Steptoe

REGULATORY LANDSCAPE IN THE EU AND THE UK: CONSIDERATIONS IN 2024

January 2024

As we step into 2024, we are witnessing significant changes in the regulatory landscapes of the European Union (EU) and the United Kingdom (UK). While the UK and EU are firmly on separate paths in their regulatory frameworks, it's worth noting that at times, they still find areas of alignment amidst their divergent trajectories.

In this review Steptoe's European teams in Brussels and London highlight key regulatory and legislative changes, summarising significant events from 2023 and outlining the anticipated landscape for 2024.

Our objective is to provide insightful perspectives on the challenges and opportunities arising from developments in the EU and UK regulatory landscape. Through series of short notes on each subject we are aiming to help you to navigate through regulations and legislative changes that presents both challenges and opportunities for businesses.

Areas reviewed are:

EU Trade

Trade Defense

Over the last year, many EU companies saw their economic activities being impacted by worldwide as well as EU-wide developments, such as rising inflation, high borrowing costs, the war in Ukraine, and the effect of economic sanctions. At the same time, some EU companies have been facing fiercer competition from abroad, as compared to the Covid era, with imports increasing as a result of a drop in freight prices, the re-opening of factories, and the elimination of supply bottlenecks. Moreover, European companies have also felt the pressure from higher energy costs as well as the need to adjust their operations to the EU's green objectives.

All these factors are coupled with a perception in the EU that European companies are disadvantaged compared to their non-European counterparts, due to an imbalance in terms of the availability of subsidies for various industries. The foregoing has created a fertile ground for the European Commission to launch new trade defense investigations, which in the previous year had not been so prevalent.

In total, **nine** new anti-dumping[1] investigations and **two** anti-subsidy[2] investigations were initiated by the European Commission in 2023. To put that into perspective, in 2022 only four new anti-dumping investigations and one anti-subsidy investigation were initiated. Moreover, it is likely that more trade defense investigations are in the Commission's pipeline.

Perhaps the most well-known of the investigations is the anti-subsidy probe against Chinese-made Electric Vehicles (EVs), heralded by the European Commission's President Ursula von der Leyen in her State of the Union address on September 13, 2023. Moreover, top trade officials have hinted at the possibility of initiating an investigation into solar modules from China, having received evidence of low prices and estimated excess capacity thereof. It is not unlikely that other clean energy products, or parts thereof, that are key for the EU's green transition may be subject to scrutiny under the EU's trade defense tools in the near future.

Level Playing Field

The EU has long considered that WTO rules (on which the classic trade defense instruments are based) do not sufficiently address certain practices that contribute to an uneven level playing field between EU and non-EU companies. In the last year, the EU has delivered a broad range of new policy tools aimed at re-balancing the rules, tackling practices that the EU considers to be unfair, and boosting EU companies' ability to compete with their foreign counterparts.

The Foreign Subsidies Regulation (FSR) entered into force on January 12, 2023, and started to apply as of July 12, 2023 (see our blog post on the Regulation here). It aims to address market distortions caused by foreign subsidies granted in relation to a wide range of economic activities – such as the provision of services, M&A, and

[1] AD694 Alkyl Phosphate Esters (certain) against imports from People's Republic of China; AD692 Electrolytic manganese dioxides (certain) against imports from People's Republic of China; AD699 Erythritol against imports from People's Republic of China; AD698 Mobile access equipment against imports from People's Republic of China; AD695 Optical fibre cables (OFC) against imports from People's Republic of China; AD693 Polyethylene terephthalate (PET) against imports from People's Republic of China; AD697 Polyvinyl Chloride against imports from United States of America and Egypt; AD696 Titanium dioxide against imports from People's Republic of China; AD700 Biodiesel against imports from People's Republic of China.

[2] AS689 New battery electric vehicles for passengers against imports from People's Republic of China; AS701 Alkyl Phosphate Esters (certain) against imports from People's Republic of China.

public procurement bid. The FSR seeks to do so by introducing three new investigative tools to be operated by the EU Commission, namely:

A notification-based tool to investigation concentrations (M&A transactions and joint ventures) above certain thresholds;

A notification-based tool to investigation public procurement bids above certain thresholds; and

A general tool to investigate all other market situations ('ex officio' tool), except for the importation of subsidized products which is covered under the WTO's Agreement on Subsidies and Countervailing Measures.

The Anti-Coercion Instrument (ACI) was adopted on November 22, 2023 and entered into force just on December 27, 2023 (see our blog post on the Regulation here). The ACI allows the EU to act in instances of economic coercion imposed on the EU or its Member States by other third states. The primary goal is to discourage coercion and, when deemed necessary and as a last resort, impose countermeasures to respond to the third country's coercion. Such countermeasures could consist of the suspension of tariff concessions and increase of customs duties, quantitative restrictions on imports or exports, exclusion from public procurements, limitation on foreign direct investment, and so on.

According to the ACI, 'economic coercion' refers to a scenario in which a third country attempts to influence the European Union or an EU Member State into making a specific decision by implementing or threatening trade- or investment-related measures. The assessment of whether a measure by a third country represents an economic coercion will be conducted on a case-by-case basis by the European Commission and the Council, based on a set of pre-established criteria.

In addition to the above instruments, the EU has also recently launched a series of measures that are aimed at boosting EU companies' green capacities, in view of other countries' (especially the US and China) similar efforts in this respect. The Critical Raw Material Act (CRMA), the adoption of which was recently agreed on by the Council and the Parliament, aims to strengthen the EU's critical raw materials capacities across all stages of the value chain and to diversify EU's imports of raw materials. The Act identifies a list of critical and strategic raw materials (such as cobalt, lithium and rare earth elements for magnets) and sets a number of benchmarks for domestic extraction, processing, and recycling capacities in order to reduce supply risks. To achieve the targets, the EU will select a number of "Strategic Projects" which will benefit from reduced administrative burdens and streamlined access to finance (including financial support by Member States).

The Net Zero Industry Act proposal (NZIA) aims to scale up manufacturing of net-zero technologies in the EU (such as batteries, heat pumps, solar panels, electrolyzers, fuel cells, wind turbines, and carbon capture and storage). The proposal lays down a target of 40% of the Union’s annual deployment needs for the manufacturing capacity of strategic net-zero technologies and aims to simplify the administrative burden of manufacturing projects. The NZIA was proposed on March 16, 2023, and is currently being negotiated by the Council and the European Parliament.

Customs

One of the most significant customs developments of 2023 was the Commission's proposal of a new EU Customs Reform package on May 17, 2023. The package aims to further harmonize national customs law and make it more suitable for the challenges of a digital and more assertive world.

The proposed EU Customs Reform will introduce significant changes with respect to online B2C sales, meant to facilitate online transactions. Specifically, for B2C transactions, importers can opt to rely on a simplified tariff

treatment for goods if the transactions qualify as distance sales for VAT purposes.[3] This simplified tariff treatment will consist of the possibility to rely on a five-tier bucket system under which different duty rates apply to specified categories of products, ranging from 0% ad valorem up to 17% ad valorem. The customs duty due would then be calculated by applying one of these new bucket tariffs to a customs value, which will also be determined in a simpler manner.

In addition, the proposed Customs Reform would make online platforms (which will be considered to be "deemed importers") responsible for ensuring that goods sold online into the EU comply with all customs obligations. This is a significant change from the current customs system, which put this responsibility on the individual consumer and carriers. Under the Commission's proposal, online platforms will be responsible for ensuring that customs duties and VAT are paid at purchase, as well as ensuring compliance of the goods with EU environmental, safety, and ethical standards and legislation.

Furthermore, pursuant to the proposal, the Commission will develop and implement the EU Customs Data Hub, which will be a platform dedicated to collecting and processing all the relevant data related to imports and exports of goods. Submitting data to this platform (covering multiple consignments) will gradually replace the requirement to lodge a customs declaration. The EU Customs Data Hub will run risk analyses and share information between the EU Customs Authority and national customs authorities as well as different stakeholders, such as the Commission, European Anti-Fraud Office and European Public Prosecutor's office.

In addition, an EU Customs Authority will be established, the role of which will be to carry out EU risk assessments based on the data submitted to the EU Customs Data Hub. The EU Customs Authority will then be able to issue control recommendations to national customs authorities. The EU Customs Authority will also collaborate with other non-customs authorities (such as law enforcement authorities).The Customs Reform proposal is currently discussed in the ordinary legislative procedure and a plenary sitting in the Parliament is scheduled for March 11, 2024.

[3] As defined in Article 14(4), point (2), of Directive 2006/112/EC.

ESG and Sustainability

EU Perspective

The EU's current legislative agenda on ESG issues is unprecedented and it will affect all companies doing business in the EU, whether they are based in the EU or not. The objectives underlying these initiatives include sustainability, human rights and the environment. At the same time, many of these requirements are also means to achieving level the playing field and constitute novel types of trade barriers.

ESG-related due diligence and related reporting

2023 saw the emergence of two key instruments laying down ESG-related due diligence and related reporting obligations: the Corporate Sustainability Reporting Directive (CSRD), adopted in January, and the Corporate Sustainability Due Diligence Directive (CS3D), whose adoption the Council and the Parliament agreed on just before the end of the year.

- The CSRD lays down reporting requirements for certain (EU and non-EU) large undertakings and groups. The reporting requirements under the CSRD are very broad, covering environmental, social and governance factors, climate change, biodiversity, circular economy, workforce, consumers, etc. As for the CS3D, this Directive will require in-scope (EU and non-EU) companies to carry out due diligence in their supply chains to address human rights and environmental, including climate change, concerns.
- As a result of these instruments, and in particular the CS3D, in-scope companies will have to map and adequately audit their supply chains, and to some extent value chains. Moreover, even if not covered, non-EU companies could be indirectly impacted as a result of EU operators imposing obligations on their suppliers, or potentially disengaging from them.

Similar to those initiatives, the proposed Forced Labor Regulation (FLR) and the recently adopted EU Deforestation Regulation (EUDR) will also require companies to carefully review, and potentially restructure, their supply chains to ensure that they comply with each measure. Specifically, the FLR, once adopted, will ban the making available on the EU market of any products made with forced labor. The EUDR, which only applies to specific commodities and products, prohibits the placing or making available thereof on the EU market if these are not deforestation-free.

The EU has also sought to level the price of carbon between domestic products and imports through the recently adopted Carbon Border Adjustment Mechanism (CBAM). Under CBAM, which will be fully operational as of January 1, 2026, EU importers of certain products will have to cover the carbon price that these products would have cost under EU emissions trading rules.

Product-related ESG initiatives

New rules on green claims, unfair commercial practices and product liability are being discussed and finalized by the European Parliament and the Council of the EU as 2024 starts. Once adopted, these rules will provide ground for consumer NGOs and other companies or individuals to challenge the labeling or marketing of companies placing products on the EU market and potentially claim damages under the new product liability rules.

Companies should already assess existing claims towards the criteria contained in the proposed rules, and adapt their marketing practices and claims accordingly.

The EU legislature has also reached agreement on a novel type of regulation : the Eco-Design Sustainable Products Regulation (ESPR), which sets the framework for the Commission to adopt eco-design parameters for

groups of products. These eco-design parameters will include requirements related to recyclability, carbon foot print or presence of substances of concern. Textiles and construction products are expected to be among the priority groups to be subject to new rules, while the scope of products to be eventually covered under the ESPR is very broad.

UK Perspective

A number of trends can be discerned from UK ESG developments during 2023, the effects of which will extend into 2024 as initiatives find their way into legislation and enter an implementation phase, demanding greater focus on sustainability.

There has been a sustained focus on defining consistently and clearly what ESG means, as well as standardizing ESG reporting.

In May 2024, the UK Financial Conduct Authority will introduce an anti-greenwashing rule for all authorized firms to ensure sustainability-related claims are fair, clear and not misleading. New rules will come into force in December 2024 requiring authorized firms to introduce product labels to help investors understand what their money is being used for, and marketing requirements so products cannot be described as having a positive impact on sustainability when they don't. A draft voluntary Code of Conduct for ESG ratings and data providers also has been put out to consultation, with the goal of encouraging market integrity.

In addition, the Digital Markets, Competition and Consumers Bill is expected to progress through the UK parliament. If passed, among other things, it is expected to give extensive new enforcement powers to the UK Competition and Markets Authority (CMA). The CMA has expressed an intention to tackle "greenwashing" and is expected to bring more enforcement actions against companies that make false eco-friendly and sustainability claims.

Supply chain resilience and transparency also has been prioritized, with the UK announcing at COP28 details of its plans for implementing the forest risk commodities regime created by the Environment Act 2021. This often has been combined with a focus on ethics and integrity, epitomized by the recent introduction of a wide-ranging private members bill in the House of Lords calling for the introduction of mandatory environmental and human rights due diligence in the UK.

A sustained focus on climate change and the energy transition has been evident. For example, as part of its action on industrial decarbonization to meet net zero, the UK government has announced its intention to introduce a UK carbon border adjustment mechanism, focusing on the most emissions intensive industrial goods imported in to the UK from the aluminium, cement, ceramics, fertilizer, glass, hydrogen, iron and steel sectors.

We expect to see these, and other initiatives develop and progress in 2024. Given the potential for the UK's approach to differ from that of the EU in some of these areas, businesses operating across Europe will need to carefully monitor developments to ensure that their compliance controls remain fit for purpose across all applicable regulatory regimes.

Sanctions and Export Controls

The effects of Russia's invasion of Ukraine on the architecture and implementation of UK and EU sanctions have continued to be felt in 2023, along with an increased focus on closing loopholes in existing sanctions legislation and cracking down on those that circumvent, or facilitate the circumvention, of sanctions. While aligned on these goals, the path to implementation and enforcement in the UK and EU has varied, a trend we expect to continue.

Businesses operating across the UK and the EU in 2023 saw increased evidence of divergence in the formulation and implementation of otherwise closely coordinated sanctions measures. For example, Russia services sanctions vary both in the conduct that they seek to restrict and the exceptions that they offer (or not, in the case of the UK) to support intragroup shared service provision. These developments continue to create additional compliance complexity for international businesses, despite sustained efforts by the UK and EU to align their approaches to the extent possible given variances in their post-Brexit sanctions architecture.

These differences are nowhere more apparent than in the divergence seen in recent months over the interpretation of the "ownership and control" test for the purpose of asset freeze sanctions. The control test has always led to significant uncertainty in both the EU and the UK as to when a person is to be considered subject to asset freeze sanctions, but a series of English court judgments and clarificatory guidance from sanctions agencies has made this fundamental matter even less clear.

Sustained focus on ensuring sanctions effectiveness and curbing circumvention throughout 2023 raises the prospect of increased enforcement action in 2024. In the first half of 2023, over 100 British companies reportedly made voluntary disclosures of Russia sanctions breaches to the Office of Financial Sanctions Implementation (OFSI). The UK also has announced the formation of a new trade sanctions civil enforcement body (scheduled to go live in early 2024) that will, in the near term, focus its efforts on the investigation and enforcement of Russia sanctions evasion, underscoring the UK's commitment to robust enforcement as a cornerstone of an effective sanctions policy. In the EU, the eleventh sanctions package introduced a new anti-circumvention tool, allowing the EU to restrict trade with all companies and persons located in third countries found to facilitate Russia's access to sanctioned goods and technology. The increasing focus on enforcement has led, amongst other things, to a political agreement between the European Parliament and the Council at the end of 2023 on the Commission's proposal to harmonize criminal offences and penalties in EU Member States.

There is little evidence to suggest that the ongoing transformation of UK and EU sanctions will recede in 2024. The Iranian government’s supply of drones to Russia, and involvement in backing hostile activity by armed groups, appears likely to result in additional designations and sanctions such as those introduced by the new UK Iran sanctions regime. As the stance of the UK and EU continues to harden toward China, one or both may follow the lead of the US in imposing sanctions.

For further updates on sanctions visit our International Compliance Blog and dedicated Russia Sanctions Developments webpage.

AI, Data and Digital

Artificial Intelligence (AI)

The AI Act is now at the final stage of the EU legislative process, and will likely be formally approved before the European elections in Spring 2024. The AI Act has a broad scope, and it will impose market access and post-market monitoring obligations to actors across the AI value chain, both in the EU and beyond. The AI Act is complemented by the AI Liability and the Revised Product Liability Directives, which ease the evidence conditions for claiming non-contractual liability caused by AI systems, and provide for a broad list of potential liable parties for harm caused by AI systems, respectively.

Some years may elapse before any enforcement actions take place under the AI Act, however we can expect some enforcement actions will take in place in 2024 regarding compliance with AI systems, notably generative AI systems, with the General Data Protection Regulation (GDPR). Moreover, we can anticipate further clarification on regulators' position on AI as data protection authorities as well as other regulators are increasingly issuing AI-related guidelines.

Cookies and other tracking technologies – Targeted advertising

We can expect important developments this year regarding the rules related to cookies and other tracking technologies, and notably their use for targeted advertising. While the draft Proposal for an ePrivacy Regulation has not made any progress over the past years and will likely be withdrawn by the next incumbent European Commission, the latter has attempted to overcome the political bottleneck with the adoption of a draft Cookie pledge, which lays down principles to better empower consumers regarding tracking-based advertising models. Further, the enforcement of the Digital Services Act, which imposes new rules on advertising, will start from February 17, 2024. Eventually, a pending case before the Court of Justice of the European Union (CJEU) should cast some light in that respect.

Cybersecurity

The NIS2 Directive will start to apply on October 18, 2024. It imposes cybersecurity risk-management measures and incident reporting obligations across the value chain, both to entities that are considered critical for the EU economy and society and to their suppliers. Similarly, the Cyber Resilience Act, whose formal adoption is anticipated within 2024, imposes cybersecurity requirements on the design, development, production, and through the whole lifecycle of products with digital elements. Last but not least, the European Common Criteria-based Cybersecurity Certification scheme is expected to be adopted within 2024. Inter alia, it will be relevant for compliance with the NIS2 Directive and the Cyber Resilience Act.

Digital Services Act

From February 17, 2024, the Digital Services Act (DSA) will apply to all intermediary service providers, including online platforms and search engines. It already applies to some Very Large Online Platforms and Search Engines. The European Commission has been very active in its enforcement towards the latter, making it very likely that enforcement actions against all the actors that fall in the DSA's scope will start soon after its application.

Data Act

The Data Act entered into force in January 11, 2024. It introduces significant changes to the legal framework governing data sharing, and it specifies who is entitled to use connected products or related services data, under which conditions and on what basis.

Antitrust/Competition

2023 has been another eventful year for competition and consumer protection at both EU and UK levels. Below we set out three areas with notable developments, that are expected to impact antitrust enforcement and disputes this year.

Enforcement

As we predicted back in January 2023, the last year saw robust enforcement action by the UK's Competition and Markets Authority (CMA), with a total of 13 investigations launched in a range of sectors, and the pace is expected to continue into 2024.

2024 is also set to see important changes to the UK's consumer protection regime with the Digital Markets, Competition and Consumer Bill (DMCC) expected to receive Royal Assent in Spring 2024. The DMCC will introduce a new targeted approach to addressing concerns regarding competition in the digital industry. Under the new regime, we expect to see the CMA's engagement with the most powerful firms in digital markets to ensure competition is maintained to protect and support consumers.

At the EU level, in September 2023, under the Digital Markets Act (DMA), the European Commission designated six gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft) and 22 "core platform services" which they provide. The obligations on gatekeepers under the DMA will become enforceable in March 2024 (see our blog post on the gatekeepers under the DMA here). We expect DMA enforcement will be one of the top priorities for the European Commission in the coming year. The Commission is very keen to hear from business users of platforms about their experiences, their concerns, and any challenges in dealing with gatekeepers, to monitor the effectiveness of compliance with the Act, and to gather evidence for possible challenges.

Private Damages Actions

In the competition litigation space in the UK, 2023 saw a surge in competition law class actions under the collective opt-out redress provisions introduced by the Consumer Rights Act 2015. There are now some 30 cases pending before the Competition Appeal Tribunal (CAT). 2023 also saw the first settlement between the Class Representative and a defendant in a class action relating to car delivery charges. In February 2024, the CAT will hear its very first trial in collective proceedings. We expect to continue witnessing major developments in developing class action litigation in the UK this coming year.

Across Europe we have been seeing a significant increase in class actions and across all professional and consumer sectors including product liability. This has been driven by the advent of the EU Representative Actions Directive 2023. The UK has a special class action regime established exclusively for follow-on damages competition cases and we are seeing a significant number of cases launched in the UK under this new regime before the specialist court, the Competition Appeal Tribunal. Such claims in the UK total Euro 120Bn. Other leading countries for class actions are the Netherlands, Germany and Portugal.

ESG and Sustainability

In October 2023, the CMA published the Green Agreements Guidance, setting out the key principles, along with practical examples, that businesses can use to inform and share their own decisions when working with other

companies on environmental sustainability initiatives. It explains that the CMA does not expect to take enforcement action against agreements that are in line with the guidance.

The CMA is currently investigating a number of "greenwashing" cases, where there is concern that businesses are making inaccurate or false environmental claims. In the Annual Plan 20223/24 consultation document, the CMA highlighted that this will be an area of priority, stating that it will continue to take action to accelerate the transition to a net zero economy and promote environmental sustainability.

The European Commission will also continue its focus on facilitating the transition to Net Zero through supervision and enforcement. In March 2023 it published a proposal for a Directive (Green Claims Directive), which aims to prevent businesses making unclear or unsubstantiated environmental claims and using labels that are not credible. The directive, expected to be voted in during early 2024, and adapted by the Member States 24 months after is introducing fines of a minimum of 4% of the business's total annual turnover in the Member State or Member States relevant to cases of widespread infringements with an EU dimension.

Chemicals Regulation

Much of the EU regulatory activities in the past 4 years has focused on chemicals, which are acknowledged to be a ubiquitous feature of modern life (in products, components, ingredients, tools, and packaging). Their use and life cycle impacts have never been under greater scrutiny. Policymakers also acknowledge that innovative chemistry has a critical role to play in solving the climate and biodiversity crises.

Strategy Direction

2023 marked a shift from last years' flurry of new proposals. With the notable exception of the PFAS restriction proposal, the EU authorities have not put forward significant new proposals for chemicals regulation. Most importantly, the revision of the REACH Regulation – anticipated and awaited since 2022 – has been postponed until 2025, at least.

This does not mean, however, that authorities were or are idle. Many of the texts already proposed have continued their trajectory and are close to adoption in this legislative cycle, and the Commission and the European Chemicals Agency (ECHA) have used their powers under the existing legislation to pursue new measures for specific chemicals or groups of chemicals. We anticipate that the following initiatives will create impactful new obligations in 2024 and beyond:

- **Eco-design** product parameters, with reverberations throughout the supply chain: The Eco-Design Sustainable Products Regulation (ESPR) is expected to be adopted and enter into force in 2024. The Commission has started reviewing product groups that will be subject to eco-design parameters, and we understand these include textiles, aluminium, cement, and potentially chemicals and cosmetics.
- **Green claims**: The Commission published its proposal for a Directive to regulate green claims, and while the obligations will not become binding until implementation in Member States legislation, we expect consumer organizations to use the definitions and parameters in the proposal to keep companies and organizations responsible.
- **Hazard-based measures**: PFAS is the most prominent proposal for restrictions based on the substances' persistent properties. The PFAS proposal will continue to be discussed by the ECHA committees, with the process expected to continue beyond 2024. In addition, national authorities and ECHA are initiating proposals based on the new hazard properties in the CLP Regulation, and in particular endocrine disruptors, PBTs, vPvB, PMTs, and vPvMs.
- Measures addressing **groups** of chemicals: ECHA has embarked on a program that looks at assessing the regulatory needs for groups of chemicals, and will propose measures accordingly.
- **One substance one assessment**: ECHA has recently outlined its plans.

In the UK, 2023 might be characterized as a year of high-profile missed deadlines and policy u-turns. For example, in January 2023, UK government committed in its statutory Environmental Improvement Plan to publish a Chemicals Strategy during 2023 to set out strategic priorities for addressing risks from chemicals and to encourage a more sustainable use of chemicals. While stakeholder groups continued to work hard behind the scenes to support this important initiative, the strategy (which was first promised back in 2018) has yet to materialize. More popular within the chemical industry was the UK government climbdown on its proposed revocation of all retained EU law (including most environmental and chemicals legislation). Instead, the scope of

the revocation was replaced with a targeted list in May, and the much-heralded display of 'Brexit freedoms' was scaled back to, in effect, a legislative 'spring clean.' This was largely viewed as a welcome pivot since it avoided unnecessarily increasing the regulatory divergence between the UK and EU.

The big news for 2024 may well be changes to the substance registration framework under UK REACH. Industry has estimated that the replication of the full EU REACH registration model for the GB market will come at an industry cost of around £2 billion. As a result, the UK government has been asked to consider an alternative approach and were tasked with exploring a new model for substance registrations, with the stated objective of "placing a greater emphasis on improving our understanding of the uses and exposures of chemicals in the GB context." The first substantive announcement about what that model may look like was published in November 2023. Initial indications are that, should the new model be adopted, there will be significant additional divergence from the EU REACH model. We await further details in a forthcoming consultation in the new year, and would encourage all affected to contribute.

Divergence is of course not limited to the legislative frameworks themselves, and divergence in terms of the management of specific chemistries is also evident. While the UK is also considering a broad PFAS restriction, it is anticipated that it will adopt a narrower definition of PFAS (requiring two fully-fluorinated carbon atoms rather than one), targeting only the most persistent chemistries. As such, PFAS could be a fascinating case study on regulatory approach and results, given that the regulators in both markets have a near identical regulatory 'toolbox.' While we currently see a 'reactive' UK approach to regulation of chemicals, watching the EU's endeavors and then either following suit or taking a different view, it remains essential to track developments in both markets as they continue to diverge.

Food Safety and Food Packaging Regulation

Following the entry into force of the new Recycled Plastic Regulation in 2022, there were fewer structural changes to the food packaging regulatory framework in 2023. Nevertheless, the evolution of food packaging regulation continued at pace, with some significant developments in the drive for more sustainable packaging solutions under the Green Deal and the new circular economy action plan. Notably, in December 2023, Commission Implementing Decision (EU) 2023/2683 entered into force providing the methodology for the calculation of recycled plastic content targets in single-use plastic beverage bottles under the Single-Use Plastics Directive.

Progress towards the new (EU) Packaging and Packaging Waste Regulation (PPWR) continues, and is expected to be agreed in 2024. It is anticipated that the PPWR will include significant packaging reduction targets, sustainability requirements, as well as a range of other measures across the entire packaging lifecycle.

In the UK, England, Scotland, Wales and Northern Ireland each has individual responsibility for the regulation of single-use plastic. While there appeared to be a common direction of travel of the national governments on this topic in 2023, implementation has generally been asymmetrical and the rules currently vary. Scotland was first to introduce broad restrictions on single-use plastics, with England and Wales adopting similar measures in 2023.

The latest single-use plastics bans in the UK were an important step forward to eliminate all avoidable plastic waste by 2042 (as required under the 25 Year Environment Plan), but the new rules were somewhat overshadowed by the delays to the new UK Extended Producer Responsibility (EPR) framework for packaging. It was announced that the introduction of new waste management fees, which will allow UK authorities to recover costs for the collection and management of packaging waste, by charging liable packaging producers under a new single point of compliance, will now be delayed by a year until October 1, 2025.

Following the introduction of the new Recycled Plastic Regulation, the Commission intends to further modernize the regulation of food contact materials (FCM), including the FCM framework regulation, Regulation 1935/2004 (the Framework Regulation). The Commission's stated view is that the FCM framework has several fundamental issues that need to be addressed. Indeed, an evaluation of the current FCM rules highlighted the following challenges:

- Safety insufficiently defined at EU level for most FCMs;
- Lack of capacity for risk assessment and management of all FCM substances and parallelly lack of priority on most hazardous substances;
- Lack of transparency on the safety of migrating substances;
- Insufficient capacity of public authorities to comprehensively enforce compliance and safety;
- Ever increasing complexity of specific detailed rules;
- Environmental challenges call for more sustainable production and use. However, rules do not encourage development of safer and more sustainable alternatives;
- New products entering the market that challenge current categories.

To (partially) answer these challenges, the current state of the revision inter alia aspires to bring the following noteworthy changes, categorised in six distinct pillars.

Pillar A: a rebalance of the focus onto the safety of the final material. This would be achieved first through a strengthening of Article 3 of the Framework Regulation with a view to ensuring that FCMs should be inert and that no migration should be allowed unless the migrating substances are known, have been risk assessed and their exposure is below resulting limit. Second, through a high level of transparency, where all substances that may migrate would be communicated to the producer of the final FCM. The idea behind this first pillar would be to drive innovation towards the design of inherently safer and more sustainable materials.

Pillar B: a change in the prioritisation of substances. In essence, substances would no longer be prioritised for risk assessment and risk management purely based on the need to authorise their use in the manufacture of FCMs. Rather, 'migratables' should be assessed for all FCMs according to a number of defined criteria.

Pillar C: a drive towards (more) sustainable FCMs. The aim under this pillar would be to focus on rules that would facilitate sustainability in the production, the use and the disposal of FCMs, by ensuring that fewer hazardous chemicals are contained in FCMs and by prioritising a more sustainable use of FCMs.

Pillar D: improving the quality and accessibility of supply chain information. This would be achieved through the revision of the approach to information system, to ensure that the objectives of Pillars A and B can be met.

Pillar E: the creation of a system for verifying compliance and undertaking official controls. The aim of this pillar would be to evaluate (i) aspects that need enforcement; (ii) the role of Competent Authorities; and (iii) the use of Notified Bodies and Designated Bodies.

Pillar F: on analytical methods. The aim would be a shift from the present focus on the enforcement of migration limits under the Official Controls Regulation (EU) 2017/625 towards a lower importance of migration testing.

However, the major changes currently envisaged – which are only aspirations that are still subject to change – are unlikely to reach the statute book in 2024. The Commission expects to finalise the assessment of the feasibility and the impact of the various proposed policy options in 2024 (including discussions in experts and stakeholder groups), with a view to conclude on its preferred policy option and to work towards a legislative proposal as of 2025.

In the UK, a consultation was undertaken in 2023 to establish whether the objectives of the FCM implementation and enforcement regulations were fit for purpose. It was concluded that the regulations continue to meet their objective of safeguarding consumers from the risk of chemicals that might otherwise have migrated into food at levels that affect human health or diminish its quality. Given the scale of the changes proposed in the EU to FCM regulation, it will remain important to monitor developments in both the EU and UK separately to ensure compliance with the diverging rules.

Criminal Enforcement and Investigations in the UK

Criminal/Regulatory Investigations in the UK

On October 23, 2023, the Economic Crime and Corporate Transparency Act 2023 (the "Act") was granted Royal Assent in the UK. Among other things, the Act renders large organizations liable to prosecution where (i) a specified fraud offence is committed by an associated person (defined as an employee, agent or subsidiary of the relevant organization, an employee of a subsidiary, or a person who otherwise performs services for or on behalf of the organization), (ii) for the organization's benefit, and (iii) the organization did not have reasonable procedures in place. The date for implementation of the Act is not yet clear but it is expected to come into force in the first half of 2024. Over the next few months, we also expect guidance to be produced by the UK government detailing what "reasonable procedures" look like, to assist organizations in assessing, and where necessary, improving their own compliance frameworks. As with the introduction of the Bribery Act over a decade ago, we expect 2024 to be a period of intense work with organizations reviewing and, as necessary updating, their existing compliance policies and procedures.

We also expect an increase in the number of investigations being opened into companies and partnerships as a result of the recent expansion (as of December 26, 2023) of the identification principle in the UK, whereby organizations may be subject to criminal liability where its "senior managers" commit a criminal offence while acting within the actual or apparent scope of his or her authority. Prior to this expansion, criminal culpability could only be founded based on the conduct of individual(s) representing an organization's "directing mind and will"- a much more limited class of senior individuals that "senior managers". A "senior manager" is an individual who plays a significant role in: (i) the making of decisions about how the whole or a substantial part of the activities of the body corporate or partnership are to be managed or organized; or (ii) the managing or organizing of the whole or a substantial part of those activities.

With a likely increase in the number of new investigations being opened overseen by a new and experienced Director at the UK Serious Fraud Office (the "SFO"), we consider that we can also expect to see more dawn raids. We can also expect to see more compelled requests for the provision of documents and / or information at a pre- investigative stage, following the extension of the SFO's powers to request such information in all its cases (and not, as previously, only in cases of international bribery and corruption).

From the regulators, we expect a continued focus on financial crime. The UK Financial Conduct Authority highlighted in its 2023 / 2024 Business Plan that financial crime remains one of its priorities, likely with a focus on AML, fraud and sanctions, as well as the effectiveness of a regulated firm's policies and procedures to identify and prevent financial crime. With such a focus, we expect enforcement actions in these areas to rise, as well as more non-traditional criminal authorities being willing to begin enforcement actions with the prize of multi-million-pound fines firmly in mind.

Individual Accountability and Workplace Culture in the UK

Promoting a healthy workplace culture – a place of diversity and inclusion with sound controls and good governance, where individuals can feel free to speak out, where remuneration does not encourage irresponsible behavior and where firms value robust adherence to its regulatory responsibilities – has for many years been a

stated aim of the UK Financial Conduct Authority (FCA) since, in the view of the FCA, a healthy culture is critical both to consumer protection and to well-functioning markets.

In 2024, we predict a growth in the scrutiny placed on workplace cultures, particularly in relation to non - financial misconduct. In September 2023, the FCA and the UK Prudential Regulation Authority (PRA) published a set of proposals[4] aimed at boosting diversity and inclusion, including a number of proposals relating specifically to the issue of non-financial misconduct. The FCA proposes to explicitly include non-financial misconduct within its rules and assessments, with the implication that such misconduct could result in a firm being deemed not to be "fit and proper" to be regulated. The proposals include making it explicit that "bullying and similar misconduct within the workplace is relevant to fitness and propriety and that similarly serious behavior in a person's personal or private life is also relevant". Further, the FCA proposes to bring offences such as sexually or racially motivated offences, or findings from a tribunal or court that a person has engaged in discriminatory practices, within its fitness and proprietary assessments. We expect a growth in the number of enforcement actions by the FCA and PRA in relation to non- financial misconduct, and a corresponding rise in the number of challenges mounted by individuals as to the relevance of an individual's private life to his or her employment or accreditation.

Outside the regulated sector, organizations are increasingly recognizing the threat of poor personal conduct or ethical issues to their very existence. In 2023, we saw a number of examples of senior corporate executives being forced to leave their positions following personal conduct or ethical allegations, and often following lengthy and expensive investigations. This trend is set to continue in 2024, particularly with the unyielding growth of social media and the pressure that this often puts on organizations to "do the right thing". Organizations are well advised to consider ethical behavior in major operational and strategic decisions and in its appointments and promotions, as well as provide training to embed their purpose and values.

ESG and Sustainability Accountability Focus in the UK

2023 saw continued focus on ESG, with organizations focusing on sustainable finance, supply chain resilience, new environmental regulations and reporting requirements, and implementing more ethical business practices. That focus will continue into 2024, with new laws, regulations and incentives being introduced to encourage greater sustainability.

[4] https://www.fca.org.uk/publication/consultation/cp23-20.pdf

UK Disputes

This year brings with it two eagerly-anticipated developments that are expected to further enhance the UK's standing as a leading destination for resolving international disputes. First, with the signing of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 19 Convention), individuals and businesses will benefit from greater certainty and efficiency when recognising and enforcing judgments internationally. Second, amendments to the UK Arbitration Act 1996 bring with them clarity and efficiency, but serve as an important reminder that parties should think ahead when agreeing their arbitration clauses – bespoke is better than off the shelf. We delve into both developments in more detail below.

UK's signing of the Hague 19 Convention – Enhancing Certainty and Efficiency in the Treatment of Foreign Judgments

On November 23, 2023, the UK announced that it would take steps to accede to the Hague 19 Convention "as soon as practicable".[5] On January 12, 2024, the UK duly signed the Convention, which will enter into force 12 months after being ratified by Parliament.[6]

The Hague 19 Convention is the product of a long-standing project by the Hague Conference on Private International Law (HCCH) to create a uniform treaty framework for the mutual recognition and enforcement of judgments on a multilateral scale. It is currently in effect among EU Member States (except Denmark) and Ukraine, and will enter into force with respect to Uruguay in October 2024. Signatories which are yet to ratify it include Costa Rica, Montenegro, North Macedonia and the United States.

Like the analogous rules concerning civil and commercial judgments under the Brussels Recast Regime, the Hague 19 Convention provides that its Contracting Parties shall presumptively recognise and enforce a qualifying judgment from another Contracting Party (Art. 4). This obligation is engaged provided that the relevant judgment: (i) concerns a civil or commercial matter not excluded by the treaty (Art. 2); (ii) renders a decision "on the merits" (including on costs, but not interim measures) (Art. 3); and (iii) satisfies at least one of thirteen "bases" for recognition and enforcement (Art. 5). A qualifying judgment may be refused recognition or enforcement under the Convention's framework, but only on limited grounds, such as fraud (Art. 7).

The UK anticipates that the Hague 19 Convention will provide "clear and effective mechanisms … to recognise and enforce UK judgments in other jurisdictions and vice versa".[7] Such a move is complementary to the UK's participation in the HCCH 2005 Choice of Court Convention, and is expected to enhance the mutual recognition and enforcement of judgments with EU/EFTA countries while the UK continues to negotiate its (re)accession to the Brussels Recast Regime. As recently stated by Justice Minister, Lord Bellamy KC, "[j]oining the Hague [19]

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[5] https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/outcome/government-response-to-the-hague-convention-of-july-2019-on-the-recognition-and-enforcement-of-foreign-judgements-in-civil-or-commercial-matters-hagu#:~:text=As%20set%20out%20in%20the,UK%20and%20in%20another%20Contracting (para. 77).

[6] https://www.gov.uk/government/news/uk-citizens-and-businesses-to-be-spared-time-and-money-on-cross-border-legal-disputes

[7] https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/outcome/government-response-to-the-hague-convention-of-july-2019-on-the-recognition-and-enforcement-of-foreign-judgements-in-civil-or-commercial-matters-hagu#:~:text=As%20set%20out%20in%20the,UK%20and%20in%20another%20Contracting (para. 78).

Convention marks a significant step forward for the UK within private international law and strengthens our appeal to businesses as a centre for dispute resolution."[8]

Reform of the UK Arbitration Act 1996 – An Important Reminder to Think Ahead and Agree Bespoke Arbitration Clauses

2024 marks the year we can expect the UK Parliament to introduce a number of changes to the Arbitration Act 1996. This follows a review process which has taken almost two years, resulting in the UK Law Commission recommending only limited amendments to the arbitration laws which have operated for more than 27 years and counting.

Here we highlight three amendments on topics that provide an important reminder of a critical point – namely, that arbitration is a process born from agreement, and the outcome of an arbitration can rely heavily upon, and oftentimes be altered by, what has been agreed in the arbitration clause.

Tribunals are to be given new and express powers to dismiss any claim, defence or issue which has no real prospect of succeeding. Tribunals cannot apply the power of their own volition; instead, parties must apply for it and they will then have a reasonable opportunity to make representations. However, party agreement rules the day. If the parties have agreed to opt out of the provision, it will not apply. And for some, there may be very good reasons to do so. Concerns about bullish counterparties or tribunals who may reach decisions in haste and fail to appreciate the nuances of arguments are just some examples that may justify agreeing in advance that this power does not apply.

Under the proposed amendments, the law which governs the arbitration clause will be the same as the law of the seat, unless the parties agree otherwise. This is a much simpler approach than applying current English case law to this often hotly-contested issue. However, simplicity is not always key. In some situations - many of which can be anticipated well before a dispute even emerges - having a different system of law applicable to the arbitration clause will provide considerable tactical advantages to certain parties and their situations.

Finally, the expected amendments will prevent those who are challenging jurisdiction from getting a second bite at the cherry. At present, a party who challenges the jurisdiction of the tribunal can typically do so twice - once before the tribunal, and thereafter before the courts. The process allows a challenging party who is unsuccessful to review the tribunal's reasons and then deploy new arguments and evidence in the challenge before the court. The proposed amendments ought to prevent this; they provide for court rules that would prohibit hearing new objections and evidence which were known and could have been discovered with reasonable diligence previously. The rules would also prevent the courts from re-hearing evidence heard by the tribunal unless in the interests of justice. On one view, these changes might avoid increased costs, delay and unfairness, and therefore should be welcomed. Conversely, they also pay significant deference to a tribunal's own determination of its jurisdiction. For the party concerned about this, and wanting to ensure the courts retain supervision, the answer is to include bespoke provisions in the arbitration clause.

The proposed reforms reinforce the age-old saying that we should "hope for the best and plan for the worst". Disagreements may be far out of mind at the time of agreeing to an arbitration clause, but time spent then considering issues like those highlighted above is time well-spent.

Parties have considerable power to shape a dispute by what they have, and have not, agreed in their arbitration clause and the consequences of those early choices can change the outcome of a dispute.

[8] https://www.gov.uk/government/news/uk-citizens-and-businesses-to-be-spared-time-and-money-on-cross-border-legal-disputes.

All too often parties agree to generic, off-the-shelf arbitration clauses which do not properly fit their circumstances, even at the time of contracting. Bespoke arbitration clauses should always be preferred and negotiated for.

Conclusion

In summary, the regulatory landscape in 2024 across the EU and UK is dynamic. The UK's persistent pursuit of post-Brexit divergence coexists with efforts to maintain alignment in certain areas. This dual approach presents challenges for businesses operating on both sides of the Channel, whether it be La Manche or the English Channel, making navigation complex.

It is also important to note that in 2024, Europe is set to host nine parliamentary elections, with four anticipated to bring about significant shifts in government and/or policy direction. We are monitoring all developments, and will continue to update you on any significant changes to ensure your business is prepared, and able to achieve competitive advantage and compliance to allow you to pursue growth strategy for your European interests.

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