music - you could still face a copyright infringement claim from the rightsholders. We've started to see more rightsholders actively enforcing their rights in respect of this sort of content. If you aren't sure whether the music in a post is licensed, avoid engaging with it.

Lauren Stone
Senior Associate

Phil Hughes
Partner

Cliff Fluet
Partner

Find out more

- AI and the impact it will have on the future of the music industry - Cliff Fluet writes for UK Music's 2023 Economic report
- AI & the music industry: "fair use" arguments take on a new tune in the US

From pixels to purchases: media regulation and branded content

What's been happening?

Media regulation is slowly adapting to increased consumption via online platforms over traditional linear broadcast.

The Media Act 2024 implemented changes, including bringing previously out-of-scope overseas-based on-demand platforms under the UK's media regulation regime. However, UK law is lagging behind technology somewhat. The regulation of live streaming platforms (which do not have on-demand functionality and/or are not on "regulated electronic programme guides") remain outside of Ofcom's remit. The status of the last government's promised "Online Advertising Programme" is also unknown. So, how are brands navigating this quagmire?

Branded content is becoming even more prevalent

Industry insiders are heralding "the third era of branded content" as brands question spending the big bucks on traditional ads and look to ditch influencer campaigns that feel inauthentic in favour of episodic and editorial content. Perhaps this is because of a perceived thirst for content that is actually entertaining or that has social impact, or perhaps it's because advertisers and their agents are buoyed by the fact that regulators haven't enforced in this space for some time (the regulator's focus on serious online harms is likely to be a factor in this). Either way if these trends continue, expect to see more editorial programmes which have been driven by brands.

Find out more

- Branded Content – Navigating the regulatory regime and other pitfalls

Put HFSS “brand advertising” on your watch list

New restrictions come into force in October 2025 prohibiting traditional broadcast TV and on-demand services from including advertising for High in Fat Salt and Sugar (HFSS) products before the 9pm watershed. As a result, we anticipate that there will be a shift to “brand advertising” for companies that are synonymous with HFSS products as pure brand advertising is exempt from the new restrictions. The rationale for this is apparently to ensure that brands have the freedom to reformulate and move towards offering healthier products.

Businesses desperate to give their HFSS products exposure may still be able to do so in a more stealth-like manner through product placement – while banned on broadcast TV, product placement for HFSS products distributed via other means would still seem to be permissible.

That said, if HFSS brands push their luck, it may well be this kind of advertising that draws Ofcom’s attention back to this topic. Burgers beware.

Tech-tonic shifts

As we move to increased consumption of programmes online, tech will play an increasing part in the delivery of advertising in and around long-form content. Expect interactivity with ads on your big-screen, virtual advertising, and even personalised integrated in-programme advertising.

Leonie Sheridan
Associate

Alex Kelham
Partner

Sponsorship goals: scoring big in 2025

What's been happening?

As sports fans, we can't escape from sponsorship.

From the logo on the front of our favourite footballer's shirt, to the name of the stadium in which we watch them play; the sponsored content we are watching on YouTube, to the watch on the latest Olympic medal winner's wrist. It is all around us and it is big business, with the global sports sponsorship market alone expected to reach nearly $90 billion by 2027. Naturally, the legal landscape is complex.

What will things look like in 2025?

The world of sports sponsorship is complex and fast-moving, and there are lots of benefits and risks you will need to consider if you are thinking about sponsoring or receiving sponsorship. Gazing into our crystal ball, here are some trends to keep an eye on this year:

- **Emerging technologies:** For example, virtual overlay of in-venue advertising allows broadcast feeds to be made bespoke to relevant local markets and enables rightsholders to sell the same advertising inventory multiple times over. Interactive sponsor advertising within and around streamed content is also likely to become more common.
- **Athlete value:** While athlete endorsement deals have been a feature of the sponsorship landscape for some time, the ever-increasing social media following of leading athletes and their amplified 'voice' means that, in many cases, brands now go directly to the athletes in their own right rather than cutting sponsorship deals at the team/club/event level – we anticipate this will continue and that savvy clubs will strike deals to maximise their athletes' profile.
- **Women's sport:** The rapid growth in popularity of women's sporting events presents sponsors with a strategic (and often comparatively affordable) route into consumers' eyeballs as such events gain traction and media popularity.
- **Grassroots and youth sport:** Brands are increasingly keen to demonstrate a connection with the 'real world' and sponsorship deals that incorporate obligations to support grassroots or youth projects can provide greater credibility within the sporting community whilst also dovetailing with sponsor brands' CSR commitments.
- **The rise of e-sports:** The e-sports sector continues to grow globally. Over the last decade, we have seen major brands such as PSG and Mercedes lean into the world of e-sports, but there has been a slight lull in enthusiasm over the last year or two. We expect this trend will reverse as rightsholders look at ways to further exploit their intellectual property and get in front of a wider audience of consumers. Will 2025 be the year that e-sports sponsorship goes (even more) mainstream?

Whatever happens, we can be sure that sponsorship will continue to play a key role in the world of sport and beyond. We at Lewis Silkin will be watching and cheering with enthusiasm.

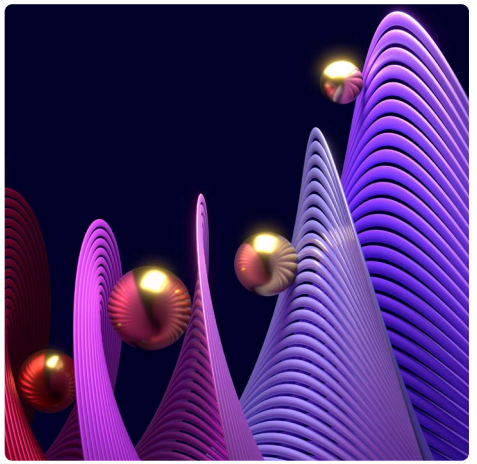
James King
Associate

David Cakebread
Associate

Alex Kelham
Partner

Find out more

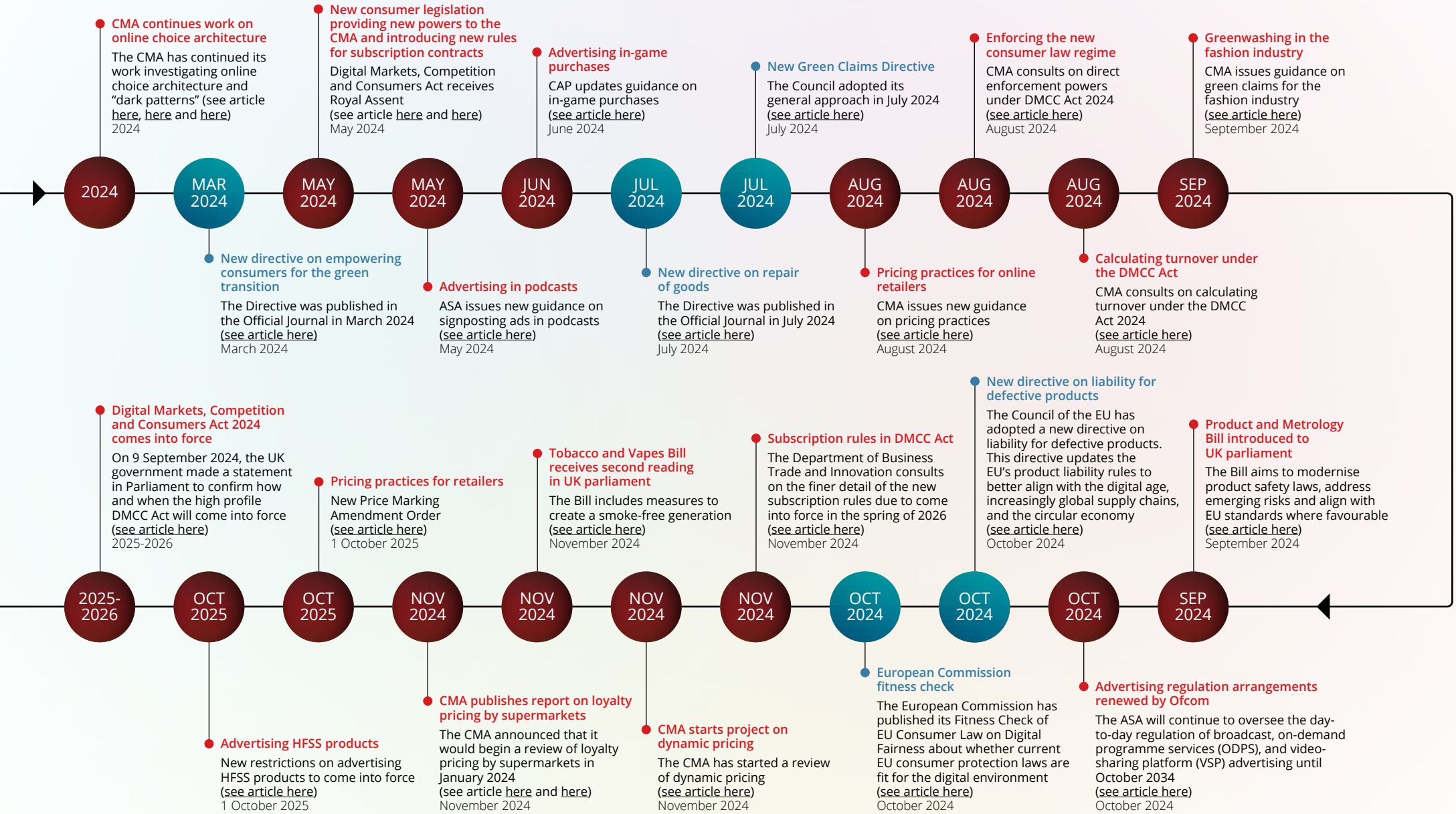
Digital Commerce & Creative 101: Sponsorship



04
Selling, buying, and marketing in 2025 and beyond

Timeline

UK EU



Ten tips for running a compliant online business

Here are our top tips for operating an e-commerce site that targets UK consumers.

01 Key company information

Where relevant, you must disclose your registered name, office address, company number, country of registration and VAT number. You may also need to include details of, and required by, any sector regulator (such as the Financial Conduct Authority). This can be included as text or hyperlinks in the footer of the landing page, so users can see it, wherever they are on the website.

02 Data protection

You will be collecting and processing customers' personal data and so must issue a privacy notice covering all your activities e.g. competitions and visits to physical shops. If your website is also likely to be accessed by children, you will need to consider the ICO's Children's Code.

03 Direct marketing

If you wish to send electronic marketing, in most cases you will need customer consent, although if an individual has bought something from you recently, you can market similar products to them as long as you give them a clear chance to opt out.

04 Cookies

Cookies can help you collect vital data to customise the customer experience and drive revenue. However, you will need consent for using cookies which are not essential to providing the website. Businesses should make it as easy to reject all non-essential cookies as it is to accept them which generally means including a "Reject All" option in the consent banner.

Find out more

- Digital, Commerce & Creative 101: Ticking the boxes when selling to consumers

05 Accessibility

Under the Equality Act 2010, online businesses selling direct to the public are required to make reasonable adjustments to ensure their websites can accommodate all users, including those with additional accessibility needs. Therefore you need to consider the design of your website.

06 Modern slavery statement

If your business has an annual turnover of £36 million or more, is doing business in the UK and is providing goods or services, then it should publish a statement with the steps taken in the previous year to deal with modern slavery risks in its supply chains.

07 Selling to consumers

UK law is very protective of consumers. The rules that apply depend on whether you are selling goods, services or digital content, but traders must give certain key pieces of information to consumers about the contract at specific points in the sales process and must provide certain cancellation rights. The consequences of getting things wrong can be significant, so build in compliance to your website and the customer journey.

In addition, the new Digital Markets, Competition and Consumer Act 2024 includes new rules that apply to subscription contracts, which are a key focus of the regulator, and are due to come into force in Spring 2026.

08 Faulty products

A consumer may be entitled to a refund, a repair or replacement, or a discount if products and services are faulty or misdescribed. UK consumer laws imply certain terms into consumer contracts, such as that goods will be of satisfactory quality and fit for purpose and that services will be performed with reasonable care and skill.

If a consumer complains, you must aim to resolve the complaint in line with your complaint handling process. Some businesses are bound by trade body rules and you might also need to refer customers to alternative dispute resolution.

Find out more

- Digital, Commerce & Creative 101: As the operator of a business-to-consumer online platform, what consumer law issues should you be thinking about?

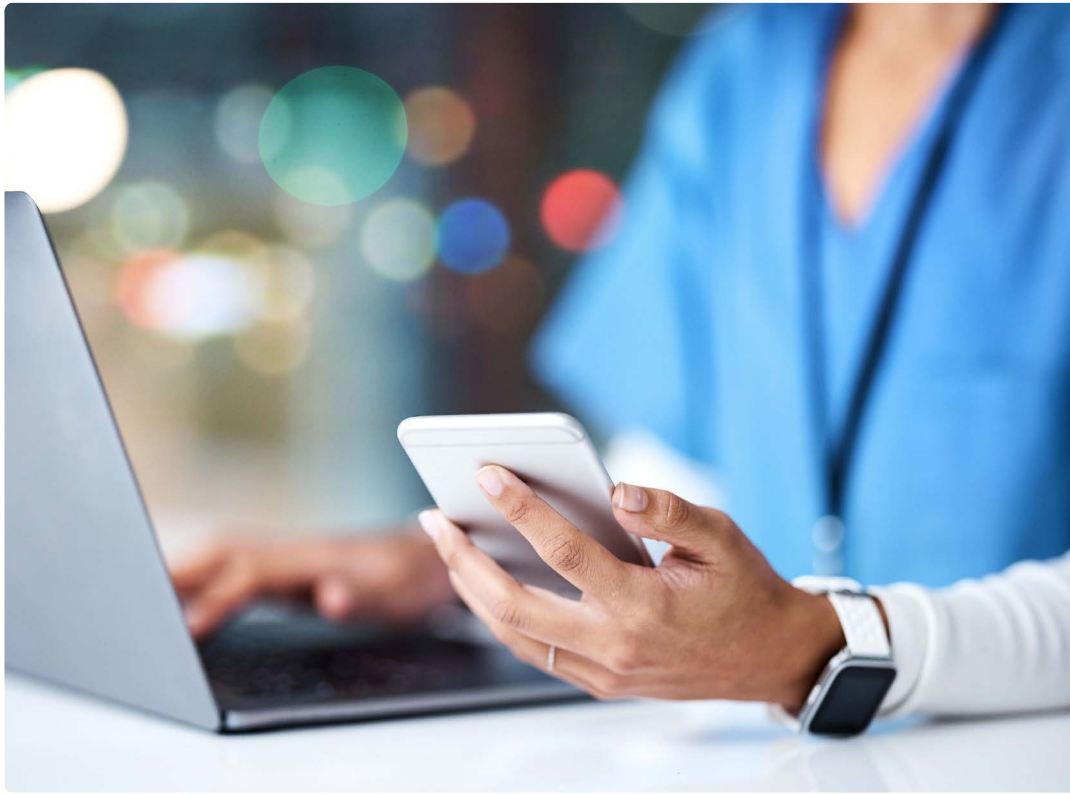
09 Reviews

If customers can leave reviews on your website, consider how you can ensure such reviews are genuine. The new Digital Markets, Competition and Consumer Act 2024 imposes specific obligations on traders to prevent fake reviews.

10 User generated content

If your website allows users to encounter content generated, uploaded or shared by other users, you will need to consider if your service constitutes a user-to-user service under the Online Safety Act which requires in-scope businesses to carry out risk assessments and put in place certain systems and processes to help improve the safety of website users.

There is a lot to consider, and it all depends on the size of your business, functionality of your site and product offering. We can help you navigate all of these challenges. In addition, let us know if you'd like to learn more about our Legal design services.



Alex Meloy
Managing Associate

Elizabeth Burton
Managing Associate

Geraint Lloyd-Taylor
Partner

Consumer law enforcement – the dawn of a new era?

With the Competition and Markets Authority (CMA) about to gain new "super" powers to enforce consumer law directly, consumer law compliance is likely to rise up the agenda of most businesses.

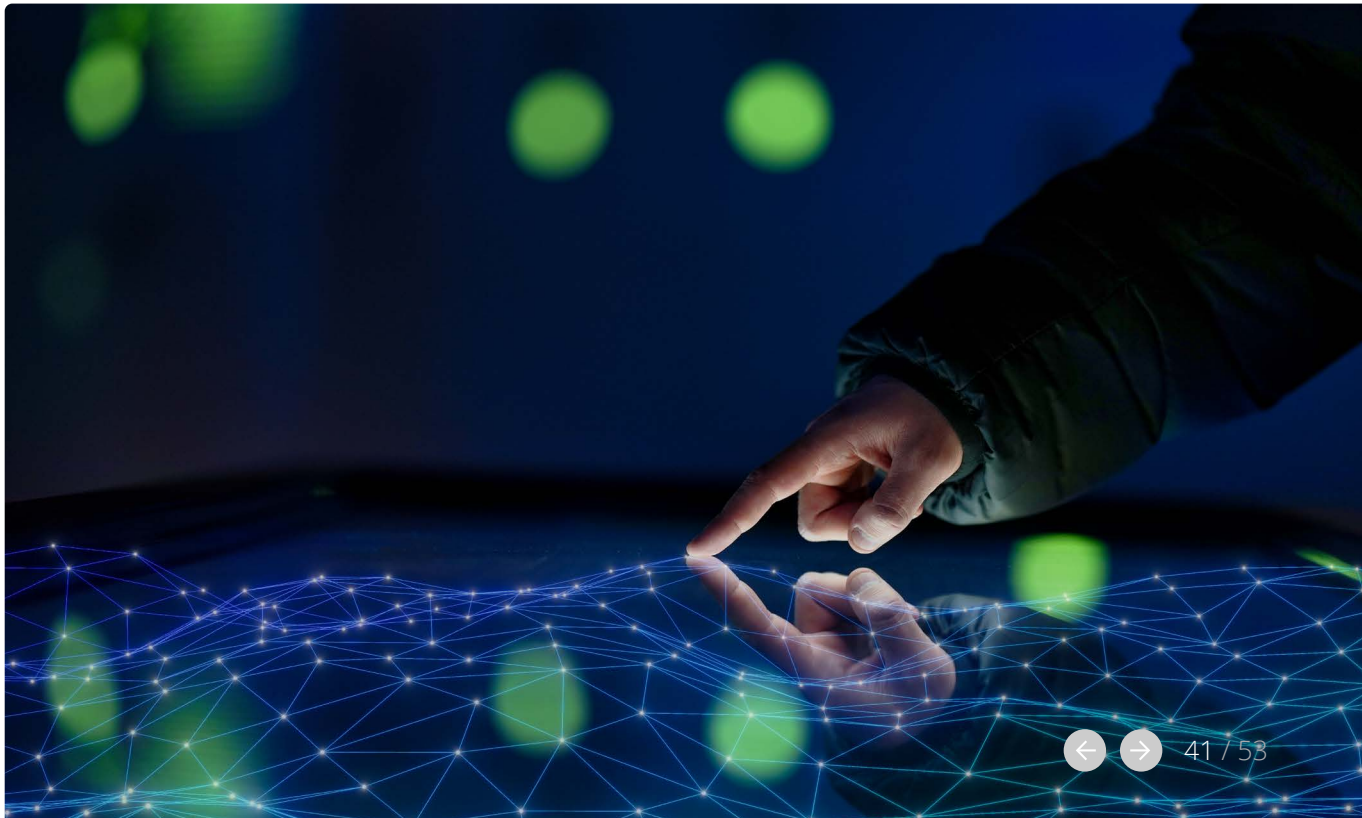
Lewis Silkin recently welcomed Jen Dinmore into its Digital, Commerce and Creative team. Jen was a Director of Consumer Protection at the CMA. Here, Jen sets out what you need to know about the new powers and her top tips.

The new powers in a nutshell

- The CMA will be able to make a finding of a breach of consumer law itself, rather than having to take the matter to court.
- The CMA is getting its own fining powers, with the ability to levy fines of up to 10% of a business's global turnover for a breach of consumer law.
- The CMA will also be able to issue hefty fines in other circumstances, including where a business fails to comply with an information notice.

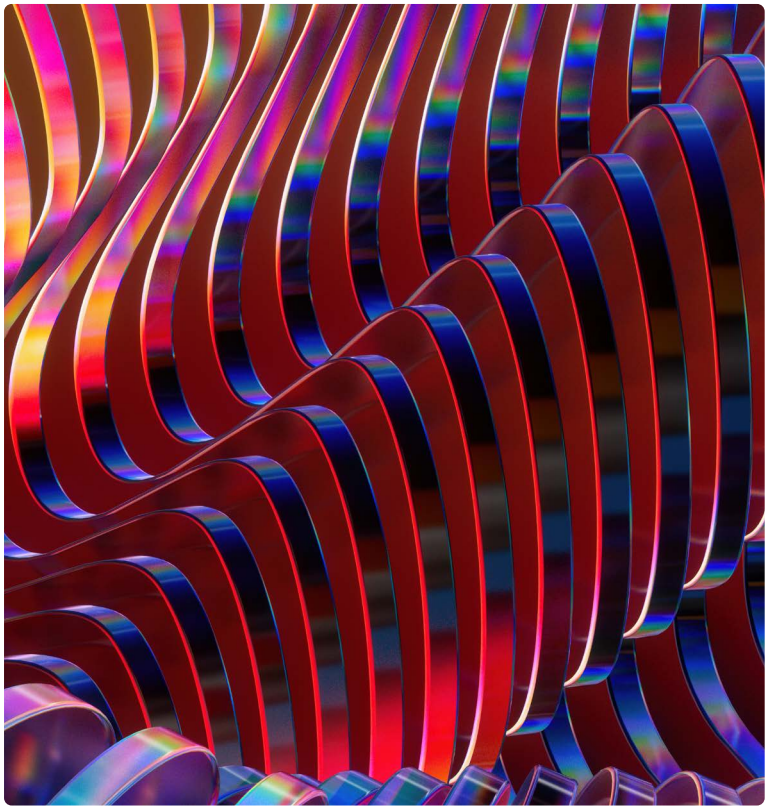
The powers in practice

- The CMA is keen to use its new powers.
- The pace of investigations is likely to become punchier. The CMA will have a duty of expedition, which it will take into account when setting investigation deadlines and considering applications for extensions to them. It makes this clear in its draft guidance.
- Be prepared for penalties. The new regime includes a process for seeking undertakings, but where they don't address the CMA's concerns, we expect the CMA to move quickly to levy penalties.



Jen's top tips

- **Failing to prepare is preparing to fail.** Crisper timetables will mean there is less time to deal with things 'as and when'. Businesses should implement contingency plans. For example, ensuring staff are clear on who will (and how to) respond to a CMA information notice or an onsite inspection.
- **If you're contacted by the CMA – don't panic!** But act quickly to escalate and be in litigation mode. Take care with communications both internally and with the CMA.
- **Who's who?** Think strategically about how best to present your case; consider how you want to come across and who is best placed to make points of detail about your business.
- **Finally – beware:** The CMA has a broad discretion when choosing enforcement targets. Don't take comfort from the fact that your practices are commonplace – this is unlikely to help your case.



Jen Dinmore
Legal Director

Geraint Lloyd-Taylor
Partner

Find out more

- Key takeaways from *A Conversation with Jen Dinmore – Big Changes and Hot Topics in Consumer Investigations*.
- Pricing again...the new Price Marking Amendment Order. What does it mean in practice?
- Online default settings – more helpful than harmful?

Avoiding pricing debacles

What's been happening?

Pricing practices were a hot topic in the consumer law world in 2024 and this looks set to continue in 2025.

The Digital Markets, Competition and Consumers Act contains new rules to restrict "**drip pricing**" – i.e. stating a certain price before adding further, non-optional charges later in the consumer transaction.

The Competition and Markets Authority ("**CMA**") has been actively targeting certain promotional pricing claims – for example, discount claims or so-called '**reference pricing**', for example "Was ~~£X~~, Now £Y". The CMA secured undertakings from Simba Sleep that it would comply with the rules and issued court proceedings against Emma Sleep as Emma Sleep did not provide similar undertakings to resolve the matter out of court.

Dynamic pricing or **real-time pricing** has also come under scrutiny, i.e. changing prices in real-time to respond to market demands. Dynamic pricing is generally allowed, and is common in some industries like travel. However, if not done correctly, it could amount to an unfair commercial practice. You may have seen recent regulatory interest in dynamic pricing practices used during the sale of the Oasis concert tickets.

The CMA is also reviewing **loyalty pricing** to consider if some existing loyalty pricing practices could mislead shoppers.

What do I need to do, and what developments can we expect in 2025?

Businesses will need to carefully review their pricing practices to make sure they are not inadvertently breaking the rules.

In particular, to avoid drip pricing, businesses should look at the consumer journey and products they offer to assess whether any "add-on" prices are truly optional or whether these prices should instead be included in the headline price. The CMA's response to the Department for Business and Trade's price transparency consultation highlights what the CMA might consider a non-optional add on.

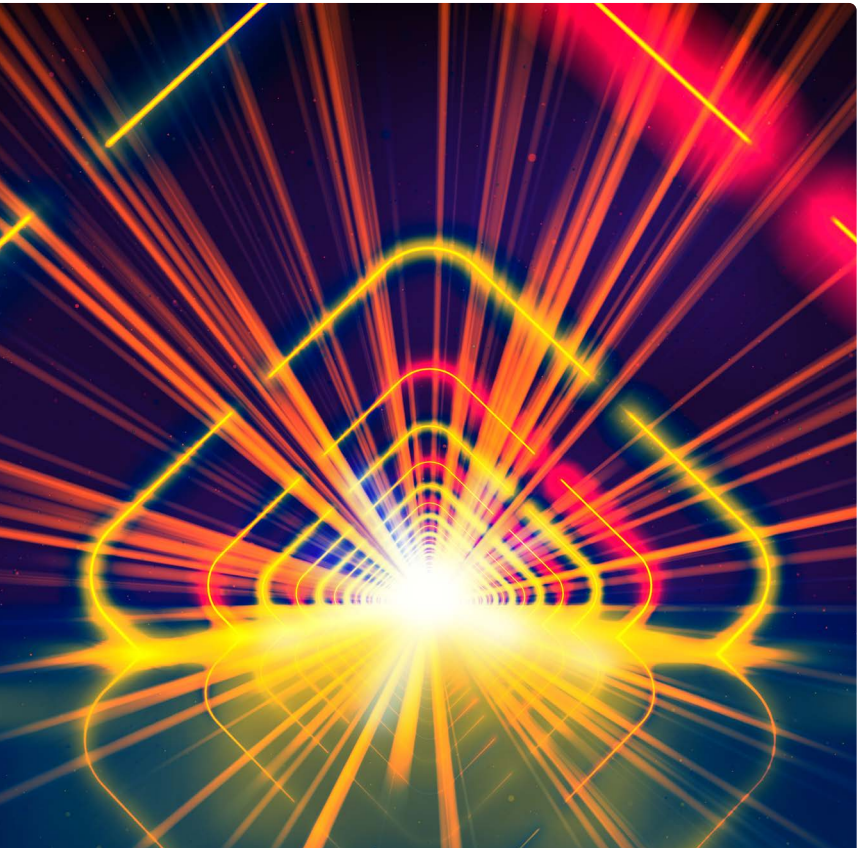
For reference pricing, businesses should assess whether any "Was/Now" pricing promotions comply with the CMA's recent guidance – especially by ensuring that:

a) the higher 'was' price has been applied for as long as (or longer than) the 'now' price, (the **duration requirement**), and

b) there has been a "sufficient number" of sales at the higher "was" price. The CMA has suggested a 1:2 ratio (meaning one product should have been sold at the higher price for every two products sold at the discounted price (the '**volume requirement**)'. Businesses should watch out for any outcome of the Emma Sleep case to see if the courts agree with the CMA's position.

What else do I need to know about the CMA's approach and powers?

To date, the CMA's approach has been to first investigate certain companies in a particular sector where it believes potentially problematic practices are commonplace, name and shame some of those companies (and issue a public statement about its concerns), elicit undertakings from those companies under threat of prosecution (which it usually makes public), then issue guidance to the industry later. Typically, CMA investigations have taken quite a long time, usually lasting over a year.



Under the Digital Markets, Competition and Consumers Act, the CMA can issue unilateral fines of up to 10% of annual global turnover. These new powers are expected to be activated in spring 2025 and after that we expect the CMA to change its approach to enforcement. It will be able to issue fines for breaches of undertakings/assurances given to it by any company, as well as any fresh instances of breaches of consumer laws by any company selling to UK consumers, whether they have been previously investigated or not.

The CMA is likely to want to reduce the time its investigations take so will want to move expeditiously (and will expect companies under investigation to do the same).

As the consequences of 'getting it wrong' increase, businesses should proactively review pricing practices to ensure that they comply.

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Find out more

- CMA starts project on dynamic pricing
- Pricing again...the new Price Marking Amendment Order. What does it mean in practice?
- CMA launches court action against Emma Sleep

Keeping out of trouble when advertising

As we reach the mid-point of the decade, 2024 was yet another year of tumultuous change for advertising and marketing.

Advertising often reflects key societal concerns and changes, as shown by high volumes of Advertising Standards Authority (ASA) complaints.

What has been happening?

The ASA and Competition & Markets Authority (CMA) continue to crack down on abuses of creative freedom.

- It's been a #bAd year for both brands and influencers, with Huel and Zoe (Steven Bartlett) and TALA (Grace Beverley) attracting criticism from the ASA for failing to clearly identify their ads.
- With consumer behaviour being driven by changing attitudes to sustainability, the CMA continues to punish brands for greenwashing. Fashion brands must take note of the new rules in the fashion supplement to the Green Claims Code, but all advertisers need to be aware of the proposed Green Claims Directive and the Directive to Empower Consumers for the Green Transition.
- Mattress brands Emma Sleep and Simba Sleep have suffered sleepless nights as the CMA investigated the use of 'dark patterns' and online choice architecture, providing challenging new guidance on pricing practices that is relevant for any online retailer. All traders should keep in mind the CMA's new powers under the DMCC when making price reduction and urgency claims.

What are things looking like in 2025?

- From **April 2025,** the CMA will have significant new powers under the DMCC, enabling it to decide itself whether consumer law has been broken and to fine companies **up to 10%** of their global turnover.
- From **1 October 2025,** new laws regarding HFSS foods will finally take effect. Both paid-for-ads and TV ads post-watershed will be banned, and multibuy promotions, such as "3 for 2" offers, will be prohibited.

What else do I need to know?

After setting out its five-year strategy, the ASA has leveraged AI to review ads in 'high priority areas' and a quick glance of published rulings reveals that a new topic of concern is considered each month.

The UK government is also looking to implement legislation to regulate the use of AI, which will be relevant for advertising too. Meanwhile, the ASA has issued guidance on AI and advertising standards, including advice to ensure ads are not misleading about what can be achieved by using a product with AI.

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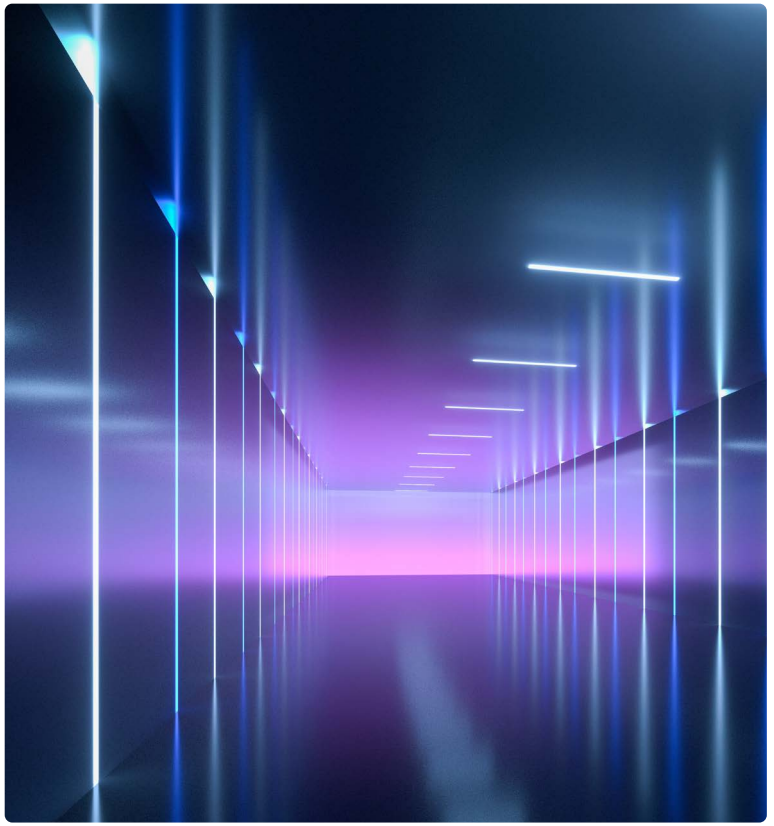

Find out more

- Digital Markets, Competition and Consumers Act
- Pricing again...the new Price Marking Amendment Order. What does it mean in practice?
- So what old chestnuts did Guy and Brinsley roast by the open fire this year?

Staying green and clean

ESG has quickly become a serious C-suite consideration, and in the UK and EU we are seeing the evolution of complex ESG regulation.

However, companies not only face pressure from regulators and consumers, but also from their shareholders, clients and customers, often in the form of ambitious reduction targets; resulting in compliance with standards that go beyond legal requirements.

This checklist sets out some key points to think about when embedding those commitments across your supply chain and deciding how to communicate sustainability commitments to consumers.

01 Articulating sustainability commitments to consumers

In the UK, the Advertising Standards Authority (ASA) regulates environmental claims by applying the rules in the CAP and BCAP Codes, which contain specific rules about environmental claims.

The Competition and Markets Authority (CMA) also regulates environmental claims, applying consumer laws in line with its own Green Claims Code (which is broadly aligned with the ASA's approach). Following the CMA's recent investigation into green claims by the fashion retail industry, the CMA has now also published a "Fashion Supplement" with specific guidance for the fashion industry as a whole. Its key takeaways are:

- Avoid using unclear terms (e.g. green, sustainable or eco-friendly) – unless the product as a whole has a positive environmental impact or no adverse impact.
- Avoid using logos, imagery and icons in a misleading way (e.g. leaves, globes, etc).
- Product ranges that are held out as being better for the planet, or less harmful, should be handled with care:
  - Consider the name of the range carefully.
  - Explain the criteria for including products in the range, and make sure they are reasonable.
  - Do not include products as part of a range unless the product meets the relevant criteria for inclusion in the range.
- Don't forget about third-party products - retailers are responsible for any claims made about third-party products that they sell, as well as their own.

02 Embedding sustainability commitments across your supply chain

On the other side of the coin, companies that commit to reduction targets need to consider how to flow these commitments through their supply chain to ensure downstream compliance. This can be a huge operation and might involve having frank discussions with suppliers from the outset.

Some options could include:

- Requiring suppliers to complete a self-assessment questionnaire or providing evidence of an independent verification process.
- Having in place proper processes to make sure that third-party suppliers can back up their claims about their products.
- Requiring suppliers to provide a declaration that the product information is accurate, before offering products for sale.
- Requiring contractual commitments from suppliers in relation to the measurement of emissions, commitment to short and long term reduction targets and reports on progress.

Find out more

- Environmental Claims in Fashion: CMA publishes NEW 'Fashion Supplement' to its Green Claims Code
- Deforestation-free products Regulation delayed
- Where are we with EU environmental legislation?

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Keeping your online terms on track and on brand

It can feel like an ongoing struggle to make sure that your consumer-facing terms and conditions comply with legal requirements.

That said, significant benefits come with revamping your T&Cs (besides compliance.) – if your customers engage with and understand your terms and recognise that they are fair, they'll be more likely to become a brand ambassador and less likely to complain about them or your goods/services. The market is quietly changing.

Consider the following questions for inspiration about how to transform your consumer T&Cs and the consumer journey:

01 Are they understandable?

Ditch the legal jargon and write your contracts in plain language to create a short, simple agreement. A study by the European Commission found that only 10.5% of consumers read the full T&Cs of a supplier if they are long and complex, but this increased to 26.5% if they are short and simple. As an extra bonus – consumers reported having a more positive attitude towards simplified T&Cs and felt more that it was worth their time to read them.

02 Are the terms fair and clear?

Although lengthy negotiations of your consumer T&Cs are unlikely, fair and transparent terms are required under consumer legislation. When simplifying the language in your T&Cs, review your rights, obligations, exclusions, customer requirements and other potentially imbalanced terms to create a fair agreement that is not open to challenge. If you're on a roll, you can repeat this exercise with your other commercial contracts to minimise negotiations and increase deal speed (and adopt the mantra: *Is this fair and necessary?*).

Find out more

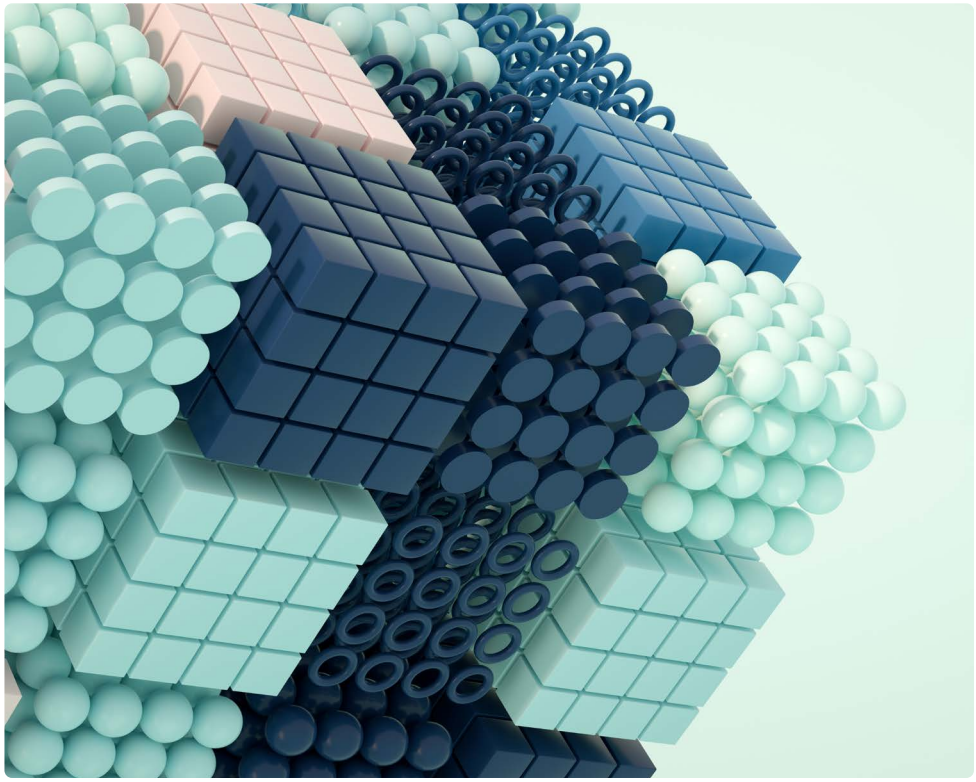
- Are your contract terms easy to read – and are consumers bothering to read them anyway?
- News: When will the Digital Markets, Competition and Consumers Act 2024 come into force?

03 Do they reflect your culture?

Use your T&Cs as an opportunity to showcase your company's brand, values and tone of voice, and to make your customers feel welcome and part of your wonderful community. Improve them further by using design elements to aid comprehension around complex terms (such as icons, infographics, timelines and other visuals) to make your T&Cs even more unique. If Shell can do it, you can do it.

04 Are users engaging with them?

A study from Ofcom found that just 3% of users typically engage with T&Cs on online platforms, unless prompted. But throw in some interactive elements, such as prompts displayed while scrolling, and this raised engagement up to 9% in trials. Don't let your revamped T&Cs go unread by your customers – trial implementing visual or interactive cues to increase user interaction with your T&Cs.



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Find out more

- Subscription contracts: the devil is in the detail – consultation on nuts and bolts

Digital, Commerce & Creative 101

- Our tech predictions for 2025: A glimpse into the future
- De-risking Devices as a Service (DaaS)
- How can IT system integrations be delivered on time and on budget?
- Software escrow: why bother, and what about SaaS and escrow?
- Basics of Consumer Law
- Consumer
- Ticking the boxes when selling to consumers
- All's 'fair' in love and contracts – a brief look at the Unfair Contract Terms Act 1977
- Running prize promotions in the UK
- DMCC Bill and subscriptions
- As the operator of a business-to-consumer online platform, what consumer law issues should you be thinking about?
- Do I need an Agent, Distributor or Franchisee?
- Checklist for running an online business
- How you can ease the logistical headache
- Joint Ventures
- How can I comply with regulatory laws affecting my supply chain?
- Drop the shipping, but not the ball! Five key watchouts for sellers who drop-ship
- "Warrants", "represents", "undertakes" – are you using them correctly?
- Force Majeure
- Liability clauses: getting them right
- Gen AI & Music: the maestro's maelstrom
- Do I need a non-compete obligation?
- Implementing Electric Vehicle Schemes
- Talent Agreements
- Sponsorship
- Online Safety Act navigation for the video games industry
- Is this for real? The legal reality behind deepfakes

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