SLAUGHTER AND MAY/

HORIZON SCANNING

2025 PROGRAMME

HORIZON SCANNING 2025 FOREWORD

Richard Smith
Partner

The global landscape continues to evolve rapidly, presenting both challenges and opportunities for businesses across the world. With elections in the UK, US and across the EU wrapped up in 2024, we will soon see how the new policy and regulatory landscape will unfold.

Emerging technologies, particularly the rapid advancements in artificial intelligence (AI), will continue to play a crucial role in shaping business operations and strategies. This evolution will have tangible impact on the energy transition and introduces new considerations for policymakers. The focus has shifted significantly from questioning the necessity of AI in businesses to determining the right strategy for its implementation and avoiding litigation risk.

In the UK, the policy landscape is undergoing significant transformation. The highly anticipated Employment Rights Bill has been described by the Prime Minister as “the biggest upgrade to workers’ rights in a generation”. We also expect a material impact on certain UK businesses as a result of employer National Insurance Contributions increases, set out in the Autumn Budget. Businesses across the UK have warned about the “harmful effect” this could have on wider society, from job losses to business closures especially in high employment, low margin sectors.

Nevertheless, there are many reasons for optimism as we look ahead to 2025. Likely regulatory easing in the US and falling inflation and declining debt costs are expected to stimulate M&A transactions. It remains to be seen whether the reforms to the UK and EU listing regimes will improve capital markets conditions in those jurisdictions. We also expect to see a strong return of private equity deal-making and commercial consolidation and investment in funds.

Businesses will need to intensify their sustainability efforts to meet increasing obligations and consumer expectations. Responsible practices can also be an opportunity to drive innovation and growth, with companies adopting decarbonisation technologies and more transparent reporting mechanisms. A just transition will remain a priority for many, with new policies and incentives to help countries reach ambitious net zero targets and promote a more circular economy. Meanwhile greenwashing and other ESG-related litigation will continue to increase.

We hope that you find our 2025 Horizon Scanning programme a helpful resource as you set your agendas and strategies for the year. Gathering insights from across all areas of the firm, the programme aims to support your decision-making and help you navigate complex risks and valuable opportunities on the horizon. Please do not hesitate to reach out to us if you would like to discuss any of the issues we cover within the publication.

CONTENTS

CAPITAL FLOWS

M&A health-check
Will favourable conditions and regulatory easing drive M&A growth in 2025? 6

M&A deals under the microscope
Making sense of the regulatory challenges 9

London calling
Is the UK stock market set for a comeback in 2025? 12

Private capital's year of building momentum
Is the stage set for 2025? 15

Private equity
The evolution of an industry 18

To run on or buy-out
Considerations for UK defined benefit schemes 20

The time to rethink business tax (again)? 22

Navigating the Asia M&A landscape
Strategic shifts and emerging opportunities 24

Financing in 2025 27

GOVERNANCE & SUSTAINABILITY

Getting your house in order
Governance in 2025 30

Labour's plans to reshape employment
A new era for the workplace 33

Beyond linear
Moving towards a circular economy 36

Clarity across borders
Delivering on due diligence in the value chain 39

CONTINUE TO VIEW MORE THEMES ENERGY TRANSITION DIGITAL CRISIS MANAGEMENT

Delivering decarbonisation How the energy transition is impacting UK and EU corporates	43
Duelling dynamics Insights into the AI-Energy Transition Nexus	46
Navigating a new wave of energy investment in 2025 The investment tide has turned	50

Digital regulation What to expect in 2025	53
Artificial intelligence Growing litigation risk	55
Tech M&A in 2025 A renewed focus on innovation and growth drives M&A opportunities	57
EU and UK operational resilience One aim, two approaches	59
Navigating digital transformation Lessons from the AT&T vs. Broadcom Dispute	61
Data commercialisation Opportunities knock in 2025	63

America first? The continuing rise of class actions in England and Wales	65
Reflections and projections on FCA enforcement	67
2025 activism playbook Trends, expectations, and corporate preparedness	70
M&A disputes A reminder on high risk areas for disputes and the latest on managing them	72
“All change” for consumer protection What you need to know	75

LISTEN TO OUR HORIZON SCANNING PODCAST

The Horizon Scanning podcast brings our insights to life with conversations that dive deeper into the challenges and opportunities facing global businesses in 2025.

Hosted by our Director of Knowledge and Learning, Claire Marshall-Barrand, the launch series for 2025 offers five short episodes introducing this year's major themes. Throughout the year, we'll continue the conversation with in-depth episodes exploring emerging issues as they unfold.

Subscribe now for exclusive perspectives from our partners on the topics shaping the future of business.

Search "Horizon Scanning Slaughter and May" on your preferred podcast app and stay tuned as we release new episodes throughout 2025.

M&A HEALTH-CHECK

Will favourable conditions and regulatory easing drive M&A growth in 2025?

Simon Nicholls
Partner

Richard Smith
Partner

Paul Dickson
Partner

Victoria MacDuff
Partner

Robert Innes
Partner

Sally Wokes
Partner

2024 was a mixed year for dealmaking, with deal values, if not volumes, increasing compared to 2023. Whilst private capital saw a moderate increase in activity, 2024 has been notable for the significant uptick in larger corporate-to-corporate activity in the UK, as companies have pursued strategic acquisition opportunities and a degree of business confidence has returned. UK public M&A has returned with vigour, led by multiple single-figure billion-pound transactions (albeit no £10bn+ megadeals) and a large number of small to mid-cap public-to-private deals.

The "problem" stories dominating the M&A headlines in 2024 have included increasing regulatory scrutiny and concerns around deliverability of transactions, private capital sponsors' struggles to exit their investments and stubborn valuation gaps – bridged, in many cases, by corporates using share consideration.

However, the outlook for 2025 is encouraging. Falling inflation and anticipated central bank rate cuts this year should result in further improvements to the interest rate environment, even if the speed and extent of those cuts remains uncertain. Political uncertainty caused by the US, UK and other significant elections around the world is now in the rear-view mirror and there are signs of greater flexibility being shown by key regulators. And several significant M&A drivers, from strategic transition imperatives to private capital value realisation, are converging.

THE PRIVATE CAPITAL CONUNDRUM

The private capital industry has been under the microscope on multiple fronts throughout 2024 – sponsors have been under pressure from investors both to return capital as funds extend beyond their expected investment horizons and to deploy record levels of committed "dry powder" raised over previous years.

The backlog of portfolio companies primed for exit is well-documented, as the unfavourable interest rate environment, financial shocks such as COVID-19, and the Ukraine war and weak capital markets have stunted sponsors' exit processes for investments made using cheap debt at the peak of the market. Even if expected returns cannot be realised, there is now an acceptance that the industry needs to normalise by completing the life cycle of these investments through exit processes. Stop-gap measures, such as the use of fund leverage facilities and continuation funds to return cash to investors, have eased some immediate pressure, but as we enter 2025, the onus on sponsors to exit investments and return capital is stronger than ever.

However, questions remain regarding the exit route for these investments. While there are signs that the US IPO market is strengthening and will offer an exit route for high quality assets in 2025, the same is unlikely to be true in Europe, at least in the first half of the year, as the European

IPO market continues to search for positive momentum despite listing regime reforms both in the UK and on the continent. Corporate buyers remain selective, and sales to corporates continue to fall relative to secondary transactions to other financial sponsors. We expect to see this trend continue as the private capital industry continues to expand and institutionalise. The cheaper cost of debt associated with an improving interest rate environment should assist exit processes by enabling buyers to offer more compelling prices and reduce the valuation gaps that have persisted throughout 2024. However, the general trend is unlikely to be universal – while some asset classes such as healthcare and med-tech are likely to see high levels of engagement, others such as consumer and real estate may take longer to emerge fully from the valuation challenges they have faced recently.

Alongside exiting investments, private capital sponsors continue to focus on deploying their record levels of committed "dry powder". Over recent years, higher interest rates have increased the cost of leveraged transactions for sponsors, exacerbating valuation challenges – with an important "lesser written" story of 2024 being the number of private capital buyers who have failed to meet sellers' expectations on value. While uncertainty around the speed and extent of anticipated interest rate cuts persists, the improvements in financing conditions expected to materialise in 2025 will assist here. We also expect to see sponsors using creative solutions to structure transactions and allocate capital with precision– for example, through stub equity offerings employing more complex capital structures in UK public-to-private transactions, and through more structured transactions such as minority investments.

CORPORATES CONTINUE TO SHAPE THE MARKET

We expect corporate-to-corporate dealmaking to continue to play a significant role in 2025, as companies look to grow and evolve through strategic transactions.

Energy and natural resources is likely to be a leading sector, where larger players look to re-shape their portfolios and smaller players seek synergies through consolidation. We also expect to see continued high levels of activity in financial services, where financial institutions look to modernise offerings, digitalise services, improve their digital infrastructure and compete against emerging players.

Whilst stabilising, the higher cost of debt during 2024 has favoured corporates able to execute deals with existing resources or their own equity – we have advised on public deals involving equity consideration for Direct Line, DS Smith, Redrow and Centamin. However, falling interest rates, coupled with an evolving and increasingly competitive financing market in which private credit providers are expanding offerings to corporates, could result in a greater number of corporates being able to use debt to pursue transactions in 2025.

Despite greater availability of funding, corporate buyers are likely to maintain their opportunistic approach to M&A with a tight focus on capital allocation. We expect conditions to continue to favour buyers, with truly competitive private M&A sales processes remaining generally challenging to construct.

TRANSATLANTIC DYNAMICS

Another headline of 2024 has been the valuation gap between UK and US indices, even if that is exaggerated by the different sector weightings of leading indices on either side of the Atlantic, as well as other factors such as accounting practices.

That has not – yet – led to a tide of US corporate bidders looking to acquire UK companies (with DS Smith's takeover by International Paper being an outlier on this front), although it has arguably made UK companies more attractive to private capital.

Our expectation is that high levels of confidence in the US market will see an increase in US outbound M&A in 2025, although the related impacts on inflation, interest rates and currency from anticipated US tariffs remain uncertain.

The disparity in trading multiples has also not led to a flood of UK PLCs seeking to switch their listing venues to the US, but M&A driven by companies seeking a "reverse" merger with smaller US peers cannot be ruled out.

AN EASING REGULATORY BURDEN?

A significant trend of recent years has been the increasing regulatory scrutiny over deals and the resulting impact on transaction deliverability, especially in certain sectors. This tougher approach was perhaps best exemplified on both sides of the Atlantic by the initial cross-regulatory opposition to Microsoft's takeover of Activision in 2023.

However, with leadership changes at the European Commission and the US DoJ and FTC, and some political pressure to soften approach, there are signs that regulatory scrutiny will ease and predictability of review processes will improve. In the UK, the CMA's recent decision to clear the Vodafone / Three UK joint venture subject only to behavioural remedies has been widely regarded as demonstrating that change in tack.

Nevertheless, from a transaction perspective, we expect the lengthened timelines now associated with regulatory review processes (including multiple foreign direct investment regimes) to remain a feature in 2025, with regulatory conditionality, buyers' regulatory commitments and associated deal protections continuing to be of paramount importance in transaction negotiations.

2025 OUTLOOK

Against that backdrop – expected improvements in debt market conditions, multiple constituents with transactions to execute and a potential lowering of regulatory hurdles – we see positive signs for M&A activity in 2025. Whilst confidence remains fragile, early momentum should provide a platform for M&A growth throughout the year.

CONTACT US TO FIND OUT MORE

Simon Nicholls
Partner
T +44 (0)20 7090 3372
E simon.nicholls@slaughterandmay.com

Richard Smith
Partner
T +44 (0)20 7090 3386
E richard.smith@slaughterandmay.com

Paul Dickson
Partner
T +44 (0)20 7090 3424
E paul.dickson@slaughterandmay.com

Victoria MacDuff
Partner
T +44 (0)20 7090 3104
E victoria.macduff@slaughterandmay.com

Robert Innes
Partner
T +44 (0)20 7090 5279
E robert.innes@slaughterandmay.com

Sally Wokes
Partner
T +32 (0)2 737 5312
E sally.wokes@slaughterandmay.com

M&A DEALS UNDER THE MICROSCOPE

Making sense of the regulatory challenges

Claire Jeffs
Partner

Bertrand Louveaux
Partner

Anna Lyle-Smythe
Partner

Lorna Nsoatabe
Partner

In recent years, dealmakers have grappled with an increasingly interventionist and unpredictable regulatory environment for M&A. However, there are signs that the momentum of interventionism is beginning to change with calls from politicians to make merger and foreign investment control more effective for economies, businesses, and consumers alike. With new administrations in the EU, UK, and the US, what changes can dealmakers expect in the year ahead?

REGULATORY HURDLES

Many international deals face several obstacles on their path to completion, including scrutiny under merger control, foreign investment and subsidy control regimes. An increased appetite for intervention has seen several authorities adopt broad approaches to claim jurisdiction over global transactions, as well as using novel approaches on substantive reviews.

Perhaps the most high-profile example was the European Commission's (EC) attempt to expand Article 22 of the Merger Regulation to claim jurisdiction over deals falling neither within its jurisdiction nor the jurisdiction of any Member State. This policy was notably used to block Illumina's USD8 billion acquisition of GRAIL. In September 2024, the European Court of Justice declared that approach to be illegal. While the EC sought to play down the significance of this development, it has been searching for new ways to review below threshold deals. For now, the EC has settled on the national "call-in" powers of certain EU Member States, which allow those Member States to review deals even when the turnover thresholds are not satisfied. There are eight Member States with these powers currently and several other Member States are seeking to establish similar powers. In October 2024, Italy used its call-in powers to refer Nvidia's acquisition of Israeli startup Run:ai to the EC, the first under the new approach.

In the UK, the Competition and Markets Authority (CMA) has been testing its jurisdictional boundaries in its investigations of several partnerships between major tech and generative AI companies. While most of these partnerships were found not to qualify for review, the CMA conducted a full review of (and cleared) Microsoft's hiring of certain former employees of Inflection and its entry into associated arrangements with their former employer. The CMA's ability to review deals has also been expanded with a new threshold capturing deals with a UK nexus where at least one party has an existing share of supply of 33% and turnover of at least £350m in the UK.

Once jurisdiction is established, the authorities are ready to apply novel and complex theories of harm to intervene in transactions. For example, in the EC's prohibition of *Booking/eTraveli* in 2023, it departed from established guidelines and applied an "ecosystem" theory of harm. That decision is now subject to appeal, although we will likely have

to wait a year or two for the judgment. Several authorities had also adopted a stricter stance on remedies in recent years, with a growing tendency in countries like the US for merging parties to abandon transactions in the face of regulatory concerns instead of seeking to negotiate remedies.

The regulatory landscape is further complicated by geopolitical tensions and the rise of protectionist sentiment. Foreign direct investment (FDI) has become a key area of concern, with governments eager to safeguard strategic industries that are crucial for national security, economic stability, and public safety. Several countries have significantly expanded their foreign investment screening regimes, broadening the scope of investments subject to mandatory reviews. In Europe, for example, 24 EU Member States now have screening mechanisms in place, with the remaining three (Croatia, Cyprus and Greece) all taking steps to implement new regimes. The EC has also proposed reforms to the EU FDI Regulation to address divergence and blind spots. In the UK, the number of filings made under the National Security and Investment Act has increased year on year, although the number of deals called for an in-depth assessment remains low.

Meanwhile, the EU's Foreign Subsidies Regulation (FSR) introduced a new suspensory regime in October 2023 for acquisitions satisfying thresholds related to turnover and financial contributions from non-EU governments. Since then, over 100 deals have been notified to the EC under the regime. In September 2024, the EC announced its first conditional approval under the FSR regime, after finding that the foreign subsidies connected to e&'s acquisition of certain PPF Telecom operations could distort the market post-transaction.

TIME FOR REFORM IN 2025?

Several business leaders and policymakers have called for reforms to this regulatory landscape. The current frameworks, they argue, are outdated, and often focused on protecting domestic competition at the expense of investment and international competitiveness.

In Europe, there is growing momentum for a rethink of the EU's merger control rules. In September 2024, Mario Draghi's report "The future of European competitiveness" advocated for a revamped approach to competition and merger reviews to boost growth and innovation. The report suggested that consolidation in sectors such as telecoms and defence should be encouraged to achieve industrial policy goals and that merging parties should benefit from an "*innovation defence*" where relevant.

Ursula von der Leyen, President of the European Commission, has also outlined the need for a "new approach" to competition policy which should be "more supportive of companies scaling up in global markets". Teresa Ribera, the EU's new Competition Commissioner, appears to be on board with this agenda, committing to reviewing the Horizontal Merger Guidelines to ensure that EU merger policy gives the "right weight" to the EU economy's needs and reflects overall policy objectives and market realities, "including possible efficiencies".

The UK is also reassessing its approach. Britain's Prime Minister, Sir Keir Starmer, has stressed that growth should be central to the Labour government's agenda, with a particular focus on ensuring that economic and competition regulators take growth seriously. The CMA appears to have taken this message on board. In November 2024, the CMA announced that it would "evolve" to help drive the government's growth mission. At the same time, the CMA announced that it would conduct a review in 2025 of its approach to merger remedies, including of the circumstances in which behavioural (rather than structural) remedies may be appropriate to offset the impact of lost competition. This pro-growth approach is already being seen in practice. In December 2024, the CMA announced its decision to clear the Vodafone/Three UK joint venture based on the behavioural remedies offered by the parties, which included investments in infrastructure.

The UK government has also announced plans to consult on a draft of the next strategic steer to the CMA. While the CMA will remain an independent authority, the steer will provide an indication of where it should focus its enforcement priorities and can be expected to focus on the Labour government's pro-growth agenda.

In the US, the agencies sought to adopt a more interventionist approach under President Joe Biden's administration. While antitrust policy did not feature highly in the election campaign, we may expect to see some changes under the next Donald Trump administration. The President-Elect has nominated Andrew Ferguson to be the Chair of the Federal Trade Commission and Gail Slater to be the Assistant Attorney General for the Antitrust Division at the Department of Justice. Both nominees are proponents of robust competition law enforcement and so it remains to be seen what impact they will have on merger control policy and enforcement.

WILL THE PENDULUM START TO SWING BACK?

As political leaders seek to adjust their regulatory frameworks in 2025, the need to assess competing priorities such as national competitiveness, robust competition enforcement and national security will mean that radical changes are unlikely to happen overnight.

While traditional metrics of market concentration and consumer harm are expected to remain crucial to substantive assessments, there may be an increasing emphasis on evaluating mergers in terms of growth and national or regional competitiveness. However, transactions that may consolidate market power or raise other concerns in strategic sectors could face heightened scrutiny.

For multinational companies, this evolving environment presents both opportunities and challenges, demanding a strategic approach to navigating the regulatory landscape. Dealmakers should factor in the increasing likelihood of conflicting regulatory approaches for global transactions, particularly if the proposed deal touches on politically sensitive sectors.

CONTACT US TO FIND OUT MORE

Claire Jeffs
Partner
T +44 (0)20 7090 4031
E claire.jeffs@slaughterandmay.com

Bertrand Louveaux
Partner
T +44 (0)20 7090 4173
E bertrand.louveaux@slaughterandmay.com

Anna Lyle-Smythe
Partner
T +32 (0)2 737 8410
E anna.lyle-smythe@slaughterandmay.com

Lorna Nsoatabe
Partner
T +44 (0)20 7090 3708
E lorna.nsoatabe@slaughterandmay.com

LONDON CALLING

Is the UK stock market set for a comeback in 2025?

Richard Smith
Partner

Simon Tysoe
Partner

Reports of the death of UK equity capital markets have been greatly exaggerated. While the London market certainly faces serious competition from overseas, the tide is turning on the City declinism of recent years amid a series of co-ordinated efforts from UK government, regulators and the LSE to boost London's appeal and attract and retain listings, with more on the reform agenda in 2025. We look at the key issues and steps being taken to strengthen UK capital markets and the extent to which they will improve London's ability to compete in 2025.

REGULATION OF LISTED COMPANIES

Last year the FCA introduced the most significant changes to the listing regime since the 1980s. In particular, it removed eligibility criteria that previously deterred companies from listing - such as requirements to demonstrate a revenue-earning track record and restrictions on dual class share structures – which should help attract high-growth tech companies, especially from the UK's thriving fintech sector. In addition, listed companies no longer need to obtain shareholder approval for related party transactions or significant transactions, making it easier for them to compete for desirable assets against private companies, PE funds and companies listed overseas. Regulation of UK Main Market companies is now broadly aligned with other major exchanges.

In 2025, there are further changes on the horizon. As part of changes to the UK prospectus regime, the FCA will raise the threshold at which a listed company needs to publish a prospectus when doing a secondary capital-raising from 20% to, most likely, 75% of a company's share capital. In principle, this will make it quicker and cheaper for listed companies to raise large amounts of follow-on capital. We also expect progress implementing other recommendations made by the Secondary Capital-Raising Review, such as shortening the period during which a rights issue or open offer must be open for acceptance and reducing the minimum notice period for an EGM.

These regulatory changes are helpful but, in order to increase the amount of capital available, structural changes are needed, particularly among UK pension funds. There is also growing recognition that investors and regulators need to be prepared to accept more risk.

AVAILABILITY OF LONG-TERM CAPITAL

The UK reportedly has the world's second largest pool of pension capital, but regulation and risk-aversion over the last 25 years have driven pension schemes to shift capital from equities to bonds, and from UK to global investments. As a result, UK pension schemes now have less of their assets allocated to domestic equities (around 4.4%) than most other countries (the global average is around 10%).

As a first step towards unlocking more pension capital, in 2023 many of the UK's largest DC pension schemes signed the "Mansion House Compact", committing them to allocate at least 5% of their default funds to unlisted equities by 2030. In 2025, the UK government will take forward plans to consolidate DC schemes and the £360bn Local Government pension scheme, which is fragmented

into 86 individual funds in England and Wales, into a series of "megafunds" that the government hopes will unlock billions of investment in British infrastructure and high-growth companies. Having fewer, larger schemes should make it easier for them to employ more diverse investment strategies and take more risks, including by investing more in private companies. In turn, this should encourage home-grown companies to stay and list in the UK. Schemes will also be encouraged to focus more on net returns rather than costs. To attract more tech companies to go public, schemes will also need to be willing to focus more on prospective capital growth and less on dividends. But mandating private sector schemes to allocate a minimum proportion of their assets to domestic equities, as has been tried in some countries, seems unlikely to occur.

RETAIL INVESTMENT

Although changing UK culture around investing will take time, there is growing recognition that individuals need to save more for their retirement. In order to obtain returns that keep pace with inflation, individuals need to invest in risk assets like shares. Reforms are likely to be brought forward in 2025 to make it easier for investment firms to provide advice and guidance to retail investors. Other regulatory changes will widen access to investment research, and developments in technology will make it ever easier to buy shares in specific companies and investment funds. Over time, this will help increase the amount of capital available in public markets.

EXECUTIVE REMUNERATION

UK companies increasingly find themselves competing for executive talent against global peers. Comparisons with the US are particularly stark, with recent data showing that the median pay for CEOs of S&P 500 companies in 2023 was more than three times that of a FTSE 100 chief executive.

But there are signs of investors in UK companies becoming willing to accept more competitive remuneration packages. During the 2024 AGM season, several large UK companies managed to obtain shareholder approval for more generous remuneration policies. In October, the Investment Association (IA) updated their Principles of Remuneration: the new version emphasises that companies can depart from the Principles if the circumstances justify it. The IA also acknowledges that "hybrid" Long-Term Incentive Plans (LTIPs), combining performance shares and restricted shares that require ongoing service but not challenging performance conditions, may sometimes be justifiable. In 2025, we expect executive remuneration to form an increasing part of the conversation about attracting and retaining companies to a London listing.

THE DRAW OF THE US

While media attention has focussed on companies that have chosen to migrate their primary listing to New York, only a few have in fact done so and all of them are predominantly US businesses for whom the US market make sense. Most companies listed in London have concluded that, at least for the time being, the US grass is not greener, and investors would prefer them to remain here. Uncertainty about whether and when the company may be included in US indices, as well as the increased complexity and cost involved in the process, also need to be factored in.

Although at first glance there is a valuation gap between UK and US markets, a significant proportion of the gap disappears if the US tech giants (who have no real peers in the UK or anywhere else) are excluded and analyses of like-for-like comparable companies have shown that UK stocks are either in line with US peers or higher in 40% of cases. Similarly, in relation to liquidity, if the 79 mega-cap stocks that account for over half of US turnover are excluded, the average large cap daily value traded is only 1.3 times that in London. The £30 billion of capital raised by UK-listed companies to support them through Covid, and recent ECM transactions such as the £7 billion rights issue by National Grid – the largest follow-on transaction in Europe by capital raised – and the £2.4 billion secondary sale of shares in Haleon have proved there is plenty of capital in the London market.

SECONDARY SALES OF PRIVATE COMPANY SHARES

With IPOs having been difficult to execute, we have seen larger private companies seeking to provide liquidity to founders, employees and early-stage investors via secondary sales, often alongside a primary fundraising round. In 2025, FCA will proceed with its proposals for a new "private stock market", establishing the PISCES regulatory framework to facilitate the intermittent trading of shares in participating private companies in a controlled environment that bridges private and public markets. Loosely modelled on similar facilities in the US, such as Nasdaq Private Markets, the PISCES framework is partly intended to encourage private companies to stay and grow in the UK, and to ease their transition to public markets. To incentivise use, purchases of shares via a PISCES platform will be exempted from stamp duty. We expect PISCES to attract a lot of attention in 2025, with the first platforms likely to become operational in the second half of the year.

2025 FORECAST

Huge amounts of capital have recently been available in private markets, enabling companies to stay private for longer, and we expect this to continue in 2025. But private market investors typically look for a return within 5-7 years – whereas public market capital is permanent – so investors will always need an exit. Although UK IPO activity this year has again been modest, the principal causes are geopolitical developments and the economic cycle, not structural weakness. As we approach 2025, the traditional benefits of being listed, such as prestige, access to capital, greater flexibility to finance acquisitions and reward staff, and price transparency remain intact.

The end of 2024 saw genuine signs of the UK IPO market returning. In December, Canal+ became the largest London listing since Haleon was spun out of GSK in 2022. Recently we have also seen private equity sponsors coming back to public markets and more actively exploring IPOs as a viable exit strategy, as well as a wave of UK tech companies ramping up their IPO preparations for 2025 or early 2026 in the hope of taking advantage of pent-up demand for new listings.

There is certainly more work to be done on the revival of the UK capital markets, with pension next on the reform agenda for 2025. But often, sentiment is everything, and the stage is set for a comeback in new listings in 2025. London is calling for a good news story.

CONTACT US TO FIND OUT MORE

Richard Smith
Partner
T +44 (0)20 7090 3386
E richard.smith@slaughterandmay.com

Simon Tysoe
Partner
T +44 (0)20 7090 3490
E simon.tysoe@slaughterandmay.com

PRIVATE CAPITAL'S YEAR OF BUILDING MOMENTUM

Is the stage set for 2025?

Harry Bacon
Partner

Filippo de Falco
Partner

Ed Fife
Partner

Aleezeh Liaqat
Partner

2024 remained a challenging year for private equity fundraisings, investments and exits. Assets purchased in the era of cheap leverage and high multiples remained locked, with many auction processes failing to take off or being interrupted, while macro-economic factors, high borrowing costs and uncertainty in advance of UK and US elections reduced appetite for deal making. This was evident particularly in the first half of the year, with sponsors turning to alternative paths to liquidity such as continuation fund transactions (at record levels), use of NAV financings, dividend recapitalisations or secondaries transactions.

Over the course of 2024, we saw the outlook for private markets steadily improve, giving us cause for optimism as we enter 2025. Inflation and interest rates stabilised, and banks gradually returned to the leveraged financing market alongside credit funds, reducing yields and the overall cost of capital. As momentum builds on the deal side, sponsors appear primed to return to sale processes to realise assets, potentially unlocking further investment activity.

PRIVATE EQUITY

A number of positive trends are expected to continue in 2025 as market sentiment improves:

- **Focus on exits:** The aggregate value of deals increased in 2024 compared to 2023, although deal volume is down, particularly in Europe. Sponsors are focusing on fewer but larger transactions, mirroring the trend of LPs investing in fewer but larger funds (leading to greater consolidation among managers). At the same time, fundraising continues to outpace dealmaking, resulting in multi-year lows in capital deployment relative to dry powder. For many sponsors, the focus in 2025 is therefore likely to be on exiting assets that have been on their books for longer periods.
- **Competition from strategics:** Cash-rich corporates increased strategic M&A activity, a trend that is likely to remain as macro- and market-based tailwinds continue. The increased competition should support M&A market fundamentals, further narrowing the valuation gaps that saw deal processes stall in the past. At the same time, attractive, stable assets may achieve higher multiples from strategics than sponsors are prepared to pay, save where they can acquire through existing portfolio companies or platforms, including the recent sale of St Modwen Homes to Apollo's portfolio company, Miller Homes, on which we acted.

- **P2Ps and carve outs:** Depressed stock market valuations in the UK have led to acquisition opportunities for sponsors. Carve outs from listed companies have increased, with sponsors often prepared to purchase a division for a price representing a premium to the listed seller's market cap. Examples include Inflexion's acquisition of the GRC division from Marlowe plc and Ascential plc's disposal of its product design business to Apax Partners, on which the firm acted. At the same time, the number of P2Ps in 2024 has surpassed 2023 levels with an increase in transactions featuring unlisted partial share alternatives, reflecting shareholders' willingness to retain ongoing exposure to the company. CVC consortium's £5.4 billion take-private of Hargreaves Lansdown plc made the news as the largest example, although activity was more prevalent at the mid-market level of the FTSE or AIM (see, for example, the Fortress offer for Loungers plc on which we acted).
- **Regulatory scrutiny:** The private capital industry remains high on the regulatory agenda, with the increased scrutiny by anti-trust and other regulators leading to longer timetables and higher costs. It will be interesting to see whether the CMA's renewed desire to pursue the Government's pro-growth strategy (as shown in their approach to the Vodafone/Three merger clearance) also results in a more positive environment for sponsor deals in the UK.

PRIVATE CREDIT

Private credit has experienced remarkable growth in recent years, with global assets under management rising from USD1 trillion in 2020 to approximately USD1.7 trillion by the third quarter of 2024. While this expansion was partly driven by the retrenchment of banks, it also reflects the structural flexibility and efficiency inherent in the private credit asset class – characteristics that are increasingly relevant across other areas of financing. Key trends include:

- **The return of the banks:** Banks resumed lending to the leveraged finance market in 2024, encouraged by a more stable economic backdrop and falling interest rates. The return of banks led to tighter spreads and reduced borrowing costs, as well as some harmonisation of terms, with direct lenders softening documentation to compete with the distributed market. Benefiting borrowers, these developments triggered a wave of refinancings last year, a number of which were conducted as dual-track processes designed to test the market and secure the most favourable terms. A brighter outlook and the emergence of a more competitive financing market also drove an increase in leveraged buyouts in 2024, a trend we expect to continue this year, supported by a stable funding platform that increasingly favours borrowers.
- **Collaboration and hybrid structures:** While competition between private credit funds and banks has, in some cases, produced positive outcomes for borrowers, there is also a growing trend of collaboration among financing providers, with private credit and the broadly syndicated market starting to work together, offering tailored solutions to meet the diverse requirements of borrowers within the context of the interest rate and market risk cycle. We saw an increase in the use of hybrid structures last year, with banks providing the first lien senior-secured portion of the financing on certain deals, and direct lenders providing the junior tranches. This structure benefits both sides, as it allows private credit funds to participate in a wider range of deals and put capital to work, while banks can transfer the riskier elements of the financing to their less regulated counterparts.
- **Regulatory impact:** With implementation of the final Basel III rules on the horizon, we may see banks increasingly seek to avail themselves of such hybrid structures in the coming year. In the extreme, the stricter capital requirements may hasten the move towards private credit. Regulation of the private credit market is, however, also one to watch in the coming years, with concerns being raised with increasing frequency about leverage levels and resulting systemic risk to the wider market.
- **New asset classes:** Beyond the M&A and corporate finance markets, private credit is expanding into other asset classes, most notably asset-based financing, and infrastructure and project financing, a trend that looks set to continue into 2025. In this space, there has been a notable increase in private credit funds with mandates focused on energy transition or infrastructure. These markets are particularly compelling for private credit due to their higher risk-return profile, tighter covenants, and long investment horizons. In particular, project finance aligns well with the needs of key investors in these funds, such as life insurers with long-term liabilities and asset-liability matching policies.

LOOKING AHEAD

Momentum is building in private markets, and the outlook for 2025 is positive. As pressures to exit assets continue to mount, and strategic interest in acquiring operationally stable, high quality assets increases, sponsors who have been able to deliver operational improvements and other "alpha generating" initiatives in their portfolio companies should reap the rewards of this discipline. This in turn should begin to unlock investment and fundraising activity, as market conditions stabilise and become more predictable, although that is likely to take more time in the face of geopolitical risks and changing regulation. The market is likely to favour those sponsors who can spot opportunities amid recent market dislocations or can provide innovative capital solutions to a range of market participants.

CONTACT US TO FIND OUT MORE

Harry Bacon
Partner
T +44 (0)20 7090 3258
E harry.bacon@slaughterandmay.com

Filippo de Falco
Partner
T +44 (0)20 7090 5335
E filippo.defalco@slaughterandmay.com

Ed Fife
Partner
T +44 (0)20 7090 3662
E edward.fife@slaughterandmay.com

Aleezeh Liaqat
Partner
T +44 (0)20 7090 3695
E aleezeh.liaqat@slaughterandmay.com

PRIVATE EQUITY

The evolution of an industry

Harry Bacon
Partner

Filippo de Falco
Partner

Aleezeh Liaqat
Partner

Since the advent of the modern private equity industry in the early 1980s, private equity houses have traditionally adopted the classic model of a buyout fund, raising capital from a club of large institutional investors to fund acquisitions and drive growth. This model has endured, notwithstanding the global expansion of the industry to accommodate a diverse range of firms and strategies.

However, the playbook is now changing. Against the backdrop of continued geopolitical and economic turbulence – and pressure from LPs to transact – two trends which demonstrate that PE firms are searching for innovative ways to generate value have emerged.

First, sponsors have been looking for ways to tap into the enormous pool of individual investor capital. GPs are raising "evergreen" (or perpetual) funds, alongside traditional (close-ended) vehicles, to facilitate access to the private wealth market.

Second, sponsors are seeking to expand their fee-bearing Assets Under Management (AUM) through consolidations and acquisitions.

WHAT ARE SOME OF THE KEY DRIVERS OF THESE TRENDS?

- **Tough exit markets; the denominator effect:** While some exit channels started to open up, market conditions in 2024 remained challenging – sponsors were reluctant to sell at low prices (this depresses fund performance) and recovery in the IPO markets was slow. Fewer exits meant that less money was being returned to institutional investors. Additionally, the denominator effect – driven by weak public market valuations – also caused institutional investors to become overallocated to PE. Both of these trends, in turn, restricted sponsors from relying on institutions as the primary source of capital for new funds.
- **Individual investor source and appetite:** Individual investors represent around half of global AUM, but only 16% of the AUM in alternative asset funds (Bain, 2023). They have plenty of appetite to invest in the PE market, which provides a means to diversify and – against the backdrop of public market volatility – generate comparatively (and significantly) higher returns.
- **Regulatory encouragement:** Regulators, following a drive by governments to boost investment in the real economy, have softened their approach. For example, regulations on European Long-Term Investment Funds (ELTIFs) have been loosened to lower the barriers to entry by retail investors (e.g. by allowing redemptions and secondary sales within funds, and reducing minimum investment requirements for retail investors).
- **The rise of the mega-fund:** With both less money and less flexibility to deploy further capital into the PE asset class, institutional investors have become increasingly selective about whom they choose to back. There is an increasing preference for a small group of well-established mega-funds, who can offer a broader range of investment options and services. This leaves smaller players – who have struggled to raise capital – ripe for acquisition by these mega-funds, who themselves see an opportunity for AUM growth.
- **AUM as a measure of success:** the flight to a smaller group of larger funds has, in turn, resulted in an increasing focus on fee-bearing AUM as a key performance indicator, especially for publicly listed asset managers, further driving consolidation in the industry.

THE RISE OF THE EVERGREEN FUND

Semi-liquid, or evergreen funds, are now increasingly being used by GPs to draw in professional and retail investors. Investors can, on day one, fully deploy their capital into a vehicle which already has a significant portfolio of assets (without having to reserve funds for capital calls). Subscriptions and redemptions can be made on a periodic basis (often monthly or quarterly), with minimum commitments set at relatively low levels (contrast this with long lock-ups and high buy-in costs of traditional buyout funds).

The main advantage of evergreen funds for GPs is their unlimited lifespan: this provides GPs with more flexibility to sell assets when market conditions are favourable, and removes some of the pressures on them to carry out new, lengthy fundraising processes. By the same token, the move away from the traditional close-ended buyout fund structure also presents new challenges. The administration of an evergreen fund often requires a significant step-up in operational capacity (given ongoing subscriptions and redemptions, as well as more frequent valuations and fee calculations) and generates additional compliance costs. The flexibilities afforded to investors also put additional pressures on GPs to both deploy funds quickly (to start earning fees and avoid a drag on returns) and manage the liquidity requirements of investors.

Despite these difficulties, there are plenty of examples of sponsors who have (or are looking to) launch evergreen products. In January 2024, Blackstone launched Blackstone Private Equity Strategies Fund (BXPE), its largest ever fund for wealthy individuals, which has since attracted inflows of around USD6 billion, and currently holds over USD650 million in assets. Others are following suit – Carlyle subsequently launched evergreen private credit and private equity funds for retail investors and Apollo launched its evergreen S3 Private Market Fund to give high net worth individuals access to the secondaries market.

CONSOLIDATIONS AND ALLIANCES

Consolidation in the PE industry has been rife in recent years, with 2024 seeing the largest wave of GP acquisitions in a decade. Fuelled by an increasing regulatory burden, higher compliance and other costs, and investor preferences for established and diversified managers, sponsors have pursued consolidation opportunities to expand into new asset classes or geographies and grow AUM (without having to build a presence organically). BlackRock's acquisition of Global Infrastructure Partners and its recent announcement to acquire HPS Investment Partners are notable examples. The rise in public listings and GP stake sales has helped to provide PE firms with the financial firepower and (for listed managers) the ability to use stock to fund these strategic acquisitions (see, for example, Bridgepoint's acquisition of ECP or CVC's acquisitions of stakes in DIF and Glendower shortly after CVC's listing in 2024).

Sponsors are also reacting to competitive pressures by becoming more innovative in how they look to grow and retain AUM, with firms searching for new sources of permanent capital, increasingly open to GP stake sales and looking to team up with other sponsors on liquidity solutions. Moonfare and iCapital are now offering stakes in PE and venture capital allocations to retail investors, while asset managers such as Fidelity Investments and Lexington Partners have partnered with these platforms to make their funds available to a broader range of investors. BlackRock and Partners Group recently launched a joint investment product for retail investors, whilst Apollo and State Street have proposed an ETF (yet to be approved by the SEC) invested in public and private credit.

OUTLOOK

In a challenging fundraising environment and turbulent market, and with political pressures helping to dismantle the traditional barriers to private markets, PE firms looking to grow and retain AUM are gearing up to become full-service providers across a range of strategies, asset classes and investor types. The consolidation trend is widely expected to continue, with sponsors such as EQT and Partners Group predicting a drastic decrease in the number of fund managers from >10,000 currently to just over 100 mega-funds in the next decade. This may lead to a market where fewer, larger houses (increasingly resembling traditional, multi-strategy asset managers) compete for institutional funds, while smaller players are forced to join forces, unless they can show real ability to generate alpha in specialised sectors or niches.

Retail offerings, consolidations and alliances show that, rather than relying solely on the traditional buyout fund model which has served the PE industry well over the years, sponsors are now focusing on the next stage of the industry's evolution and coming up with innovative ways to achieve it.

CONTACT US TO FIND OUT MORE

Harry Bacon
Partner

T +44 (0)20 7090 3258
E harry.bacon@slaughterandmay.com

Filippo de Falco
Partner

T +44 (0)20 7090 5335
E filippo.defalco@slaughterandmay.com

Aleezeh Liaqat
Partner

T +44 (0)20 7090 3695
E aleezeh.liaqat@slaughterandmay.com

TO RUN ON OR BUY-OUT

Considerations for UK defined benefit schemes

Charles Cameron
Partner

Thomas Peacock
Partner

Whilst the total value of defined benefit (DB) scheme liabilities being transferred to an insurer in the first half of 2024 has been lower than expected, the number of transactions (134) has eclipsed another record in the UK, the highest number of deals ever recorded for a six-month period. The UK derisking market is expected to remain strong into 2025 and beyond.

NEW LEGISLATION AND INCREASING DB SURPLUSES

New UK legislation which came into force in September 2024 requires sponsors and trustees to document a long-term objective for their DB scheme, whether that be to run-on, transfer to an insurer or transfer to a commercial consolidator. They must also agree and document a funding and investment strategy on how they will ensure a scheme is funded and invested consistently with that objective going forward.

According to PwC's Buyout Index, the surplus of the UK's 5,000+ corporate DB pension schemes grew to £330bn at the end of October 2024 from £300bn at the end of September 2024. With the introduction of the new DB funding and investment regime and such strong surpluses, many sponsors of the largest UK DB schemes are evaluating their long-term strategies. This includes considering whether, and if so when, insurance remains the best option for them and their scheme's members, or if they should run on their scheme, and if so for how long and under what conditions, to generate additional surplus. This debate was further elevated by the publication of the UK government's consultation in March 2024 on how they could make it easier for trustees of well-funded schemes to make payments from surplus to employers and scheme members, in the hope that employers will then use that cash for new capital investment in the UK. There is clearly also more to come from the government on future investment and surplus options for UK DB schemes.

We have also seen examples in members forming action groups, such as the BP Pensioner Group, to bring public attention on sponsors or trustees in two key areas - discretionary pension increases in times of high inflation and non-mirroring of discretionary benefits when insuring.

UNDERSTANDING RISK IRRESPECTIVE OF YOUR LONG-TERM STRATEGY

Whichever option is taken, one area deserves attention from both sponsor and trustee: are the risks which remain the sponsor's responsibility post buy-out properly understood and mitigated? Acceptable mitigation requires a full understanding of how and when those risks can arise.

In the case of scheme investments, delaying a buy-in, for example, may facilitate the run-off of illiquid assets, meaning that sponsors do not run the risk of a funding gap caused by illiquid asset haircuts on early sale (which may also achieve a more competitive process with insurers when the scheme is taken to the market as a more attractive, easily transactable prospect).

What about uninsured liabilities? These can arise in three main areas:

- uncertainty as to benefits, for example where amendments to scheme rules are invalid or do not accord with the parties' intentions at the time;
- data errors, such as not accurately recording changes in membership; and
- administration errors, where schemes have not been administered in accordance with their governing documentation and overriding legislation.

The due diligence process is crucial as it provides a solid foundation to the sponsor assessment of the risk of uninsured liabilities emerging in the future which will help inform its end-game strategy. Completing full due diligence before going to the insurance market will ensure greater certainty over the final premium paid. Furthermore, the extent and outcome of the due diligence process will inform any decisions as to mitigation, including whether to purchase run-off and missing beneficiary insurance or the more expensive residual risk insurance which insures against unknown member benefit entitlements not included in the insurer data and benefit specification (subject to material exclusions).

Whilst the due diligence process is trustee led, from a governance and reputational perspective the sponsor should be aware of the risks for which it is contingently liable. We have seen a huge variation in approach to due diligence from trustees. The sponsor should input into the process to ensure that it:

- understands the due diligence carried out and the risks of the methodology adopted. It is vital to understand what has not been looked at. For example, have predecessor scheme trust deeds, vaulted papers and adviser files been reviewed? What steps have been taken to verify the benefit specification; how will member data be checked – if on a sample basis, what is the sample size and how will it be selected; what data items will be recalculated and how?;
- understands any points raised by the insurer or the trustee's advisers in addition to the matters identified by the trustee and how these are responded to;
- is involved in deciding how to resolve any issues identified e.g. where scheme benefit changes are proposed in order to align governing documents and administration practice;
- is involved in agreeing the terms of any bulk purchase annuity or residual risk policy with the insurer which addresses the issues identified and understands the consequences of those terms.

We recommend that the scope and process for due diligence is jointly agreed by the trustee and the sponsor at the outset (i.e. in advance of any transaction) so that both parties are aware of the level of comfort to be provided by the exercise. The strongest level of comfort will require the sponsor, the trustees, the scheme's legal adviser and the scheme administrator to work together to review a wide range of documents, data and calculations. In particular, any due diligence scope should be considered separately from the question of what, if any, insurance cover to purchase. Through early and ongoing involvement, the sponsor can be more comfortable with the likelihood of uninsured risks emerging that may ultimately remain its responsibility post buy-out.

CONTACT US TO FIND OUT MORE

Charles Cameron
Partner
T +44 (0)20 7090 5086
E charles.cameron@slaughterandmay.com

Thomas Peacock
Partner
T +44 (0)20 7090 4256
E thomas.peacock@slaughterandmay.com

TIME TO RETHINK BUSINESS TAX (AGAIN)?

Dominic Robertson
Partner

Charles Osborne
Partner

Sarah Osprey
Partner

Over the last year, many businesses will have incurred significant costs in adapting to the new global corporate minimum tax, but following the US election in November 2024, there are concerns about the effectiveness of this measure without US support.

It's unlikely that we will see the UK or EU repeal their implementation of the global minimum tax during 2025, but they may reconsider other policy choices in light of US tax changes which will have a global impact.

On both sides of the Atlantic, the search for the right tax mix and level of taxation to cover public spending and stimulate growth will underly policy decisions. Where the US may rely on substantial business tax cuts and a potential increase in tariffs, the new European Commission's focus is on energy taxation and further harmonisation of tax systems across the Member States. The UK's Labour government has promised corporate tax certainty, but also announced significant employment tax increases falling on business.

One thing is clear. Multinational businesses will have to keep adapting to navigate the tax landscape to select the right investment opportunities and prevent reputational risks that arise from tax disputes.

BUSINESS TAX UNDER THE UK LABOUR GOVERNMENT: "PRO-WORKER AND PRO-BUSINESS"?

The Labour government published their "Corporate Tax Roadmap" at the Autumn Budget in October 2024, hoping to assuage concerns about its stewardship of the tax system. This publication was, however, accompanied by significant changes to employers' national insurance contributions which are predicted to affect employment and wages.

The Roadmap emphasised that, until 2028 or 2029, the corporation tax rate would remain capped at 25%, and that the patent box and generous capital allowances remain in place. It reiterated the government's commitment to the global corporate minimum tax, and the government emphasised that, apart from noted changes in the Roadmap due to consultation or unforeseen developments, there should not be any further surprises.

For sectors such as private equity, Labour's personal tax measures will also be crucial. As details emerge of the proposal to tax carried interest as income (albeit at lower rates), industry may question the stability of the new regime. Other countries' special tax regimes for new arrivals may well look attractive to highly-paid and mobile talent – just how attractive will depend on the final design of the new residence-based taxation regime that will replace the current "non-dom" rules.

The UK government has also announced that it will increase the tax authority's compliance workforce by almost 20%, which will inevitably translate into increased investigatory activity. We expect continued scrutiny of tax deductions for debt financing and the pricing of intra-group transactions. The significant tax savings from self-employment will also lead to continued disputes over the dividing line between employment and self-employment.

US TAX UNDER TRUMP: MAKE BUSINESS GREAT AGAIN?

Following the November 2024 election, the Republicans now hold the Presidency and both Houses of Congress. At a minimum, temporary tax cuts introduced during President Trump's first term are expected to be extended or made permanent.

But the proposed tax changes may go much further. Federal corporate taxes could be reduced to as little as 15% for some US businesses making products in the US. Tax incentives for green investment, enacted under President Biden in the Inflation Reduction Act, may be reduced. President Trump has also signalled the possibility of significant increases in tariffs which would have fundamental repercussions for businesses exporting to the US.

Businesses based in countries (such as the UK and many EU Member States) that impose a digital services tax face the prospect of potential retaliatory tariffs against measures which are seen as taxing successful US businesses.

Republicans also consider elements of the global corporate minimum tax detrimental to US business. President Trump could seek to impose similar retaliatory measures against countries that have implemented the tax. The UK and EU Member States would again be amongst those jurisdictions, and the possibility of such retaliatory measures could ultimately mean that the international agreement on the global minimum tax (and its implementation) may collapse in the long-term.

EUROPEAN COMMISSION'S VISION FOR 2025 TO 2029

It appears that energy taxation and encouraging investment into clean technologies will be the top priority for the incoming European Commission from 2025. For the first time, the EU tax portfolio will fall within the remit of the new Commissioner for Climate, Net Zero and Clean Growth, Wopke Hoekstra.

If President Trump scales back comparable environmental incentives in the US, it's possible that the EU's policy in the area may be set with one eye to attracting investment that might otherwise have been located in the US – though one challenge will be how the EU funds the huge cost of a programme comparable to the US Inflation Reduction Act.

Despite the Commission's high-profile win before the European Courts in the *Apple* State aid case, opening new tax State aid investigations is unlikely to be a high priority. The fact pattern in *Apple* was unique among the State aid cases, and other court decisions have been clear that Member States are free to set their own tax rules.

It's more likely that the Commission will continue to push for the broader harmonisation of corporate tax rules across the EU. But given previous failed attempts, it would be surprising if wholesale reform happened during Hoekstra's tenure (let alone in 2025). More promising projects would be the proposed decluttering of EU tax rules, and its continued fight against aggressive tax structuring.

Hoekstra also appears to be in favour of rolling out a digital services tax across the EU, if the US does not agree to a significant reform of digital taxation to shift tax from the US to countries using US technology. (Spoiler alert – the US will not agree to this.) Nevertheless, we would be surprised to see an EU-wide digital services tax agreed before the end of 2025. If such a tax was imposed, US trade sanctions would be likely to follow.

CONTACT US TO FIND OUT MORE

Dominic Robertson
Partner
T +44 (0)20 7090 3848
E dominic.robertson@slaughterandmay.com

Charles Osborne
Partner
T +44 (0)20 7090 5030
E charles.osborne@slaughterandmay.com

Sarah Osprey
Partner
T +44 (0)20 7090 3709
E sarah.osprey@slaughterandmay.com

NAVIGATING THE ASIA M&A LANDSCAPE

Strategic shifts and emerging opportunities

Chris McGaffin
Partner

Lisa Chung
Partner

Stephanie Courtice
Counsel

2024 has been a relatively subdued year for dealmaking in Asia, overall. The activity levels broadly reflect pressures on M&A seen in most parts of the globe – higher inflation, higher interest rates and increased geopolitical tensions – and there have also been Asia-specific factors at play: in particular affecting China M&A, both inbound and outbound. For us, valuation and execution risk have been the biggest challenges in putting deals together in Asia this year. While innovative deal structures – such as earn-outs, tranche deals and bespoke price adjustments – can mitigate and share risk to facilitate deal-doing, lower investor confidence and valuation issues have continued to hold back activity levels. Further, concerns about whether, in what timeframe, and at what cost regulatory clearances might be obtained have continued to stop parties agreeing deals (Chinese investment in the US being an obvious example), with Boards' fears in this regard being fanned by some high profile deals being blocked post-announcement, including the Singapore government taking issue with Allianz's bid for Income Insurance on public interest grounds.

That being said, there was a notable uptick in M&A activity in the third quarter, which we feel has continued into the final part of the year. This momentum, combined with expectations of improvement in the macroeconomic environment, makes us optimistic we will see higher deal levels in 2025.

THE BRIGHT SPOTS: JAPAN, INDIA, SOUTHEAST ASIA

Starting with the good news, there have been some notably bright spots of intense activity in the region.

Japanese outbound and inbound M&A have each been strong in 2024. Despite the weakened yen, Japanese buyers have continued to go outside their borders, in particular into the US and Europe, in a search for future growth in light of challenging domestic demographics. Japanese businesses have continued to be targets for both global PE and overseas corporates, with M&A activity being supported by factors including corporate governance reforms and the weak yen, added to which Japan is a natural beneficiary of slumping inbound M&A into China. This is reflected in some of the more notable deals seen this year, with KKR and Bain Capital locked in a bidding war for Japanese software provider Fujisoft and Canadian convenience store chain Alimentation Couche-Tard Inc. having launched a series of hefty offers for Japanese retailer Seven & i Holdings.

India has, unsurprisingly, been another major beneficiary of foreign investment shifting away from China. With the Indian economy running hot, investor confidence has been high. Continued inbound investment from financial sponsors wishing to be a part of India's strong growth trajectory, as well as a growing appetite from Indian corporates to participate in domestic M&A, have driven increases in M&A activity for 2024. What is more, India's buoyant capital

markets – on track for a record-breaking year for capital raised in IPOs – have contributed to a virtuous cycle as multinationals have sought to tap into public markets for capital by listing Indian subsidiaries, PE investors have been provided with additional exit options and strong equities valuations have helped narrow M&A valuation gaps.

Southeast Asia is also rapidly becoming a global trade hub and attracting foreign investment focus due to its strong economic integration, population growth, and strategic location; while its proximity to China makes it ideal for multinational corporations (MNCs) that are looking to diversify their supply chains. Alongside growth in manufacturing, including high-tech areas such as electric vehicles, data centres and the digital sector more widely are driving overseas investment growth. Earlier this year, Microsoft and Amazon Web Services separately committed to multi-billion US dollar digital infrastructure investments in Malaysia and Google has said it will invest in a data centre and cloud region in Thailand. We are also seeing a lot of activity in the insurance sector, with insurers, especially in life and health, competing to capture slices of the growing demand for insurance being driven by demographic trends and the region's rapid development.

CHINA

The world's second largest economy continues to grapple with an economic downturn, increased US-led investment and export restrictions, and ongoing geopolitical tensions. Unsurprisingly, against this backdrop, China's year-to-date M&A deal volume and value have both fallen compared to 2023, and remain significantly lower than the high watermark years in the middle of the last decade.

China's response has been mixed. While making efforts to encourage foreign investment, it has simultaneously been working to rebalance its economy to be less dependent on exports and external factors. In a bid to boost economic activity, foreign investment and M&A, Beijing has rolled out waves of economic stimulus and other wide-ranging measures. It has lifted merger control thresholds, introduced measures to encourage M&A for qualified listed companies, and further reduced the number of sectors off limits to foreign investors – meaning there are now more sectors open to foreign investment than ever before. China is also looking to its strengths in sectors such as renewable energy technology and high-end manufacturing to fuel economic growth.

A key trend for MNCs operating in China has been the strategic re-alignment of investments in the region, driven by macroeconomic headwinds and increasing competition from domestic market participants. It is projected that 2024 could be the first year of annual net outflow from China since comparable records began in 1990. This outflow illustrates the continued impact of "de-risking" and "China +1" strategies, but it is also partly attributable to significant outbound Chinese investment, in particular to Southeast Asia. MNCs' responses to the current conditions have ranged from strategic divestments and "de-risking" efforts, to doubling down on existing investment, the formation of new strategic partnerships with leading Chinese players, and new investments into growth sectors. Despite the more dire predictions around "decoupling" and capital flight that peaked in the early COVID period, relatively few MNCs with established businesses have sought to exit China entirely at this point. AstraZeneca, though rumoured in 2023 to have drawn up plans to spin-off its China business, instead made further China investment – including a planned USD450m factory – and this year its CEO reaffirmed the company's commitment to China. Where we have seen withdrawals, they have typically been in the private equity space and driven by specific sectoral investment restrictions – in 2023, Sequoia Capital announced it was splitting off its China business from its Europe and US partnership, citing an "increasingly complex" dynamic. On balance, while there has been a reduction in the amount of new inward investment, in our experience most MNCs operating in China who saw China as a key market before the last few years' difficulties – whether for manufacturing, R&D or consumers – continue to do so.

LOOKING AHEAD

Under the incoming Trump administration, US policy towards China will continue to play an important part in the Asian business landscape. Donald Trump has pledged to make widespread use of tariffs, with targeted measures against China including a proposed levy of 60% (or more) on Chinese-made products. This is leading international and Chinese businesses to re-assess their supply chains and is already driving some M&A and investment activity around the region (albeit tempered by the fact that the detail of the tariffs and how they would operate in practice is not clear at this stage). It is also possible that Trump's "America First" approach will strain the western alignment seen during the Biden administration around directing trade and national security restrictions against China. This may open up possibilities for the UK and the EU to take a position that creates more advantageous economic parameters for UK and EU businesses active, or looking to become active, in China.

Asia remains the growth engine of the world, and, as we look ahead in 2025, we expect M&A activity across the region to increase, notwithstanding the significant complexities attached.

Given that backdrop, those buying or selling assets in Asia will more than ever need the best advisers in the region to help to navigate through the complex and evolving landscape.

CONTACT US TO FIND OUT MORE

Chris McGaffin
Partner
T +852 6323 5072
E chris.mcgaffin@slaughterandmay.com

Lisa Chung
Partner
T +852 9162 0836
E lisa.chung@slaughterandmay.com

Stephanie Courtice
Counsel
T +852 2901 7290
E stephanie.courtice@slaughterandmay.com

FINANCING IN 2025

Matthew Tobin
Partner

Guy O'Keefe
Partner

Credit markets performed well in 2024, supported by an improving macroeconomic backdrop and robust demand from almost all segments of the market.

While borrowing costs remain high relative to recent years, falling inflation and a subsequent easing of monetary policy combined with an improving economic outlook to deliver favourable conditions for financing activity. This allowed corporate treasurers to take prudent action to ease near-term maturity pressures across both the investment grade and high yield markets.

Bond issuance was especially strong last year, underpinned by a refinancing wave that reduced near-term maturity wall pressures for corporates and for sub-investment grade issuers in particular, and which saw almost all areas of the bond market record strong year-on-year growth. We also saw good momentum across the broadly syndicated loan market, as the product responded to interest rate cuts and increased demand from corporates and financial sponsors.

FOCUS SWITCHES TO GROWTH

This momentum is expected to continue into 2025. We expect the focus to gradually shift from refinancing and corporate housekeeping towards support for growth strategies, as corporates take advantage of lower borrowing costs to fund expansion. Financing should support both organic and inorganic growth, with capital expenditure rising across sectors that support global trends, such as the transition to net zero, and the rise of M&A on the corporate agenda.

Markets have factored in an anticipated near-term rise in inflation, driven by certain policies outlined by the Trump administration and measures announced in the UK budget. Regarding expected changes in the US, the counterbalance is the expectation that the new administration will cut regulation and usher in a more business-friendly environment, which should promote dealmaking with positive implications for the acquisition and leveraged finance markets.

In respect of leveraged finance, the gradual return of banks to this corner of the market has seen both spreads tighten and terms soften. While we expect private credit to continue to fund a significant proportion of buyouts in 2025, the emergence of a more balanced financing platform should favour borrowers and encourage sponsors to embark on larger, more complex deals. We also expect to see more hybrid structures in large leveraged deals, with private credit funds providing junior tranches and the senior portion of funding from banks.

SUSTAINABLE FINANCE

The sustainable finance market showed more positive momentum in 2024, driven by activity in Europe, which accounted for around 53% of global sustainable bond market issuance, and around 41% of sustainable borrowing.

While there continues to be good investor demand for these products, and broadly compelling reasons for corporates to use sustainable instruments, we started to see activity decline in the second half of the year. There are a number of drivers for this, key among them being negative perceptions of the structuring and reporting requirements that sit alongside sustainability labelled debt and the associated costs together with increased concerns about green-washing.

The new EU Green Bond Standard came into effect in December. While not obligatory, the standard potentially offers issuers and investors greater transparency and comfort when issuing green bonds, although we expect that there will be no immediate rush for many corporate issuers to use the label, in part due to the requirements the EU Green Bond Standard layers on top of the existing market labels such as the ICMA principles and concerns around useability of the EU Taxonomy.

The potential to develop and expand the nascent transition finance market – in other words, financing for transitioning entities and transition activities has been a key area of focus. The market is currently digesting the findings and recommendations of the Transition Finance Market Review. We expect further developments in this space in the new year.

DEMAND FOR EUR AND GBP PAPER

Tighter spreads and healthy yields encouraged issuers to return to the bond market last year, with issuance volumes up by almost 20% compared to 2023. Throughout 2024 there was strong investor demand for Euro paper, and in the second half of the year for sterling supply. Strong investor demand saw books on a number of sizable investment grade deals covered three or four times, including Lonza's EUR1 billion 12-year print. We expect this momentum to continue into 2025.

In addition, appetite for Euro-denominated bonds from US multinationals looks set to increase, due in part to the relative cheapness of raising capital in Euros, but also in support of acquisition financing, which we expect to pick up as 2025 unfolds.

Private placements continued to perform strongly. In 2024, the US private placement market experienced a revival, delivering one of the most active markets in years, driven by strong demand from investors diversifying across long tenors. This demand has not yet been fulfilled, and we expect there to be ample opportunities for investment grade corporates to bring opportunistic deals to the market throughout the year.

SECURITISATIONS

Global structured finance markets recorded solid growth in 2024, driven by robust asset-backed and residential mortgage-backed markets, and a sharp increase in collateralised loan obligation issuance. We expect to see healthy issuance levels in 2025, assuming interest rates continue to fall, as this should stimulate consumer activity in the areas that fuel origination of the underlying products. The upcoming Basel reforms are also expected to continue to drive the current wave of "significant risk transfer" transactions by banks in the UK and the rest of Europe.

In the European Union, efforts continue to reinvigorate the EU securitisation market, which is increasingly seen as an important engine of the real economy. In September, Mario Draghi's report on the future of EU competitiveness added to calls for further reform of the European securitisation regulatory regime, with the goal of strengthening bank lending and providing additional finance for investment across the bloc. A subsequent consultation from the European Commission, which closed on 4 December, has given a broad range of market participants an opportunity to help shape the future of the market and deliver a more effective framework.

In the UK, the auto loan finance securitisation market (and, to some extent, the wider asset-backed finance market), has been adversely affected by a surprisingly broad ruling from the Court of Appeal on the subject of broker commissions. It is hoped that steps by the FCA, and clarification of the scope of the ruling from the UK Supreme Court, will help stabilise the position and bring greater certainty to the scope of lenders' and brokers' duties.

SPECIAL SITUATIONS AND RESTRUCTURING

There has been a steady level of activity in the special situations and restructuring market through 2024, with an important milestone being reached: the first visit of a Part 26A Restructuring Plan to the Court of Appeal in Adler providing some helpful guidance on how the procedure should be used going forward. That is just as well, as a number of plans continue to be litigated (some successfully). Outside of formal restructuring, we have seen a number of European companies that might otherwise have been on the brink of a restructuring continue to access liquidity to achieve challenging refinancings, often times accompanied with some level of liability management, or use M&A and/or private capital to avoid a restructuring.

Looking into 2025, we expect those trends to continue with more leveraged companies being required to consider the full range of strategic options as we face a difficult European macro environment, political stasis in certain key jurisdictions and the threat of potentially significant US policy choices. In terms of sectors, one obvious area of activity will be infrastructure, where all eyes will be on the water sector including Thames Water as it continues with its restructuring process. However, a range of other sectors will face headwinds: certain retail and hospitality businesses have been adversely affected by the recent UK Budget; high energy prices and ESG policy may continue to negatively impact certain industrials and automakers; and, following the Swedish battery developer Northvolt's entry into Chapter 11, there may be further restructurings in the "ESG" space where policy in the UK and elsewhere keeps changing and investment returns have not lived up to ambitions.

CONTACT US TO FIND OUT MORE

Matthew Tobin
Partner
T +44 (0)20 7090 3445
E matthew.tobin@slaughterandmay.com

Guy O'Keefe
Partner
T +44 (0)20 7090 3299
E guy.okeefe@slaughterandmay.com

GETTING YOUR HOUSE IN ORDER

Governance in 2025

Andrew Jolly
Partner

Harry Hecht
Partner

As we enter 2025, companies face continued pressure to maintain high governance standards. A focus on transparency continues to underpin updates to relevant legislation and regulation across the world. The UK government and regulatory bodies are introducing updated policies in several areas, including to help prevent fraud that benefits corporates, restore trust in audit quality, and ensure responsible corporate behaviour.

Boards and in-house legal teams must stay informed and prepared, ensuring their governance structures are resilient. We explore the recent and upcoming changes in audit and corporate governance, providing guidance for companies to align with new standards and strengthen their governance structures.

AUDIT AND CORPORATE GOVERNANCE REFORM

Restoring trust in audit and corporate governance has been on the political and regulatory agenda since 2018, prompted by significant corporate failures such as Carillion, Thomas Cook and BHS. At the same time, there is a desire, and a need, to position UK capital markets, domestically and internationally, as a more attractive and efficient place to do business.

Whilst some regulations to bring in additional reporting requirements for private and public companies were withdrawn in 2024 to "cut red tape", corporate governance reform has been brought into sharper focus again in recent months.

The Audit Reform and Corporate Governance Bill announced by the new UK government in July 2024 will establish the new regulator, the Auditing, Reporting and Governance Authority (ARGA). Although its scope remains unclear, a significant development would be the intention for ARGA to have the power to investigate and sanction company directors for serious failures in relation to their financial reporting and audit responsibilities. Currently the Financial Reporting Council (FRC) can only take action against directors who are members of an accountancy body.

THE NEW UK CORPORATE GOVERNANCE CODE

In January 2024, the FRC published an updated UK Corporate Governance Code (the 2024 Code) which will replace the UK Corporate Governance Code published in 2018 (the 2018 Code). The FRC scaled back its original proposals (published in March 2023), to keep changes to the "minimum that are necessary" whilst maintaining the comply or explain approach to compliance.

All changes, apart from those made to Provision 29, are effective for accounting periods beginning on or after 1 January 2025, with first reporting in 2026. The changes to Provision 29 will come into effect on 1 January 2026. There are several significant changes, included a new shift of focus, and related responsibility, to the board to maintain an effective risk management and internal control framework.

Although boards will not have to make the new assurance declaration until the 2027 reporting season, implementing a robust corporate governance framework now can help companies adhere to standards and prevent criminal activities such as fraud. Boards must ensure the right controls, oversight mechanisms, and accountability structures are set up to reduce the potential for misconduct.

NEW COMPLIANCE EXPECTATIONS IN FRAUD PREVENTION

On 6 November 2024, the UK government also published long-awaited Guidance on the new corporate offence of failure to prevent fraud. This represents a pivotal move towards holding organisations more readily accountable in the UK for economic crimes, and at the same time marks a major development in compliance expectations. Set to take effect from 1 September 2025, the new offence means that large organisations may be criminally liable if an associated person, such as an employee or subsidiary, commits fraud intended to benefit the organisation or its customers / clients. However, it will be a complete defence if an organisation can prove reasonable fraud prevention procedures were in place – emphasising the critical role of the compliance framework.

The UK government Guidance offers practical advice for organisations on designing and implementing fraud prevention procedures, building upon established principles from prior failure-to-prevent offences. However, the new Guidance reflects a more refined and comprehensive approach, reflecting over a decade of enforcement experience of what constitutes "adequate" or "reasonable" compliance programmes. The Guidance also encourages businesses to draw on a broader array of resources, including the UK Corporate Governance Code. Key expectations include conducting a risk assessment to identify unique fraud risks, designing and implementing tailored policies and procedures, and embedding these practices through training and communication.

BOARD ENGAGEMENT EXPECTATIONS FOR FINANCIAL SERVICES FIRMS AND THE INVESTOR COMMUNITY

The quality of a firm's governance is generally acknowledged by financial regulators as one of the most significant contributors to its legal and regulatory compliance. Faulty governance in regulated firms doesn't always impact short-term financial success, but it can lead to other failures in the long run, including enforcement action.

In the UK, the Senior Managers and Certification Regime is expected to remain a key priority. Policy makers are also increasingly focused on the role that accountability mechanisms play in the management of non-financial or emerging risks in regulated firms, such as artificial intelligence, as well as their interdependence with organisational culture.

Recent enforcement action from the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), including the 2024 fines imposed on HSBC for historic depositor failings and on Citigroup for failures in trading systems and controls, provide examples of firm failings that are considered to be grounded in inadequate governance and board oversight. One area where we might expect a conflation by regulators of perceived shortfalls in regulatory compliance and poor governance is in connection with the consumer duty, specifically, the delivery of good consumer outcomes.

Firms can help to mitigate the risks by identifying and avoiding cultural characteristics that regulators have referred to among the root causes of systemic compliance problems.

Another integral part of holding companies to high governance standards involves the stewardship activities of the investor community. The UK Stewardship Code, which serves as the "benchmark" framework against which stewardship practices are reported, has seen considerable take up among asset managers and asset owners since its last substantial revision. However, there has also been some pushback from both the investee and investor community against the reporting burdens placed by the UK Stewardship Code. As a result, the FRC launched a comprehensive review, which culminated in the publication of its consultation on proposed changes to the UK Stewardship Code in November 2024.

The proposals include re-defining "stewardship", streamlining the signatory assessment process and principles in order to reduce reporting burdens and improve flexibility. Specific principles for proxy advisers and investment consultants are also being introduced, reflecting their importance in the investor and stewardship ecosystem. Whether the overhaul of the UK Stewardship Code meets the FRC's stated aim of ensuring it continues to drive effective stewardship without imposing onerous reporting burdens on signatories remains to be seen.

ESG GOVERNANCE AND REPORTING

The rapid pace of change in ESG-related obligations offers risks and opportunities across the world and is encouraging corporates to review and update their sustainability-related governance. This pressure may drive closer self-examination of existing governance structures, helping to improve external stakeholder relations and mitigate risks associated with increased disclosures.

Reporting under the EU's Corporate Sustainability Reporting Directive (CSRD) and associated European Sustainability Reporting Standards (ESRS) begins on a phased basis from the end of 2024. Companies in scope will be obligated to consider a range of potential disclosures in respect of their sustainability governance on a "double materiality" basis. In advance of the middle of 2027, in-scope EU and non-EU companies will also need to put relevant governance and risk management policies in place to comply with the EU's Corporate Sustainability Due Diligence Directive (CS3D). This includes needing to have a strong process to identify and engage with a broader range of stakeholders and incorporate third-party views into internal governance. Longer term, the CS3D requires the European Commission to review and monitor the directive's effectiveness, including in respect of good governance, to see whether the CS3D needs to be updated and broadened.

The global adoption of the International Sustainability Standards Board's (ISSB) sustainability and climate standards, as well as various transition plan disclosure frameworks, will also drive developments in governance reporting. In the UK, a consultation on a proposed set of Sustainability Reporting Standards based on the ISSB standards is expected in early 2025. In addition, although the UK's Transition Plan Taskforce's (TPT) transition plan disclosure framework is currently voluntary, it is expected to be integrated into domestic UK law in the next 2 - 5 years following the consultation planned for the first half of 2025.

Although the TPT describes its framework as the "gold standard" for transition plan disclosures, recent draft guidance from the European Financial Reporting Advisory Group states that EU undertakings will not have to be familiar with the TPT's framework when reporting in line with the ESRS. As such, some divergence may be expected.

CONTACT US TO FIND OUT MORE

Andrew Jolly
Partner

T +44 (0)20 7090 3034
E andrew.jolly@slaughterandmay.com

Harry Hecht
Partner

T +44 (0)20 7090 3801
E harry.hecht@slaughterandmay.com

LABOUR'S PLANS TO RESHAPE EMPLOYMENT

A new era for the workplace

Philip Linnard
Partner

Philippa O'Malley
Partner

In October 2024, the UK government introduced The Employment Rights Bill 2024 (the Bill) into Parliament, the most significant piece of employment legislation in decades. In doing so, it met its deadline to introduce legislation within the first 100 days of government, aiming to implement around a third of the key pledges from Labour's Plan to Make Work Pay. The Bill has since been described by Sir Keir Starmer as "The biggest upgrade to workers' rights in a generation".

The Bill includes 28 individual employment reforms, of which the most significant are:

- Making unfair dismissal a "day one" right, subject to a statutory probation period.
- Significantly restricting employers' ability to make changes via "fire and rehire".
- Expanding the scope of collective redundancy consultation.
- Reshaping industrial relations and creating new trade union rights.
- Complex new provisions for zero-hours and low hours workers.
- Strengthening harassment protections and pay equality.

The Bill raises many important questions for both employers and employees. Some parts of the Bill contain detailed provisions, while other sections give ministers the authority to propose regulations and confirm further details in the coming months.

NEXT STEPS

The Bill is now in Committee stage in the House of Commons, with the Report Stage due to commence on 21 January 2025.

The UK government held four consultations on the Employment Rights Bill from October to December 2024, covering collective redundancies, industrial relations, zero hours contracts and Statutory Sick Pay. Changes may be made to the Bill as a result of responses to the consultation. Amendments have already been tabled as the Bill enters Committee stage in Parliament – notably the promised extension of time limits for employment tribunal claims from three to six months. Further consultations are expected early next year. This is an opportunity for employers and other stakeholders to share their views and suggest amendments to the Bill's provisions and details within regulations.

COLLECTIVE REDUNDANCY AND FIRE AND REHIRE

The Bill would amend the law so that employers will have to consult collectively when they are proposing 20 or more redundancies within 90 days or less, even if the dismissals are not all at one establishment. The consultation on collective redundancy and fire and rehire asks for views on further measures to strengthen the remedies for a breach of the collective consultation requirements, intended to deter employers from "buying out" consultation rights:

- Increasing the maximum period of the protective award from 90 to 180 days' gross pay per employee or removing the 90-day cap altogether.
- Making "interim relief" available to employees who bring claims for the protective award, allowing them to apply to court for their employment contract to continue pending a full hearing of their claim.
- Making interim relief available to employees who bring an unfair dismissal claim under the Bill's fire and rehire provisions.

The consultation also mentions a new possibility of increasing the minimum consultation period when an employer is proposing to dismiss 100 or more employees - from 45 to 90 days.

If they go ahead, the proposals in this consultation may increase protections for employees but will reduce flexibility for employers. The introduction of interim relief would also increase the risks and uncertainties for employers. Although it has been rarely used by employees in automatic unfair dismissal cases, it might be a more attractive remedy in collective consultation and dismissal and re-engagement scenarios.

INDUSTRIAL RELATIONS

The consultation on creating a modern framework for industrial relations covers two main areas: industrial action and the trade union recognition process. The proposals include:

- Extending the expiration date of a trade union's legal mandate for industrial action from six to 12 months.
- Simplifying the requirements on trade unions to provide detailed worker information to employers in the ballot notice and the notice of industrial action.
- Amending the law which prevents unions from taking protected industrial action where there has been a "prior call" to take unofficial action to allow unions to ballot for official protected action where a prior call has taken place in an emergency.
- Preventing employers from altering the number of workers in a proposed bargaining unit once a trade union recognition application had been submitted and extending the protections from "unfair practices" by the employer during the recognition process.

ZERO HOURS CONTRACTS

The consultation seeks views on how the new rights to a contract with a guaranteed number of hours and reasonable notice of shifts should apply to agency workers – for example, whether the responsibility should fall to the employment agency or to the end hirer. With reasonable notice of shifts, the UK government has decided that both the employment agency and the hirer have responsibility; the consultation is about how this would work in practice. A further consultation will be launched on the implementation of the zero hours contracts measures more generally.

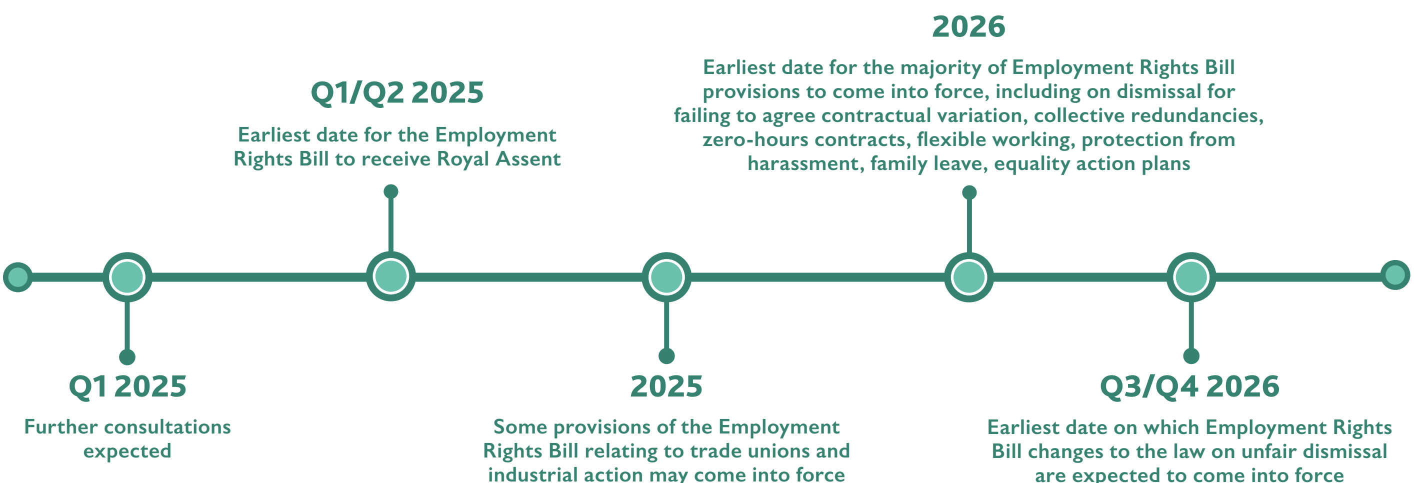
STATUTORY SICK PAY (SSP)

The changes introduced in the Bill will mean that for some lower earners, including those earning below the lower earnings limit, their rate of SSP will be calculated as a percentage of their earnings instead of the flat weekly rate. The consultation asks for views on what this percentage should be.

TIMELINE FOR IMPLEMENTATION

The UK government has stated that it may be autumn 2026 before the majority of the Bill's changes comes into effect. This should mean that businesses have time to both input into the detail of those changes via the various consultations, and by starting to consider what changes they may need to their employment structures, policies and processes.

There are however some changes which may come into effect in 2025, alongside many further consultations on the Bill's proposals. An indicative timeline is set out below:



DIVERSITY AND INCLUSION REPORTING UPDATES

The UK government has also pledged to introduce disability and ethnicity pay gap reporting for large employers (currently companies with 250 or more employees), building on the existing gender pay gap reporting regime. The amendments will be introduced in a draft Equality (Race and Disability) Bill due to be consulted on "in due course" and published during the current parliamentary session for pre-legislative scrutiny. The Bill also proposes extending the specific equal pay provisions of the Equality Act 2010, which currently only apply to discrimination based on sex, to both race and disability. No further detail of this proposal has yet been published, and we await the Bill's publication in order to better assess the likely impact of this change.

Although some large employers already disclose disability and ethnicity pay gap information on a voluntary basis, and certain listed companies must include board diversity disclosures in their annual reports (on a "comply or explain" basis), the introduction of mandatory disability and ethnicity pay gap reporting is likely to require significant and careful preparation. Following the progress of the draft Bill and related consultation may help to provide clarity, and thought should be given to the challenge of how to collect and interpret the relevant data sooner rather than later.

CONTACT US TO FIND OUT MORE

Philip Linnard
Partner

T +44 (0)20 7090 3961
E philip.linnard@slaughterandmay.com

Philippa O'Malley
Partner

T +44 (0)20 7090 3796
E philippa.omalley@slaughterandmay.com

BEYOND LINEAR

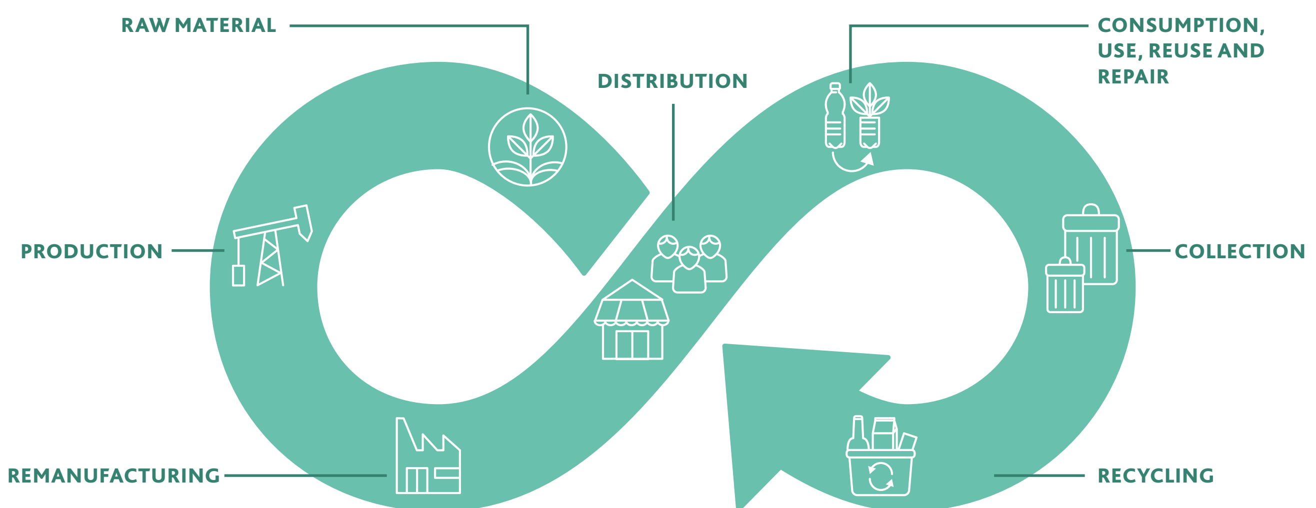
Moving towards a circular economy

David Hay
Partner

Samantha Brady
Head of Environment and Climate Change

The concept of a "circular economy" is being increasingly adopted in legislation, including in mandatory reporting and disclosure frameworks. This highlights the circular economy's role in ensuring a sustainable future. A circular economy is a system that aims to deliver social and economic prosperity without requiring unsustainable levels of raw material extraction, consumption and pollution. Three design principles underpin this: eliminating waste and pollution; extending the lifetime of products and materials for as long as possible; and regenerating natural systems (Chatham House, 2024). In contrast, the linear or resource-intensive economy is a system that extracts resources, manufactures products, uses them, and then throws them away (Chatham House, 2023).

Examples of these reporting and disclosure frameworks include the EU's Corporate Sustainability Reporting Directive (CSRD), which contains disclosure requirements on resource use and circular economy (set out in the European Sustainability Reporting Standards disclosure requirement E5 (ESRS E5)), addressing extracting non-renewable resources, waste generation and pollution.



WHAT ARE THE LEVERS FOR CHANGE?

Internationally, progress is fragmented. The EU is a frontrunner – it adopted its new circular economy action plan (CEAP) in March 2020, described as one of the main building blocks of the European Green Deal. One of the plan's objectives is to "lead global efforts on circular economy". Under this the EU has introduced a range of initiatives, such as the Ecodesign for Sustainable Products Regulation (ESPR), the Right to Repair Directive and a proposal for a Regulation to reduce microplastic pollution from plastic pellets.

Developments in the UK have historically derived from the EU's approach – the EU adopted its first CEAP in December 2015. Circular economy ideas are currently scattered across different policy proposals and legislation. For example, the Environmental Improvement Plan 2023 (which, at the time of writing, is undergoing a "rapid review" launched by the current UK government) sets out the intention to move to "a more circular model of resource use". Labour committed to this in its manifesto, and in September 2024 a Circular Economy Taskforce was established to develop a new strategy. A plastic packaging tax has been in place since 2022 and, as set out in the Autumn Budget 2024, is set to increase in 2025 in line with inflation. The extended producer responsibility regime for packaging is also undergoing reform, including in relation to electrical waste, and the UK government recently announced a ban on single-use vapes from June 2025, pitched as the "first step on the road to a circular economy".

MOVE TO A WHOLE LIFE-CYCLE APPROACH

To date, legislation has largely been focused on waste reduction and recycling. However, policy approaches are becoming more holistic, and we expect this to continue, with a move towards an increasingly "whole life-cycle" approach. The EU's ESPR, which entered into force in July 2024, establishes a framework for setting ecodesign requirements on specific product groups which aim to, amongst other things, improve product durability, reusability, reparability, energy efficiency and recyclability.

Specific sectors are also giving thought to integrating sustainable design considerations from beginning to end. In the built environment, an increasingly discussed challenge is how to reduce "embodied carbon" – the emissions associated with materials and construction processes throughout the whole life-cycle of a building or infrastructure (UKGBC, 2024). In the UK, embodied carbon emissions are largely unregulated, with the bulk of mandatory requirements focusing on improving energy efficiency. Organisations such as the UK Green Buildings Council have called for further regulation to help accelerate industry action on embodied carbon. A cradle to grave approach is the most comprehensive means of tackling, and minimising, climate and biodiversity harms.

CONSUMER CHOICE AND CONSUMER EMPOWERMENT NOW AN INCREASING DRIVER

In addition, consumers are increasingly aware of the impact of their buying choices and demanding more from businesses. In tandem, regulators are closely scrutinising claims made about products to ensure that they are not misleading, and consumer protections in relation to greenwashing are being enhanced – the Competition and Markets Authority's (CMA) recent investigation into "green" claims in the UK fashion sector focused on several issues, including claims about products being recycled or containing recycled fabric. Following the investigation, the CMA has released tailored green claims guidance for the fashion sector. The EU's CEAP contains proposals for Directives on Green Claims and on Empowering Consumers in the Green Transition (ECGT). These aim to ensure that companies substantiate their environmental claims and consumers receive the information they need to make informed decisions about products. EU Member States have until March 2026 to transpose the ECGT Directive; the Green Claims Directive is yet to be finalised.

The global nature of supply chains and trade routes means that impacts of legislation are likely to be felt beyond national borders, as some companies may seek to pass obligations down to suppliers. For example, the ESPR will apply to products made outside the EU (if placed on the market in the EU) as well as inside it. Partly in response to this, there have been calls for global policy coherence and better coordination between countries, which could serve to piece the legislative jigsaw together, level the playing field, and accelerate international efforts to address climate change, pollution and biodiversity loss.

INTERNATIONAL EFFORTS TO REDUCE PLASTICS POLLUTION

In March 2022, the United Nations Environment Assembly adopted a resolution to develop an international legally-binding instrument addressing plastics pollution across its entire life cycle, including production, design and disposal. The fifth session of the Intergovernmental Negotiating Committee (INC-5), held in Busan from 25 November to 1 December 2024, aimed to finalise this instrument. However, negotiations concluded without agreement, primarily due to countries' divisions over limiting plastic production. Over 100 countries advocated for upstream plastic production limits, while a minority of major oil-producing countries opposed such measures, in favour of downstream plastic waste management approaches. This impasse has delayed the treaty's finalisation. The INC intends to reconvene for subsequent discussions in 2025. Mobilising the private sector remains a fundamental part of developing and implementing sustainable solutions to this escalating global challenge.

KEY TAKEAWAYS FOR BUSINESSES

In 2025, we expect policy efforts to move towards a circular economy – at both a national and international level – to continue. For businesses, particularly those operating across borders, navigating a fragmented, and growing, regulatory landscape can present challenges. Moving towards a more circular business model can also create opportunities, from creating efficiencies to complementing existing emissions reductions efforts. Ways to prepare could include:

1. **Closely monitoring developments** to pre-empt what is coming, and scoping out at an early stage when, and to which areas of the business, legislation applies.
2. **Thinking about compliance at the operational level**, which may involve large data gathering exercises to satisfy specific disclosure requirements and conducting closer due diligence of supply chains to determine product and material origins. Dedicated teams may need to be put in place, with appropriate processes and oversight.
3. **Reviewing strategy, governance structures and approaches** to reporting to ensure that circular economy considerations are appropriately embedded in an organisation. Companies may need to consider increasing mandatory disclosure requirements, such as ESRS E5 under the CSRD, which in-scope companies will need to report on if deemed material to the business.
4. **Mitigating greenwashing risks** by considering the types of claims made about products and services and whether they can be adequately backed up in the face of increasing standards for making such claims and regulatory scrutiny.

CONTACT US TO FIND OUT MORE

David Hay
Partner
T +44 (0)20 7090 5083
E david.hay@slaughterandmay.com

Samantha Brady
Head of Environment and Climate Change
T +44 (0)20 7090 4279
E samantha.brady@slaughterandmay.com

CLARITY ACROSS BORDERS

Delivering on due diligence in the value chain

Harry Hecht
Partner

Smriti Sriram
Partner

Moira Thompson-Oliver
Head of Business and Human Rights

THE CHANGING LANDSCAPE

Towards the end of 2023, we reflected on the ongoing uncertainty surrounding the Corporate Sustainability Due Diligence Directive (CS3D) and the due diligence-related implications for companies and financial institutions. With the CS3D having come into force in July 2024, there is now a clearer picture of the legislative requirements even if companies are still grappling with how they should satisfy those requirements.

On a staggered basis, the CS3D will impose complex requirements on EU and non-EU companies to conduct ongoing due diligence (DD) into their operations as well as the operations of their subsidiaries and those within their "chain of activities", which includes certain up and downstream business relationships. Companies must also have a transition plan in place.

Adding to the picture is a slew of other international DD legislation, in particular a range of new laws and proposals relating to modern slavery and child labour, in places such as Canada (Fighting Against Forced Labour and Child Labour in Supply Chains Act 2024), and Australia (Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Act 2024). This is also true of Europe (with the Forced Labour Regulation, which will apply in three years, and the Deforestation Regulation (EUDR), which will impose its own prescriptive DD process) and the UK (where the House of Lords Select Committee on modern slavery recently published recommendations for improving the UK's Modern Slavery Act 2015, including mandatory DD requirements compatible with international regimes, in response to which the government has confirmed its commitment to tacking modern slavery and foreshadowed a wider review of how best to tackle forced labour and increase transparency in global supply chains).

With so much change taking place in a short space of time, many global companies would benefit from a regional or group-wide approach when reviewing and implementing DD processes to meet such a range of demands at once. Simultaneously, these changes offer businesses a chance to assess their strategic risks and potential opportunities to enhance decision making.

WHAT'S IN A NAME? "VALUE CHAIN" VS "CHAIN OF ACTIVITIES"

For Corporate Sustainability Reporting Directive (CSRD) purposes, a "value chain" means the full range of activities, resources and relationships, both upstream and downstream, related to the company's business model and the external environment in which it operates. It includes what a company, its subsidiaries and business partners use and rely on to create its products or services from conception to delivery, consumption and end-of-life.

In contrast, the CS3D refers to a "chain of activities", which is narrower and only includes suppliers that contribute to a company's production of goods or provision of services, such as the supply of raw materials or manufacturing services (upstream); and distribution, transport and storage of a product (downstream).

EU

Corporate Sustainability Reporting Directive 2022

Corporate Sustainability Due Diligence Directive 2024

Deforestation Regulation 2024

Forced Labour Regulation 2024

Conflict Minerals Regulations 2017 (reviewed in 2024)

FRANCE

Vigilance Law 2017

GERMANY

Lieferkettensorgfaltspflichtengesetz (LkSG) 2021

NORWAY

Transparency Act 2021

SWITZERLAND

Code of Obligations and related Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour 2021

UK

Modern Slavery Act 2015 and House of Lords Select Committee 2024

US

Uyghur Forced Labour Prevention Act 2021

CANADA

Fighting Against Forced Labour and Child Labour in Supply Chains Act 2023

AUSTRALIA

Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Act 2024

JAPAN

Guidelines on Respecting Human Rights in Responsible Supply Chains 2022

COUNTING THE COST OF DUE DILIGENCE

According to the European Commission, the biggest companies within scope of the CS3D may incur significant costs in complying with these requirements. At the top end, one-off costs are estimated to reach up to €190,300, with recuring costs of up to €643,300. As such, making use of existing systems and processes wherever possible is likely to be a key factor in keeping compliance costs down and minimising additional management time.

For example, the double materiality process that the CSRD requires asks companies to assess financial and impact materiality in terms of impacts, risks and opportunities for themselves as well as the environment and people. This inward and outward looking approach could help map out a company's value chain and potential problem areas, including where it impacts human rights. This in turn could help in developing a plan to remediate these adverse human rights impacts for CS3D purposes.

An important point to note about the CS3D's approach is that it links environmental and human rights impacts together explicitly, and so will require an approach that looks at both simultaneously.

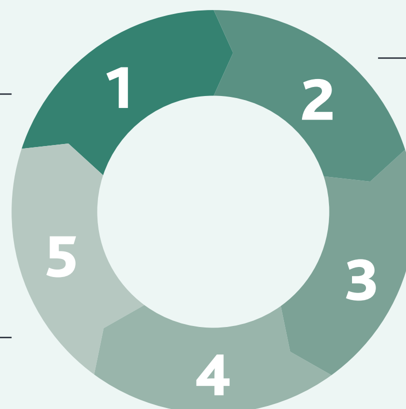
MANAGING VALUE CHAIN RISKS IN 2025 AND BEYOND

The risks of litigation, regulatory enforcement and reputational damage arising from a company's value chain all continue to be high on the risk register of many international companies. In particular, the English courts have become a leading destination for foreign claimants seeking redress from multinational corporations for alleged harms suffered in connection with the operations of their foreign subsidiaries. More recently, this has also included third parties in their overseas supply chains. For example, the Court of Appeal held in December 2024 that the English courts have jurisdiction to hear claims brought by migrant workers against Dyson group companies concerning harms allegedly caused by a Malaysian third-party supplier to Dyson.

With the introduction of new pieces of legislation, often inspired by soft law approaches which are being converted into hard law enforcement mechanisms, these risks are heightened and increasingly complex to navigate. The CS3D, for instance, specifically requires that companies establish a complaints process for their adverse impacts, and provide remediation for any actual adverse impact they have caused or jointly caused. The EUDR currently states that anyone may submit substantiated concerns to a competent authority in the event of suspected non-compliance.

DUE DILIGENCE AND STEPS FOR IMPLEMENTATION

Integrating value chain due diligence practices into company policies and management frameworks to help:



The range of developments in this space over a short period of time makes it difficult to create and manage effective, efficient and cohesive solutions given the high degree of variance between different companies depending on their operational footprint, sector and corporate culture. As a result, whilst there are places to look for practical guidance such as the UN Guiding Principles and guidelines from the OECD, they do not provide a complete picture. Notwithstanding this, we consider the following aspects to be central for most companies:

1. **Integrating due diligence into the company's governance, strategy and business model.** Effective governance is critical for complying with DD requirements and managing associated risks. This may include developing or reviewing existing sustainability-related governance to ensure the right structures and feedback mechanisms are in place at board, executive and operational levels. It will also often mean reviewing DD policies at both the parent and subsidiary level, to strike the right balance of control and delegation. These changes will need to be adaptable enough to absorb a wide range of evolving DD demands if companies want to stay ahead and avoid having to develop new systems more than once.

2. **Looking for where the gaps are and how to fill them.** The first step is often the difficult task of mapping the company's operations and business relationships, getting the right information together, then seeing where the compliance gaps are and how to fill them. Where not all impacts can be addressed at once, impacts can be prioritised based on the severity and likelihood of harm, and stakeholder engagement. The CS3D marks a significant step change in that it not only requires in-depth DD to be carried out, but also requires plans to be developed and applied to remediate issues that come to light.

3. **Reflecting on what the requirements mean for the company and its value chain.** Regular review of existing business and contractual relationships and supporting policies is always a good place to start, with an increasing number of organisations putting in place standard contractual clauses to oblige partners to comply with relevant codes of conduct and provide sufficient information for rigorous reporting. Others are putting in place a screening process for prospective business partners. In doing so, companies will need to be careful to provide targeted and proportionate support to SMEs as required, for example, by the CS3D.

4. **Engaging with stakeholders effectively.** Stakeholder engagement, as part of a DD and double materiality assessment process, is a key requirement in the CSRD and CS3D to enable effective and transparent communication. The definition of stakeholders is broad, and can include employees, affected communities, civil society institutions and even nature as a "silent" stakeholder. Some stakeholders may be less familiar with the increasingly complex and evolving DD process, meaning additional support may be needed to enable effective engagement.

5. **Being mindful of Scope 3 emissions.** The CS3D refers to absolute targets, where appropriate, for reducing Scope 3 (indirect) greenhouse gas emissions. Whilst not explicit, it is likely impossible for organisations to comply with the requirements without being acutely aware of, and monitoring, Scope 3 emissions - in effect making Scope 3 a DD requirement.

Recent developments pose a significant challenge to companies as they review, adapt and develop their approach to DD across their entire value chains. With statutory obligations becoming more onerous and coming into force in a wider range of jurisdictions, we expect the demand on company resources to increase over time, with elevated levels of complexity, harder-edged consequences to getting things wrong, and ever increasing amounts of data being required.

To some degree, this process can often look and feel like just another compliance exercise, but the companies that navigate this area most successfully will be those who embed processes, systems and controls within their existing governance architecture in a way that meaningfully engages the right stakeholders and produces reliable data, but is adaptable to future legislative change.

CONTACT US TO FIND OUT MORE

Harry Hecht
Partner

T +44 (0)20 7090 3801
E harry.hecht@slaughterandmay.com

Smriti Sriram
Partner

T +44 (0)20 7090 3718
E smriti.sriram@slaughterandmay.com

Moira Thompson-Oliver
Head of Business and Human Rights

T +44 (0)20 7090 3115
E moira.thompsonoliver@slaughterandmay.com

DELIVERING DECARBONISATION

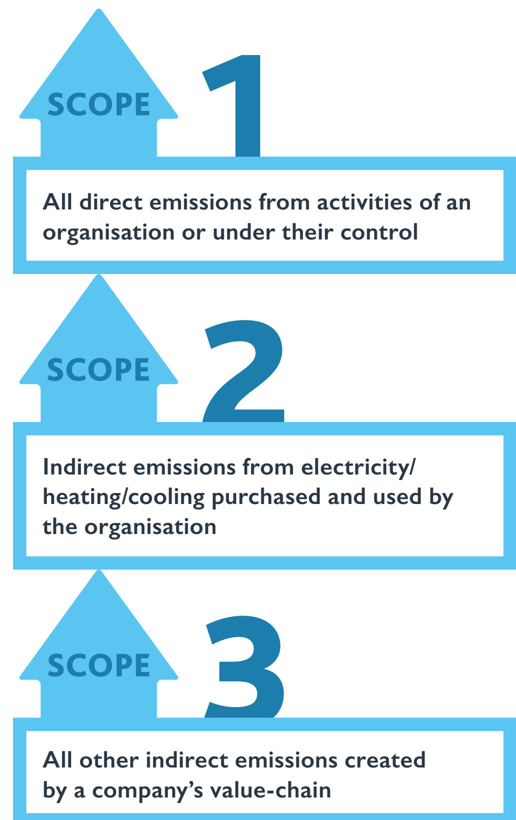
How the energy transition is impacting UK and EU corporates

Azadeh Nassiri
Partner

Susan Hughes
Partner

Corporates around the world are showing leadership by setting ambitious climate change targets. The drivers to decarbonise may be regulatory, linked to corporate purpose, reputational and/or financial. We are also seeing more scrutiny of and legal challenges to corporate decarbonisation strategies by consumers, NGOs and other stakeholder groups. Investors and debt funding providers looking to deploy climate aligned capital are also increasingly reviewing corporate decarbonisation commitments more closely.

As a result, a growing number of corporates are looking to set robust strategies to reduce their Scope 1, Scope 2 and Scope 3 emissions. The CDP in its *The state of play: 2023 climate transition plan disclosure* report found that over 5,900 of the companies surveyed reported that they have a 1.5°C – aligned climate transition plan in place – an increase of 44% from 2022 – with 8,600 companies reporting their intention to develop a climate transition plan in the next two years.



Source: GHG Protocol Corporate Accounting and Reporting Standard

Transitioning to low carbon energy sources in respect of an organisation's own footprint (Scope 1 emissions) and along its value chain (Scope 2 and Scope 3 emissions), is a significant contributor to the achievement of corporate decarbonisation goals.

ALIGNING DECARBONISATION STRATEGIES TO THE REGULATORY ENVIRONMENT

To successfully roll out energy transition strategies, a business must first align its strategy with the applicable regulatory environment. In the UK and EU, regulation and market interventions seek to deliver national and international decarbonisation commitments in the context of liberalised markets. As a result, governments and regulators frequently use a "carrot and stick" approach to influence market behaviour. For example, both the UK and EU use "cap and trade" emissions trading systems (**ETS**) which seek to internalise the cost of carbon for operators in covered sectors (such as energy and energy-intensive industry), combined with capital payments or operating incentives to encourage capital investment in fuel switching. This helps to incentivise businesses to reduce their emissions both to avoid additional liability of purchasing allowances and to benefit from the available incentive schemes. An example of this includes the UK's carbon capture, usage and storage (**CCUS**) business models which provide capex and opex support alongside the UK ETS.

This differs with other markets, where the downside of carbon pricing is often absent. However, the introduction of Carbon Border Adjustment Mechanisms (**CBAMs**) in the EU and UK means that exporters to these markets will need to account for the embodied emissions within products covered by the measures, essentially imposing a cost of carbon on imports.

To leverage energy transition opportunities, corporates must align their decarbonisation strategies to the applicable regulatory environment.

WHAT TRANSITION STRATEGIES ARE BEING USED?

A range of strategies are available for corporates across all sectors of the economy to implement their energy transition.

1. Capturing cost savings from energy efficiency measures

Reducing energy consumption by deploying energy efficiency measures is a natural starting point for many organisations to reduce Scope 1 and Scope 2 emissions whilst also delivering cost savings. Deeper energy saving measures often require either capital investment or technological advances. These can be supported by government schemes or tax incentives to encourage implementation. However, mismatched incentives can hinder action. For example, commercial real-estate landlords might struggle to make the case for expenditure to implement energy efficiency measures where the costs cannot be recovered under the service charge and the short-term financial benefit of the energy savings will accrue to the tenant. To overcome this, absent regulatory intervention, enforceable green lease provisions (where a landlord and tenant commit to improving the environmental performance of premises) are gaining traction in some markets.

2. Transition to renewable and low carbon power

Companies frequently consider onsite renewable power generation such as solar PV, sometimes alongside electricity storage. This can be managed by the business or outsourced to an energy provider. However, due to the need for a reliable supply, onsite generation is often supported by offsite supply via green tariffs or corporate renewable power purchase agreements (**CPPAs**).

Presenting renewable energy guarantees of origins to demonstrate the renewable quality of a company's energy consumption has been subject to some criticism however where the regulatory framework does not guarantee temporal matching of renewable production and consumption. As a result, to tackle Scope 2 emissions, large energy buyers may prefer to contract directly with low carbon generators using CPPAs. This is a trend particularly prevalent in the digital technology sector where players such as Amazon, Microsoft and Google are significant offtakers under CPPAs. The collateral required to support termination payments coupled with low liquidity in the CPPA market however may make accessing the market harder for smaller buyers.

3. Investment in electrification of heating and transport

Electrification and the shifting of energy use from fossil fuels to renewable, nuclear and other low carbon power sources is a key aspect of corporate energy transition strategies across all sectors of the economy. Electrification also requires organisations to commit capital to transition their activities to power consumption. For example, this may require investing in electric vehicles (EV) and associated EV infrastructure. In addition, some corporates may be looking to deploy ground and air-source heat-pumps or connecting to local heat networks. In each case, solutions will need to be specifically designed, not only to meet the requirements of the organisation and the local regulatory regime, but also those of the site and its operating profile.

4. Increasing internal power procurement capabilities

Power procurement can be a business-critical issue in some sectors, particularly those in the manufacturing, technology, mining and food and beverage industries. For these businesses, we are seeing dedicated in-house teams being established to manage group procurement strategies. Energy management and data platforms are increasingly needed to track and optimise low carbon power usage. With demand for electricity forecast to rise across the global economy, power procurement is likely to move onto the board agenda.

5. Hard-to-abate sectors are turning to low carbon fuels and CCUS

In certain sectors where processes or activities may not be readily electrified, a range of other energy transition approaches are being considered.

Low carbon hydrogen (and its derivative products) is emerging as a feedstock or a fuel in some sectors, for example in heavy industry where it is used in processes such as in steel manufacturing or chemicals production or as a fuel for high heat. CCUS is also being deployed, particularly in sub-sectors such as cement, paper, refineries and in the waste sector.

In other sectors such as aviation and maritime transport, sustainable synthetic fuels are beginning to gain traction. Inputs such as low carbon hydrogen or other low carbon feedstocks can also be used to produce synthetic hydrocarbons to be used as “drop-in” fuels, compatible with existing assets and infrastructure. The high cost of these alternatives however, as compared to the counterfactual, high carbon alternative, means that government support is frequently required to support production and incentivise companies to transition to these lower carbon options.

6. Tackling residual emissions using carbon credits

For residual emissions, corporates are exploring opportunities to purchase carbon credits in the voluntary carbon markets to neutralise emissions. With work progressing to assure the integrity and quality of carbon credits by organisations such as the Integrity Council for the Voluntary Carbon Market, confidence in this market is expected to rise. And, following the agreement at COP29 of standards for carbon reductions and removals, and project methodologies, it is hoped that confidence will increase further. Robust monitoring, reporting and verification processes are a key element in protecting purchasers against greenwashing allegations.

CONCLUSION

The implementation of a successful decarbonisation strategy with effective governance and a compelling business case can drive external value in the long run as well as contributing to a company’s ethos, purpose and decision making. Whilst comprehensive transition plans are not yet a legal requirement for all companies in the UK and EU, they are expected to become mandatory requirements for larger companies in the coming years. Coupled with a growing focus on the development of industrial strategies in these jurisdictions, we expect the sharpening of incentives and penalties to encourage active energy transition planning, combined with increasing corporate reporting obligations.

CONTACT US TO FIND OUT MORE

Azadeh Nassiri
Partner
T +44 (0)20 7090 5294
E azadeh.nassiri@slaughterandmay.com

Susan Hughes
Partner
T +44 (0)20 7090 5155
E susan.hughes@slaughterandmay.com

DUELLING DYNAMICS

Insights into the AI-Energy Transition Nexus

James Cook
Partner

Oliver Moir
Partner

Artificial Intelligence (AI) is revolutionising the global energy sector, presenting both transformative opportunities and significant challenges. On one hand, AI systems demand vast computational power, contributing to immense energy consumption. On the other hand, AI has the potential to optimise energy systems, facilitating renewable energy integration, improving grid stability, and enhancing efficiency. This article explores the regulatory, investment, and legal considerations shaping the complex AI-energy dynamic, providing seminal insights for corporate leaders traversing the AI-energy transition nexus.

THE DOUBLE-EDGED NATURE OF AI'S ENERGY USAGE

AI presents a paradox for the energy sector. While it drives efficiency, AI's deployment – particularly for generative models – requires enormous computational power. As a result, AI contributes to the rapid growth of data centre energy demand, which some industry analysts expect to triple by 2030. Technology companies are heavily investing in renewable and nuclear energy generation, including small modular reactor (SMR) technologies, to meet this demand. Meanwhile, legacy electricity grids – in regions such as the UK and EU – require extensive modernisation to support increasing and more complex energy flows.

Conversely, AI's potential to optimise energy systems could dramatically reduce emissions and improve efficiency. It could facilitate renewable energy integration, enhance storage solutions, or improve operational decision making. Over the coming year, stricter regulatory oversight or voluntary initiatives may propel sustainable energy practices, with operators encouraged to minimise emissions and improve data centre efficiency.

LEVERAGING AI FOR THE GLOBAL ENERGY TRANSITION

The electricity sector accounts for approximately 30% of global greenhouse gas (GHG) emissions. Achieving international climate targets will require continued growth and decarbonisation of the electricity sector. In support of these ambitions, AI could offer solutions to energy security, affordability, and sustainability challenges.

Electricity Generation and Grid Management

More specifically, AI could optimise renewable energy project planning by using advanced algorithms to forecast complex weather patterns, geological conditions, and grid constraints. These algorithms might enhance operational efficiency and reduce costs. In addition, AI-driven preventative maintenance could minimise interruptions in energy infrastructure.

In transmission and distribution, AI might improve grid stability by using dynamic line rating, which increases the capacity of transmission lines by analysing real-time conditions (including real-time weather conditions and fluctuations in energy demand). Indeed, AI is already deployed in parts of Germany to dynamically adjust electricity flows to enhance efficiency and reliability. These applications may also support renewable energy integration and reduce the need for costly backup systems.

End-Use Energy Management

AI-driven systems can optimise the energy use of devices such as electric vehicles (EVs), lighting, and air conditioning by adjusting settings—based on demand pattern predictions—to improve energy performance, minimising emissions and costs. Similarly, AI algorithms could reduce data centre resource usage by dynamically calibrating thermal, water, battery, and server management systems to real-time demand. Virtual power plants also increasingly leverage AI for demand forecasting, enabling peer-to-peer energy trading and load balancing.

Energy Storage

AI's ability to balance real-time supply and demand could enhance the efficiency of energy storage systems, extending the lifetime value of assets such as batteries, pumped hydro, chemical storage, and molten salt storage. It may also facilitate innovations in battery chemistry and EV charging technologies—including vehicle-to-grid (V2G) systems—by optimising charging and discharging schedules.

Barriers and Risks

There are various impediments to higher AI adoption in the electricity sector. These include poor-quality data, cybersecurity and safety risks, and regional differences in governance regimes. For example, AI models trained on region-specific data may perform sub-optimally in other contexts, such as different weather patterns or economic conditions.

Inconsistent regulations across jurisdictions also create operational and compliance challenges. In multiple regions—such as the US, EU, and China—data centre energy demand is also eclipsing the growth of low-carbon electricity generation. Nevertheless, operators could address many of these barriers and risks by adopting best practices in AI governance, robust cybersecurity measures, and through close collaboration with governments and regulators.

APPLYING AI TO THE GLOBAL ENERGY TRANSITION

ENERGY TRANSITION PRINCIPLES	DESCRIPTION	AI APPLICATIONS
AVAILABILITY AND SECURITY	Ensuring a reliable and uninterrupted supply of high-quality energy resources that adequately meet the diverse needs of consumers, and safeguard against disruptions or shortages.	1. Predictive Maintenance 2. Demand Forecasting 3. Grid Management
AFFORDABILITY	Ensuring energy services are financially accessible, with costs comprising no more than 10% of household incomes.	1. Increase Energy Efficiency and Load Balancing 2. Dynamic Pricing Models 3. Automated Energy Management
SUSTAINABILITY	Responsibly managing resources to balance current requirements with long-term resource conservation, minimising environmental impact, supporting community wellbeing, and sustainable development goal alignment.	1. Optimise Energy and Resource Use 2. Renewable Energy Integration 3. Emissions Reduction Modelling

GOVERNING THE AI-ENERGY NEXUS

Infrastructure Investment and Corporate Structuring

Strategic regulation and investment are critical to aligning AI development with energy transition objectives. AI infrastructure—comprising hardware and energy assets—remains capital intensive. Traditionally powered by centralised electricity grids, data centres are now exploring decentralised energy models, including onsite renewable generation and battery storage. Proposals such as modular data centres and "Graphics Processing Units (GPUs)-as-a-service" also aim to address electricity and land scarcity, while improving energy efficiency.

Convergence between these assets and sectors is driving new corporate structuring and financing strategies, particularly in the UK, EU, and US. We observe vertical integration as a significant trend, with companies co-locating renewable energy assets with data centres to secure sustainable energy supplies. With this, strategic partnerships between technology firms, energy companies, and infrastructure developers are also increasingly enabling shared investment in large-scale renewable projects and advanced data centres.

Innovative financing models—such as YieldCos and DevCos—can attract investment by enabling companies to separate operational assets—that generate predictable revenues—from riskier developmental projects, to ensure both stability and continuous innovation. Sustainability-linked instruments—including green bonds—are also increasingly deployed to lower borrowing costs for companies achieving environmental performance targets.

Formal Regulation

Governments are introducing measures to align AI with energy transition objectives. In the EU, measures such as the Taxonomy Regulation, European Code of Conduct for Energy Efficiency in Data Centres, Energy Efficiency Directive, and Corporate Sustainability Reporting Directive (CSRD) establish reporting requirements for energy consumption, emissions, temperature, thermal recycling, and resource use. The Corporate Sustainability Due Diligence Directive (CS3D) also requires technology companies to evaluate and address risks deriving from algorithmic biases, data privacy, supply chain, energy, and water consumption. Moreover, the AI Act mandates risk assessments and data governance for high-risk applications, including critical digital or electricity infrastructure deploying AI for grid management or data centre operations.

The UK's Streamlined Energy and Carbon Reporting (SECR) regime requires large companies to disclose energy use and emissions. At the same time, the Task Force on Climate-related Financial Disclosures (TCFD) mandates disclosure of climate-related risks and opportunities. The Building Regulations also prescribe energy efficiency standards for buildings. Furthermore, reforms to the UK's Nationally Significant Infrastructure Project (NSIP) regime could impose more stringent environmental or reporting requirements on new UK data centres. Several US states—such as California—enforce stringent energy efficiency standards for data centres. These regulatory efforts promote transparency and encourage investment in sustainable AI infrastructure.

Voluntary Industry Initiatives

Industry-led initiatives are complementing formal regulations. For example, the Climate Neutral Data Centre Pact commits operators to achieve climate neutrality by 2030, focusing on energy efficiency, renewable energy, water usage, and thermal recycling targets. Similar sectoral initiatives include the Circular Economy for the Data Centre Industry project, the Green Grid initiative, and the iMasons Climate Accord. Adopting AI-driven energy monitoring systems could streamline reporting and improve transparency, which is increasingly valued by stakeholders and regulators alike. Carbon markets also offer opportunities for technology companies to neutralise emissions or generate carbon credits through AI-optimised operations.

Geopolitical and International Trade Considerations

Complex international trade challenges and opportunities may emerge over the next 12 months. Integrating AI into the energy transition will necessitate addressing geopolitical challenges. Export restrictions on AI hardware and tariffs on critical technologies—including energy-efficient GPUs, application-specific integrated circuits (ASICs), field-programmable gate arrays (FPGAs), digital signal processors (DSPs), and reduced instruction set computer (RISC) chips, which accelerate sequential processing and machine learning—could disrupt supply chains, and incentivise regional production. Simultaneously, data sovereignty regulations—including the EU Data Protection Act—may compel localised data storage, thereby driving demand for regional data centres and infrastructure investment. Aligning with emerging international standards can position companies to capitalise on new cross-border opportunities, while navigating regulatory complexities.

CONCLUSION

AI's impact on the global energy transition relies on multiple interconnected factors. Ultimate success will hinge on unleashing AI's ability to catalyse renewable electricity generation, transmission, storage, and end-use, while mitigating its environmental footprint (through energy-efficient hardware and software, and increasing renewable energy deployment). Corporate leaders and general counsel will remain architects of a future in which AI and the energy transition mutually reinforce each other to drive sustainable progress. By structuring power purchase agreements, navigating data centre reforms, tracking transatlantic regulations, safeguarding intellectual property, or drafting sustainability reports, legal teams can holistically and strategically ensure that their organisations comply, and thrive, in this era of transformation.

CONTACT US TO FIND OUT MORE

James Cook
Partner
T +44 (0)20 7090 4216
E james.cook@slaughterandmay.com

Oliver Moir
Partner
T +44 (0)20 7090 3307
E oliver.moir@slaughterandmay.com

NAVIGATING A NEW WAVE OF ENERGY INVESTMENT IN 2025

The investment tide has turned

Michael Corbett
Partner

Hywel Davies
Partner

Alex Dustan
Partner

The energy transition is increasingly driving investment in the energy sector. Investment in the energy transition is forecast to double that of fossil fuels in 2024. For several reasons, this trajectory is expected to continue in 2025.

Firstly, the macro-economic challenges which the sector faced over recent years, such as geopolitical uncertainty, supply chain constraints and the rise in the cost of finance, are now largely accounted for in valuations and return expectations. Businesses focused on the energy transition, which are particularly impacted by these conditions due to difficulties in passing increased costs on via higher prices, have (for the most part) shored up their finances by implementing strategies such as strategic disposals or partnerships.

Secondly, having spent the first half of this decade revising regulatory frameworks, governments, particularly in OECD countries, are now proactively implementing measures to steer capital towards energy transition opportunities. The EU's Green Deal is an example of this. Initiated in 2019, the EU institutions have now undertaken a significant programme to align EU laws with the climate neutrality goal. In November 2024, Ursula von der Leyen announced her new Commission will continue to pursue its goals but with a focus on competitiveness in key areas such as innovation, manufacturing and industry.

The picture is nuanced, particularly in countries where new administrations are set to take office following recent elections. The US is an obvious example of a likely retrenchment from energy transition policies, however it is unclear the extent to which this rhetoric will be borne out. However, in other markets incoming governments may seek to deepen energy transition policy. Such as in the UK where the government's Clean Power Mission is seeking to accelerate decarbonisation of the electricity system by 2030.

In the private sector, the adoption of climate risk management strategies and greater levels of sustainability reporting by businesses and investors, whether voluntary or mandatory, are also driving investment in energy transition-related assets.

INVESTOR REQUIREMENTS MUST BE APPROPRIATELY ACCOUNTED FOR

However, to mobilise private capital requires a range of policy interventions. The type of intervention varies and depends on a range of factors including:

1. **Technology maturity** – investment appetite and return expectations vary depending on the maturity of the technology. Pre-commercial technologies require a higher risk / reward due to their novelty and uncertain returns. As a result, they are typically incubated using R&D budgets within large corporates or funded by venture capital investment. An example of the latter is Tokamak Energy, which recently raised a $125 million of further funding for its fusion energy solution.

2. **Financing approach** – where corporate finance is being used, debt and equity funders will look to the corporation's balance sheet to recoup their investment plus returns. However, where non- or limited-recourse finance is sought, investors will need to satisfy themselves that risks are appropriately mitigated or allocated, and that forecast revenues are reasonably likely to be achieved.
3. **Investor hold period** – some investors will have mandates that require a sale within a given period. For example, hold periods are typically 4-7 years for private equity, but perhaps up to 10 years for infrastructure funds, and much longer for patient pools of capital with long-dated liability such as pension funds or insurers. This in turn drives investment pay-back periods.
4. **Investor risk appetite** – certain types of capital prefer low risk, regulated returns, whilst others will accept greater levels of risk, commensurate with rewards.

It is not appropriate for governments to intervene in relation to every risk, however. Some risks such as technology, construction and operating risks are commonly managed by the private sector.

THOUGHTFUL POLICY DESIGN IS CRITICAL

It is crucial that these factors are considered in the design of policy interventions. However, the extent to which they can be accounted for will depend on local circumstances. In some jurisdictions, central vs local government jurisdiction may limit the country-wide actions the central government can deploy. In others, constitutional or public law checks and balances or value for money duties may also need to be accounted for. For example, in the UK and EU, State aid or subsidy control rules will need to be respected. As a result, approaches to stimulating energy transition investment can vary significantly.

For pre-commercial technology, interventions focus on grants or tax incentives for R&D which tend to be relatively blunt tools, providing little insight into the actual expenditure required which can raise value-for-money concerns. Investors may also be reluctant to rely on tax incentives for multi-year projects due to actual or perceived change in law risks. The incoming Trump Administration will likely remove or curtail incentives introduced only around 2.5 years ago in the Inflation Reduction Act. And the UK government's promise of stability in a "Corporate Tax Roadmap" has done little to boost business confidence which in November 2024, was reported to be near the record low recorded at the start of the COVID-19 pandemic (with business tax among the top three concerns). So, what other tools are governments using to incentivise significant capital expenditure?

Early investments into many renewable technologies such as onshore and offshore wind or solar in the UK and EU were historically supported via fixed feed-in tariff or a feed-in premium schemes. However, many markets are now implementing a contracts for difference (**CfD**) mechanism. A two-way CfD scheme for renewable power generation, introduced in Britain in 2014, is widely seen as successful to incentivise development of high capex, low opex renewable assets (see box for details). The CfD mechanism is now also being rolled out for newer technologies in the UK such as electrolytic and carbon capture and storage (**CCS**) enabled hydrogen production. It is also now expected to be used more widely in EU member states for new renewable and nuclear projects following adoption of proposals to reform electricity market design in 2024.

SPOTLIGHT ON THE UK CFD FOR RENEWABLES

The CfD for renewables is structured as a private law contract whereby generators are paid the difference between a market reference price for power and a strike price secured at auction. Successful bidders sign a contract with an insolvency remote company wholly owned by the UK government which provides them with an inflation-adjusted fixed revenue stream for 15 years, the cost of which is recovered from power consumers by suppliers. The CfD regime has driven significant investment in UK renewables, with a range of investors taking stakes in projects throughout their life-cycle according to their risk appetite and their willingness to take construction/development risk.

Where policy seeks to stimulate demand for a higher cost low carbon fuels, market mandates have been used to incentivise the supply by avoiding non-compliance penalties. This has helped to encourage investment in renewable transport fuels in the UK and is the approach that both the EU and UK have introduced to develop the market for sustainable aviation fuels (SAF) under their respective ReFuelEU and SAF mandate policies. Whilst it is still too early to judge the success of these policies in the context of the international aviation market, there is a risk if the penalty is not sufficient to drive investment in local production, particularly where lower cost, international supply is available. This may result in fuel suppliers preferring to pay the penalty and pricing this into supply via increased charges, effectively shifting the responsibility for investment to their customers.

To mobilise institutional investment in monopolistic infrastructure, the UK is increasingly considering structures geared towards investors seeking long-dated, regulated returns. Regulated asset base models or licence-based cap and floor regimes which provide revenue certainty over the long-term are increasingly implemented. We are seeing these being deployed for new nuclear power projects and networks such as carbon dioxide transportation and storage and hydrogen transportation. For first-of-a-kind projects, this is being supplemented by a government support package to address key risks and ensure bankability. However, because periodic price controls mean that expenditure and returns will be subject to regular review, a key element in the success of these regimes is confidence in the regulator. This will vary according to the market and can be sensitive to wider market sentiment.

Other indirect interventions are also important. These include concessionary finance (debt or equity) from publicly owned institutions where liquidity is lacking in the commercial markets. For example, the UK's National Wealth Fund will have a total capitalisation of £27.8 billion and an expanded mandate to support delivery of the UK's industrial strategy in areas where there is an undersupply in private finance.

CONCLUSION

Increasingly government interventions underpin investment models for energy transition assets. To ensure their success, it is important for investor requirements to be borne in mind in their design. Consequently, debt and equity investors will need to model and stress test the regulatory regime to appropriately assess and structure their investment.

CONTACT US TO FIND OUT MORE

Michael Corbett
Partner
T +44 (0)20 7090 3431
E michael.corbett@slaughterandmay.com

Hywel Davies
Partner
T +44 (0)20 7090 3102
E hywel.davies@slaughterandmay.com

Alex Dustan
Partner
T +44 (0)20 7090 3573
E alexander.dustan@slaughterandmay.com

DIGITAL REGULATION

What to expect in 2025

Laura Houston
Partner

Jonny Slade
Partner

Natalie Donovan
Head of Knowledge
Tech and Digital

The last few years have seen a wave of new, sometimes overlapping, digital regulation across the globe. The EU's ambitious digital programme has resulted in numerous pieces of legislation, while the UK is treading a delicate line of testing post-Brexit divergence while recognising the need for global businesses to have certainty and consistency. 2025 will be the year when many of those new laws start to bed down, and organisations need to put processes in place to comply. Here we look at developments in four key areas: AI, data, competition and digital regulation for financial services.

AI

The EU AI Act has dominated discussions around AI regulation in Europe and beyond for some time. While it is now in force, this focus may continue as further developments are expected this year. For example, the rules banning certain AI use apply from this February and those relating to general purpose AI apply from this August. Listening to EU legislators and regulators discussing implementation of the Act, they do (particularly following the Draghi report on EU competitiveness) seem very aware of the challenge they face to ensure regulation does not stifle innovation in a highly competitive global AI market – and this theme (or tension) is something we are seeing played out more generally in relation to digital regulation across the globe. That said, in the UK we are also expecting an AI Bill, although this is only expected to regulate those developing the most powerful AI models.

New AI specific laws are not, however, the only developments requiring focus. AI raises particular challenges for intellectual property law, and we await case law and/or government intervention to determine whether current approaches to training AI are compatible with IP law and whether the output from generative AI is protectable. Ultimately this comes down to balancing the interests of content providers and AI developers.

On the privacy front, regulators continue their focus on AI. Organisations are still processing new guidance from both the EU and UK. At the time of writing, we expect the European Data Protection Board (EDPB) to publish its foundation models paper on 23 December 2024 and we additionally expect the UK's data regulator, the Information Commissioner's Office (ICO) to publish the response to its consultation on generative AI, with more developments expected in 2025.

In other areas, the UK's new Online Safety rules and developments from sector regulators (including the financial regulators – see below) are also expected to impact AI.

DATA

2025 looks to be a year of change for data privacy. The UK's Data (Use and Access) Bill is expected to become law in the first half of 2025, amending the existing data privacy legislation. Most significantly for business, this Bill introduces higher penalties for cookie and marketing infringements, in line with those under the GDPR, and facilitates "Smart Data" data sharing schemes in sectors such as finance and energy, building on the success of the UK's existing Open Banking scheme. New guidance from the ICO is also expected on key topics including data anonymisation and cookies. In the EU, businesses will welcome promised guidance from the EDPB on the interplay between the GDPR and other data-relevant legislation, including the AI Act and Digital Markets

Act. Further key pieces of EDPB guidance are expected on anonymisation and "consent or pay" models (beyond those being operated by large online platforms). It is also expected that EU GDPR procedural reforms will progress during 2025, potentially to completion, which promise to facilitate more efficient resolution of complex cross-border cases, whilst the incoming EU Commissioner for Justice, Michael McGrath, has said he will address unfair personalisation practices.

COMPETITION

In the UK, and at the time of writing, the new digital markets regime established by the Digital Markets, Competition and Consumers (DMCC) Act 2024 is expected to commence shortly, with the Competition and Markets Authority (CMA) planning to designate three or four firms as having "strategic market status" in the first year after commencement. Once designated, these firms will have to comply with merger reporting obligations and targeted conduct requirements, and could be the subject of "pro-competitive interventions" by the CMA. A new merger control threshold intended to capture "killer acquisitions" will also become operational.

In Europe, we can expect the existing momentum of enforcement under the Digital Markets Act (DMA) to continue in 2025 – the new Competition Commissioner, Teresa Ribera, has said she plans "vigorous enforcement" of the DMA, a sentiment echoed by Henna Virkkunen, Executive Vice-President for Tech Sovereignty, Security and Democracy. The two Vice-Presidents plan to work closely on the DMA and have the shared priorities of opening up closed ecosystems, giving consumers choice and ensuring data belongs to those who generate it. Ribera has made clear that greater resources will be needed to enforce the DMA, noting that this is an issue which "*goes beyond our borders*" and requires coordination with national competition authorities.

DIGITAL REGULATION FOR FINANCIAL SERVICES

Businesses operating in the financial services sector are subject to specialised digital regulation, which will continue to evolve across 2025. Regulatory rules on operational resilience, which seek to manage the risk of cyber-attacks and IT system outages among other disruptions, will apply in the EU from 17 January 2025 and to specified UK firms by no later than 31 March 2025. As part of this operational resilience framework, both jurisdictions will also start to designate a small number of third party (which could include AI and cloud service) providers to the financial sector as "critical", imposing requirements on them directly.

This regulatory capture of critical third parties speaks to the increasing enmeshment of technology and financial services. Responding to this, we expect financial regulators in the EU and UK to continue to dig into the impacts of Big Tech's entry into financial services, progress the development of Open Finance, and modernise the payment services landscape.

As AI use cases in the financial sector proliferate, we may receive clarification from EU authorities on the relationship between financial regulation and the EU AI Act, and there are suggestions that the current tech-agnostic approach to AI of the UK regulators may ultimately shift. Finally, the EU's regulatory framework for cryptoassets applied in full from 30 December 2024 and will start to take hold in 2025 (subject to grandfathering provisions). The UK has confirmed that it will press ahead with a more comprehensive regulatory framework for cryptoasset activities in 2025, with final rules expected in 2026.

CONTACT US TO FIND OUT MORE

Laura Houston
Partner
T +44 (0)20 7090 4230
E laura.houston@slaughterandmay.com

Jonny Slade
Partner
T +44 (0)20 7090 8436
E jonathan.slade@slaughterandmay.com

Natalie Donovan
Head of Knowledge Tech and Digital
T +44 (0)20 7090 4058
E natalie.donovan@slaughterandmay.com

ARTIFICIAL INTELLIGENCE

Growing litigation risk

Ross Francis-Pike
Partner

Rob Sumroy
Partner

Natalie Donovan
Head of Knowledge
Tech and Digital

Robert Brittain
Head of DI Knowledge

Businesses are increasingly integrating AI into their working practices - with McKinsey recently reporting that 65% of the respondents to their "State of AI" survey are now regularly using generative AI in their organisations, nearly doubling the percentage from their equivalent survey last year. Given the pace at which AI is developing, legislators across the globe are racing to catch up. The EU AI Act became law in August and, in the UK, an Artificial Intelligence Bill is expected. The EU has also taken steps to make it easier for consumers to bring claims against companies including when they are harmed by AI, introducing the EU Revised Product Liability Directive (to become law in Member States by December 2026) which includes a reversal of the burden of proof in some circumstances such that the burden is on the defendant to show that the relevant product (which can include AI) was not defective.

EXPONENTIAL GROWTH IN AI LITIGATION VERY POSSIBLE

However, to many, AI still remains a "black box" – do we really know how powerful it is? What does the AI model really know or do? Could it be hallucinating or biased? With the ever increasing use of AI, its growing complexity and increased legislation, there is clear potential for exponential growth in litigation arising out of the manufacture and use of AI.

Litigation relating to AI has to date primarily focussed on the development of the relevant AI, including a number of claims being commenced against manufacturers on the basis of alleged breaches of intellectual property rights. However, as businesses increasingly integrate AI into their working practices, claims relating to the use of AI have also arisen under both contract and tort law. Before the English courts in *Leeway Services Ltd v Amazon*, Leeway Services alleged that Amazon's use of AI systems resulted in its wrongful suspension from trading on Amazon's online marketplace, and in *Tyndaris SAM v MMWWVWM Limited* (VWM), VWM argued that Tyndaris had misrepresented the capabilities of an AI-powered system. Neither of these cases have reached trial but in the recent Canadian judgment *Moffat v Air Canada*, Air Canada was found to have failed to take reasonable care to ensure the accuracy of responses provided to customers by its chatbot.

THE REGULATORS ARE TAKING NOTICE

Regulators are also increasingly active in respect of AI. For example, in the UK the Information Commissioner's Office has published a strategic approach to AI and the Financial Conduct Authority is looking to develop its understanding of the risks and opportunities AI presents to the financial services sector. We may also be at the start of

a period of increased regulatory focus on whether companies have made false or misleading public statements regarding their use of AI, with the US Securities and Exchange Commission announcing in March 2024 that it had reached settlements with two investment advisers regarding so-called "AI washing" (Delphia (USA) Inc. and Global Predictions Inc.). With greater regulatory focus, the chances of private claims piggy backing off of adverse regulatory findings increases.

MASS CLAIMS A RISK

Group litigation, in particular, is a key area of risk for both manufacturers of AI and businesses relying on it. Given the characteristics of AI, it is easy to see how a group claim could arise – for example, given the speed with which AI operates, an error could have affected a large group of people before it is even spotted. Whilst the alleged loss suffered by each individual claimant could be small, the aggregated harm across the group could potentially be very large. Whilst the English Supreme Court's 2021 decision in *Lloyd v Google* may have given businesses some comfort that England is a jurisdiction in which it is difficult to pursue group claims, there are a number of ways in which such claims can be structured before the English courts, for example:

- The Supreme Court indicated in *Lloyd v Google* that a group claim could be structured such that common issues across claimants are considered during a first stage heard on a representative basis, with claimants then pursuing individually any losses they suffered in reliance on that first representative decision. Whether there are common issues will be a fact specific question and there have been a number of recent cases before the English Court of Appeal in which they have considered this question. The court approved this approach in *Commission Recovery Limited v Marks and Clerk LLP*, whilst rejecting it in *Prismall v Google UK Ltd and DeepMind Technologies Ltd*, having found that the proposed group of claimants did not share a common interest in respect of the alleged misuse of their medical data. We are currently waiting on the Court of Appeal's decision regarding a proposal to structure a securities law claim, in which investors are seeking to recover losses suffered as a result of allegedly untrue statements contained in various public documents, in a similar manner (*Wirral Counsel v Indivior PLC / Reckitt Benckiser Group*). Given the potential for an increase in regulatory decisions regarding "AI washing", the Court of Appeal's decision in this case may be pivotal to how potential future group claims pursued on a similar basis in respect of alleged untrue public statements regarding AI could be structured.
- Whilst cumbersome and potentially expensive, claimants can pursue a group claim by obtaining a group litigation order (GLO) that provides for the joint case management of claims which give rise to common or related issues of fact or law. However, a GLO is not strictly required and a large number of claimants could also seek to pursue their claims as individual parties in one set of multiparty proceedings. This is the approach adopted by around 620,000 claimants in the ongoing *Município de Mariana v BHP Group* proceedings, in which we act for BHP.
- We also continue to see a large number of claims being commenced under the collective proceedings regime in the UK's Competition Appeals Tribunal (CAT). Whilst such claims must be pursued on the basis of a breach of competition law, there is an ongoing trend of parties seeking to frame what are in effect consumer-protection actions as claims for anti-competitive conduct in order to benefit from this regime and it is easy to see how this could also arise in respect of claims regarding AI. We are acting on a number of these claims, ranging from the defence of a train operator in respect of historical sales of a certain train ticket type, to a water company in the first environmental collective proceedings brought before the CAT. It is noteworthy that tech giants are also increasingly a target of such claims, with cases currently being pursued against Microsoft, Meta, Alphabet / Google and Apple - with a new high profile claim having recently been commenced by a UK consumer champion Which?.

Whichever route is adopted, it seems nothing more than a matter of time before a group claim arising out of the development or use of AI will be commenced before the English Courts.

CONTACT US TO FIND OUT MORE

Ross Francis-Pike
Partner
T +44 (0)20 7090 3713
E ross.francis-pike@slaughterandmay.com

Rob Sumroy
Partner
T +44 (0)20 7090 4032
E rob.sumroy@slaughterandmay.com

Natalie Donovan
Head of Knowledge Tech and Digital
T +44 (0)20 7090 4058
E natalie.donovan@slaughterandmay.com

Robert Brittain
Head of DI Knowledge
T +44 (0)20 7090 3683
E robert.brittain@slaughterandmay.com

TECH M&A IN 2025

A renewed focus on innovation and growth drives M&A opportunities

James Cook
Partner

After a dip in activity, M&A in Europe, the Middle East and Africa (EMEA) recovered in 2024, with each of Q1-Q3 showing an increase in deal value year-on-year. We expect that 2025 will build on this, with further rate cuts globally and pressure on PE funds to deploy record levels of dry powder ($4.5tn at the end of H1 2024).

Tech was the most active sector in 2024, accounting for 18% of potential deals and seeing a 29% year-on-year Q3 value increase, and for 2025 there is no obvious challenger. Large deals were popular, and we see multiples continuing to rise given the high growth rates of EMEA tech companies. With intense competition for targets, the largest deals were partial investments, such as Bharti Global's £3.6bn purchase of a 24.5% stake in UK telecoms giant BT. This seems likely to continue, with recent data suggesting that in their 2025 tech M&A strategies, 80% of private equity firms are considering minority investments.

Software represented 80% of tech deal value in Q1-Q3 2024 and we expect that trend to continue. We also see the continued growth into 2025 of "reverse" acqui-hires, where instead of buying a target outright a company will selectively hire its employees and license its software, as Amazon did in August with AI robotics startup Covariant. 2025 tech deals may cluster around sectors already transformed by AI software, like business services and e-commerce.

We also see the UK forging its own tech-friendly path. The UK led EMEA M&A in 2024, with deal values over twice as high as Germany's in second place. UK tech will remain attractive to both PE buyers (see Thoma Bravo's $5.3bn acquisition of cybersecurity player Darktrace) and strategic players (see Informa's £1.2bn acquisition of Ascential), given the country's deep talent pool and valuation discounts vs. the US. UK tech startups and scale-ups secured £7.4bn in funding in H1 2024, a 16% increase year-on-year representing nearly one third of all European VC funding, and again we see that continuing given the relative stability of the UK and renewed focus on innovation. Whilst structural and regulatory reforms seek to unblock the IPO pipeline, M&A will be the dominant exit route in the sector in the meantime.

POLITICAL BACKDROP

2024 saw over half of the world's population vote in elections. In the UK, market and business reaction to the new Labour government was initially muted, but the rally in UK M&A has shown investors' confidence and we expect it to accelerate. Labour has introduced significant opportunities for high-growth tech companies and their investors, including the largest-ever UK government investment in R&D (£20.4bn) and the ten-year extension (until 2035) of the Enterprise Investment Scheme and Venture Capital Trust. More generally, a renewed focus on investment in the European tech sector is inherently likely to drive more M&A.

In the US, by contrast, Donald Trump's 2024 election victory inspired an immediate rally in US stocks and optimism among dealmakers. However, Trump and his Vice President-elect JD Vance do present the tech sector with some uncertainty. While major tech figures like Elon Musk and potentially Mark

Zuckerberg will be close to the new administration, Vance and other future officeholders have indicated an interest in some extent of a break-up of Big Tech. This would create highly desirable new target companies but also further disturb deal flow from some of tech's most prolific buyers (negating the potential shift in regulatory backdrop described below).

Geopolitical tensions (particularly conflicts in Ukraine/Russia and the Middle East, plus potential trade wars between China and Trump's US) could affect decision-making regarding international expansion, supply chains, offshoring, and personnel movement – factors which may in turn drive M&A decisions themselves.

REGULATION

The antitrust landscape in Europe and the US has been notoriously challenging in recent years for large tech acquisitions (see Adobe's attempted acquisition of Figma as an example). In the UK, the Digital Markets, Competition and Consumers Act will widen the powers of the Competition and Markets Authority (CMA) to review tech deals and the Digital Markets Act in the EU will bring enhanced scrutiny to all M&A deals by the largest of tech companies.

However, the picture is far from one-sided. For example, the CMA has cleared the £15bn Vodafone / Three telecoms merger with behavioural remedies and will conduct a review in 2025 of its approach to merger remedies, which opens the door to more flexibility. Mario Draghi, former Prime Minister of Italy, has suggested that certain tech mergers be given an "innovation defence" in EC review, and the combination of a new EU Competition Commissioner and the ECJ's striking down of the decision to block Illumina / Grail may bring about a significant change in environment.

That said, we expect tech dealmakers to continue to address regulatory risk through contractual protections, such as reverse break fees and "hell or high water" clauses, which require a buyer to do everything in its power to secure clearances.

AI

AI underscored many of 2024's biggest tech deals, both in AI products and also in AI-driven industries such as data centres (see the $16.1bn buyout of AirTrunk by a Blackstone-led consortium as just one example). By volume, AI M&A grew 33% year-on-year in Q1-Q3 2024, outpacing tech M&A overall. These trends will continue into 2025 as more AI use cases are tested.

Dealmakers must consider the EU's AI Act, which became law last year and whose compliance deadlines begin on 2 February 2025. The Act catches systems developed anywhere so long as they are put on the market or into service in the EU, and affects not just developers but also corporate users of AI. Its maximum penalties are severe: the higher of 7% of global turnover/€35mn (vs the GDPR's 4%/€20mn). Similar legislation is coming in around the globe.

Buyers will focus on this more in due diligence and contractual protections, such as compliance warranties, indemnities to cover historic breaches, and/or conditions precedent to compel sellers to achieve compliance before closing, e.g. by conducting model evaluations.

CONTACT US TO FIND OUT MORE

James Cook
Partner
T +44 (0)20 7090 4216
E james.cook@slaughterandmay.com

EU AND UK OPERATIONAL RESILIENCE

One aim, two approaches

David Shone
Partner

Regulated financial institutions operating in the UK and EU often rely on third-party service providers to help run or facilitate important parts of their business. The July 2024 CrowdStrike outage illustrates the critical role that third-party service providers can play in the financial sector, and the risks they could pose to financial stability when things go wrong. In this article we outline the key provisions, points of difference, and implications of incoming UK and EU regimes designed to meet this risk and bolster operational resilience. Under both regimes, and for the first time, technology services to the financial sector will be subject to direct supervision by financial services regulators.

THE REGIMES AT A GLANCE

From 17 January 2025, new EU rules concerning the provision of information and communication technology (ICT) services to regulated financial institutions will apply under the Digital Operational Resilience Act (DORA). DORA sets digital operational resilience standards for EU regulated financial institutions, requiring them to manage their ICT risks effectively, and will subject critical ICT third-party service providers (ICT CTPs) to a brand new oversight framework.

The UK, meanwhile, has adopted a two-pronged approach. First, through the implementation of a framework for operational resilience in the financial sector, which was introduced in March 2022 with a longstop compliance date of 31 March 2025, and which applies to regulated financial institutions. Second, through the introduction of a new oversight regime for CTPs who provide material services to regulated financial institutions, which will take effect from 1 January 2025.

No CTPs have yet been designated under either regime, but initial designations are expected to focus on large cloud and other infrastructure providers (and increasingly, artificial intelligence solutions). Importantly, the UK regime is broader than DORA and could, in future, capture other firms – for example, those providing claims management services to insurers.

Both the EU and UK regimes will have significant consequences for regulated financial institutions and CTPs. In the sections below, we outline several important considerations for firms when preparing for these changes.

WHAT THIS MEANS FOR THE FINANCIAL SECTOR IN 2025

Leaving aside DORA's focus on ICT risk, there are several areas where the UK and EU regimes are aligned. In both jurisdictions, operational resilience rules require regulated financial institutions to implement internal governance and control frameworks to identify, prevent, manage and respond to risks which may arise. Under DORA, these measures will include a requirement to implement an ICT risk management framework and digital operational resilience strategy which establishes risk tolerances. Firms subject to the UK's operational resilience rules are already required to identify their important business services (IBS), set impact tolerances for service disruption and implement strategies, processes and systems to enable the firm to remain within those impact tolerances.

There are also similarities in terms of the testing and incident management requirements that apply under both regimes. DORA mandates that regulated financial institutions perform threat-led penetration testing (TLPT) on ICT tools, systems and processes, which is likely to be more exacting than the testing processes many may have faced previously. UK regulated financial institutions are already required to carry out scenario testing of their ability to deliver IBS during a disruption event, which may, and in most cases should, include penetration tests. Under both regimes, firms must maintain a communication strategy to minimise harm caused by disruption events.

One key distinction for firms to bear in mind is that DORA prescribes minimum contractual arrangements that must be included in contracts between EU regulated financial institutions and ICT service providers and provides for the ability to rely on standardised contractual provisions. Enhanced provisions apply where the services support critical or important functions of the financial institution. No equivalent requirements apply under the UK operational resilience rules or CTP regime, although existing outsourcing rules will overlap with these requirements in many areas.

WHAT THIS MEANS FOR CTPS IN 2025

The obligations that apply to CTPs exist in parallel and are intended to complement rather than to blur, eliminate or reduce the responsibilities of regulated financial institutions.

Under DORA, ICT CTPs which are designated as critical to the EU financial sector will be subject to oversight by the European Supervisory Authorities (ESAs) acting as so-called “Lead Overseers”. This designation will depend on both quantitative and qualitative factors and focusses on the substitutability of the service provision. Under the UK CTP regime, designation is based on the likelihood that a failure in, or disruption to, a CTP’s service provision could threaten the stability of, or confidence in, the financial system of the UK. This assessment will consider the materiality of the services and the number and type of regulated financial institutions to which the services are provided, and oversight is conducted by the UK regulators (the Bank of England, PRA and FCA).

The effect of designation for any CTP is similar in the EU and the UK. CTPs will be subject to new obligations to establish and maintain risk management policies and communication strategies, carry out testing programmes, and implement incident monitoring and reporting mechanisms. There is a deliberate symmetry between these rules and the operational resilience rules that apply to regulated firms, strengthening the alignment of interests between CTPs and their financial sector clients.

Supervisory powers exercisable by the Lead Overseer under DORA and the UK regulators are also comparable, including investigatory and information gathering powers, and disciplinary measures in the event of non-compliance. Penalties, however, presents a significant area of difference. DORA provides the ESAs with the power to hand down significant fines to ICT CTPs for non-compliance, but the UK regime does not include fining powers.

Another important area of divergence is territorial scope:

- Under DORA, the powers of the Lead Overseer extend beyond the EU, and third country ICT CTPs will be required to establish or designate an EU subsidiary as the primary point of contact.
- The UK CTP regime is location agnostic (i.e., it is not concerned with the location of service providers) but does not provide for extensive extraterritorial powers for the UK regulators in the same way that DORA does. UK CTPs are also not required to set up a branch or subsidiary in the UK.

NEXT STEPS

For financial institutions that are used to operating within the ambit of the UK and EU’s existing outsourcing rules, these new frameworks are unlikely to require fundamental changes to existing processes, controls and arrangements. For technology providers designated as CTPs however, the changes are likely to be more significant, as firms adapt for the first time to direct supervision by UK and EU financial services regulators. While driven by different motivations, it is no coincidence that these changes are taking effect at the same time, as legislators and regulators in the UK and EU adopt a more muscular approach to the regulation of “big tech”. Both developments seek in their own way to address sources of systemic risk within the technology sector, and to remedy perceived imbalances of power between tech providers and their customers. Whether this will prevent another CrowdStrike incident is debatable (it is unlikely that CrowdStrike itself would have been designated as a CTP), but both the UK and EU regimes demonstrate the significant supervisory concern as to those risks and a willingness to intervene directly to mitigate them.

CONTACT US TO FIND OUT MORE

David Shone
Partner

T +44 (0)20 7090 5242
E david.shone@slaughterandmay.com

NAVIGATING DIGITAL TRANSFORMATION

Lessons from the AT&T vs. Broadcom Dispute

David Ives
Partner

Duncan Blaikie
Partner

Digital transformation is continuing at pace, with organisations starting to deploy new transformative technologies like AI and fully embrace cloud and other service based solutions. However, as we become more reliant on our digital service providers, it is increasingly important to ensure that our contracts with them provide sufficient stability and certainty. Suppliers are facing increased costs, both to supply their services and to comply with an increasingly complex web of digital regulation, and they may therefore be looking to fully enforce their contracts where there are financial incentives to do so. Last year's (now settled) dispute between Broadcom and AT&T is an example of this. So what lessons can we take from this dispute when negotiating new digital arrangements in 2025?

AT&T V BROADCOM: THE FACTS

When Broadcom took over VMware, it announced (in December 2023) that it would restructure VMware's software licensing model, moving from a perpetual licence model to subscription licensing products (with such products sometimes being "bundled" with other products).

AT&T, the Fortune 500 telco giant, had a perpetual licence of VMware virtualisation software and did not want to move to the new subscription model, which would result in a substantial price increase. It argued its existing licence included a two year extension for support and maintenance services (such as security patching) which Broadcom refused to honour. It therefore sought a mandatory injunction from the court which would force Broadcom to accept AT&T's exercise of its renewal rights. Without such services, AT&T claimed it would not be able to guarantee stable and secure services for its customers (including critical national infrastructure). The parties subsequently reached a settlement in principle and the judge issued Broadcom with a temporary restraining order to continue providing VMware support services to AT&T pending a decision.

DO YOU HAVE ALL THE RELEVANT T&CS?

VMware and AT&T had executed a number of relevant agreements over the course of decades working together – the claim references an older End User License Agreement (EULA) and a newer Enterprise License Agreement (ELA), along with more than 10 contract amendments. It can be hard to keep track of all changes to live contracts, and a contract audit may be needed to uncover all amendments over time.

Relevant terms may also be incorporated into the contract by reference – e.g., hyperlinks to a website or vendor portal with standard-form terms or policies. AT&T noted that Broadcom were relying on "*VMware support policies, which permit the end of availability of the product offerings*".

It is important for customers to understand what is tucked away in the small print, and to have a clear understanding of the basis on which these terms can be amended (including whether a software vendor has the right to change these unilaterally).

ARE YOUR RENEWAL RIGHTS CLEAR?

Broadcom appeared to be relying on ambiguity in the AT&T renewal provisions (along with the "End of Availability" provisions discussed below) to deny renewal of the support and maintenance services for the current software products.

In this case, a question arose over whether AT&T had to give notice for three annual renewals in 2023 (at which point AT&T only renewed for one year), or if it could give three consecutive annual renewals on successive years.

To stress-test your renewal rights, customers should put themselves in the shoes of their counterparty – if they were the vendor, where in the terms could they create doubt? Even if it's not a slam dunk, any ambiguity can give ammunition to a vendor in this position.

HOW DO YOU RESOLVE INCONSISTENCIES?

A large part of Broadcom's argument in the AT&T case appeared to revolve around an "End of Availability" clause in the (older) EULA document. Broadcom described this clause as "unambiguous" and claims it clearly allowed VMware to pull support for certain products. As such, it argued that VMware was not required to honour the renewal right (which is referenced in a later amendment to the ELA) for support and maintenance services for those products.

While AT&T argued in its original claim that the later renewal right implicitly overrides the older "End of Availability" clause, Broadcom in its reply has pointed to some express provisions which appear to provide for the EULA (and "End of Availability" clause) to take precedence over at least some other contractual documentation.

The case settled, meaning we never got the court's verdict on this, but it is still a useful reminder to ensure that your suite of contract documents has a clear "order of precedence" clause which clarifies which document or provisions should prevail in the case of conflicts or inconsistencies. These clauses become even more important if your vendor relationship is governed by a significant number of contractual documents (as was the case here).

CAN IMPLIED TERMS HELP YOU?

AT&T also sought to rely on breach by Broadcom of an implied duty of good faith and fair dealing (under New York law) – the availability of this kind of implied term will vary from jurisdiction to jurisdiction, but may be able to assist if particularly aggressive tactics are being employed.

PERPETUAL LICENCES MAY NOT ALWAYS BE FOREVER

As AT&T (and many other VMware customers) are finding, having a licence which is theoretically "perpetual" is only useful for as long as the vendor is willing to provide support and maintenance services. We have long seen vendors limit support services after a period of time, in part (some would argue) to "encourage" customers to enter into new arrangements.

AT&T clearly foresaw this risk, and tried to mitigate by negotiating extension rights before the sale to Broadcom completed, to give a runway to migrate off the software. As Broadcom said in its reply, "AT&T also could have spent the last several months or even years 'migrating away' from VMware software, which it has admitted it intends to do".

However, this case shows that even foresight and bargaining power may not fully protect a customer in circumstances where their vendor is looking to change software licensing models. Whatever the contract says, lock-in risk is compounded where the expected cost and complexity of migrating to a rival software provider is significant. It is therefore important for customers to monitor the market and, wherever possible, to understand what alternate services may be available.

CONTACT US TO FIND OUT MORE

David Ives
Partner
T +44 (0)20 7090 4266
E david.ives@slaughterandmay.com

Duncan Blaikie
Partner
T +44 (0)20 7090 4275
E duncan.blaikie@slaughterandmay.com

DATA COMMERCIALISATION

Opportunities knock in 2025

Rebecca Cousin
Partner

"Data is the DNA of modern life and quietly drives every aspect of our society and economy without us even noticing." These were the words of the UK government's Technology Secretary, Peter Kyle, in his statement announcing the introduction of the UK's new Data (Use and Access) Bill (Data Bill) in October.

Like other countries the UK is seeking to unlock the growth potential of the data that surrounds us, while protecting personal data and intellectual property. This growth potential could all come under a broad heading of data commercialisation although, given its breadth, it means different things to different people. It would encompass, for instance, using customer data for profiling and better marketing campaigns, improving efficiency of logistics operations and better fraud detection.

This fast-evolving regulatory landscape means that 2025 looks to us to be the year when businesses should focus on realising the promised riches from unlocking data. So, what are some of the factors that we believe make 2025 the year to concentrate on data commercialisation?

REASONS FOR 2025 TO BE THE YEAR OF DATA COMMERCIALISATION

Greater certainty of a stable data privacy regime

There had been some uncertainty since Brexit as to the approach to UK data privacy legislation. The Labour government has now introduced the Data Bill, which includes, for instance, a relaxation of the existing rules on making automated decisions based on personal data. The Data Bill is expected to become law in broadly its current form in the first half of 2025, bringing some certainty and stability, and thus making it easier for businesses to plan compliant data commercialisation strategies.

Greater clarity on regulatory interpretation

Regulators' views on cookies, which have been a key part of many commercialisation strategies, have been crystalising and aligning across the UK and EU through enforcement action and guidance.

The European Data Protection Board (EDPB) is due to publish further guidance on the so-called "pay or consent" model early in 2025, and, in the UK the ICO is expected to release its own guidance on this topic in a similar timeframe, having recently released its updated draft guidance on cookies. In addition, the UK Data Bill proposes changes to the consent requirements for some cookies and other tracking technologies. Meanwhile loyalty schemes have been one of the focus areas in 2024 for the French data protection authority, given that they are another significant source of data collection for commercialisation, with an update on its work in this area expected in Spring 2025.

This will all contribute to a more certain regulatory landscape in which to develop commercialisation programmes.

Greater access to data

Incoming legislation promises to facilitate greater access to data, with the UK government suggesting that data sharing provisions in the Data Bill could boost the UK economy by £10bn. This is in part through greater access to public sector data but also by laying the foundations for so-called smart data schemes to enable customers to request their data be shared with third party providers. This effectively extends the successful "open banking" data sharing to other sectors such as energy. In the EU, the Data Act comes into force in September 2025, aiming to enhance the EU's data economy and foster a competitive data market by making data more accessible and usable. This is to be achieved by increasing access to data generated by internet-connected products and related services meaning more data will be available for commercialisation.

The practical implications of the EU AI Act will be better understood

The majority of the EU AI Act's provisions come into force in August 2026 and there is a vast amount of guidance promised from the EU AI Office during 2025, including on the definition of AI systems and on prohibited AI uses. With the passage of time and with this promised guidance, organisations will in 2025 have a better understanding of the implications of the EU AI Act for their commercialisation projects.

Greater certainty on using copyrighted materials in AI

Following a sustained period of uncertainty in the EU and UK about the legality of using copyrighted content to train AI, greater clarity should be forthcoming in 2025. The judgment in the *Getty Images v Stability AI* case will shed light on the current UK position, whilst we are hopeful that the UK government's consultation published in December 2024 will lead to a resolution of this copyright law conundrum going forward regardless of the outcome of the Getty case. In the EU, greater certainty is also expected, with the promised finalisation of the AI Office's code of practice on general purpose AI which addresses certain aspects of this issue.

This increased clarity on what will and will not infringe copyright will enable the risks of data commercialisation through generative AI to be better assessed and weighed in a more informed way against the benefits.

WHAT TO DO TO TAKE ADVANTAGE?

Ensure you have good data governance in place

Projects to improve data quality and locate data are key to allow the organisation to have one "view" of the customer and to ensure the data is accurate. This is therefore the bedrock needed for successful data commercialisation.

Agree data strategy and risk appetite

Principles on who within the business is allowed to use what data and for which strategic purposes ensure that the whole organisation is aligned. It is also important to assess the organisation's risk management strategy to enable commercialisation projects to be developed and deployed within the organisation's risk appetite. Having these controls in place also helps facilitate sharing of data between different internal divisions as they are reassured as to the purposes for which it will be used by others.

Tone from the top and incentivisation

Tone for the top, as in all areas, makes a big difference. If the CEO sets the expectation that all parts of the business should be engaged in data commercialisation, then this will flow throughout the organisation. This can also be supported through ensuring that individual objectives and incentives include data commercialisation, and are aligned with the overall strategy.

CONCLUDING THOUGHTS

Data governance has in many organisations been an after thought, or an area that has struggled to receive adequate resources to address the many changes, such as the operation of legacy systems, data sprawl and poor data culture. With the growing focus on data as a valuable asset, this has brought good data governance to the fore. As no longer is it "just" a compliance project, it is now seen as an important bedrock to driving more value from the organisation's existing data assets.

CONTACT US TO FIND OUT MORE

Rebecca Cousin
Partner
T +44 (0)20 7090 3049
E rebecca.cousin@slaughterandmay.com

AMERICA FIRST?

The continuing rise of class actions in England and Wales

Jonathan Clark
Partner

Peter Wickham
Partner

Nicholas Querée
Senior Counsel

Elizabeth Jordan
Senior Counsel

A long-standing feature of the US legal system, the growth of class actions in England and Wales continues to represent a significant risk for many businesses operating in this jurisdiction even without the adoption of a full US-style class action culture.

England and Wales shares much of what drives mass claims in the US: an openness to the use of litigation funding (combined with the ability to insure in respect of adverse costs risk), an active and innovative bench of claimant-side law firms, and a range of potential claims well-suited to potential class actions including collective actions for competition law breaches and securities claims brought pursuant to sections 90 and 90A of the Financial Services and Markets Act (FSMA) 2000. English courts have also proven very willing, at least at the preliminary stages of litigation, to entertain claims against English incorporated or London-listed groups in respect of acts alleged to have taken place outside the jurisdiction. Yet there are important differences.

Limited availability of "opt out" class actions

Perhaps the most important difference is the limited availability in England and Wales of so-called "opt-out" class-action mechanisms where potential claimants are assumed to be part of the class unless they take positive steps to remove themselves. This can generate very significant claims for damages (albeit often on an aggregated basis), and potentially very large payouts for the funders and law firms who finance and litigate these claims.

CONTINUING RISE OF COMPETITION COLLECTIVE ACTIONS

The UK's only "opt-out" class action regime operates within the competition law space, and – fuelled by litigation funding – it is unsurprising the Competition Appeal Tribunal (CAT) continues to oversee a burgeoning roster of vast claims across a broad range of industries including cars, trucks, trains, telecoms, financial services, water and especially tech. The attractiveness of an opt-out mechanism has also seen claimants pushing the boundaries of competition law, seeking to argue an ever-growing list of behaviours (which would more intuitively be the subject of claims based on consumer, environmental, data protection or other laws) to be anticompetitive and therefore capable of redress through this specialist regime.

The jury is still out as to the regime's effectiveness in delivering redress for class members and attractive returns for the many funders and law firms who have invested in its success. 2025 will be critical in this regard, with the CAT due to give judgment on the first cases to reach trial and several class representatives likely to face the challenge of meaningfully distributing collective settlement sums. If it delivers, this nascent regime is expected to serve as a blueprint for other areas.

GROWTH IN SECURITIES LITIGATION

Outside competition law, recent years have seen a significant growth in securities litigation, with multiple claims filed against corporates off the back of regulatory resolutions with authorities in the UK and internationally. Claimants have cited alleged misstatements or omissions in respect of firms' ethics and compliance practices as having induced them to buy securities they might not have invested in. Claimant lawyers and their funders have also begun to explore claims in respect of market disclosures regarding the efficacy of supply chain due diligence and human rights practices, and increasingly environmental disclosures.

Claimants in securities litigation claims have attempted to use the so-called "representative claimant" procedure in the English Civil Procedure Rules to establish an opt-out mass-claim mechanism by the back door. This was rejected at first instance, in a claim brought by investors in Indivior, but has recently been subject to appeal with judgment keenly anticipated by parties in several pending cases.

In addition, H2 2024 has seen several first-instance decisions answering questions of direct relevance to claims based on s90/90A of FSMA, often to the advantage of defendant issuers. The courts have often taken a restrictive view of when an investor can have said to have relied on an alleged misrepresentation or omission in a market announcement, potentially excluding some passive investors from participating in these claims, and curtailed the right of shareholders in corporates to obtain material held by defendant corporates arguably subject to legal professional privilege.

Permissive approach to litigation funding

Another key difference is the apparent willingness of courts – and in particular the Supreme Court – and Parliament to intervene in the litigation funding model. Litigation funding is undoubtedly here to stay, with little sign that the current UK government takes a different view than its predecessors of the policy arguments around access to justice which militate in favour of a more permissive litigation funding regime. Yet, the decision of the Supreme Court in PACCAR Inc did inject uncertainty and risk into the litigation funding market which will not be definitively resolved until the UK government concludes its review and legislates, a process now not expected to be complete before the end of 2025 at the earliest.

These differences arguably increase the uncertainty on the claimant side of litigating class-actions in England and Wales, with a possible consequence that claimant law firms and funders seek a higher return for that higher risk at least until some of the key legal uncertainties are resolved. Nevertheless, the cost and uncertainty of defending class actions in England and Wales remains deeply unappealing for businesses. The fact the English experience is not a direct analogue of the US approach will be of cold comfort to companies wrestling with this emerging, yet material, litigation risk.

CONTACT US TO FIND OUT MORE

Jonathan Clark
Partner
T +44 (0)20 7090 4039
E jonathan.clark@slaughterandmay.com

Peter Wickham
Partner
T +44 (0)20 7090 5112
E peter.wickham@slaughterandmay.com

Nicholas Querée
Senior Counsel
T +44 (0)20 7090 4739
E nicholas.queree@slaughterandmay.com

Elizabeth Jordan
Senior Counsel
T +44 (0)20 7090 3946
E elizabeth.jordan@slaughterandmay.com

REFLECTIONS AND PROJECTIONS ON FCA ENFORCEMENT

Nick Bonsall
Partner

Gayathri Kamalanathan
Partner

Ewan Brown
Partner

Ross Francis-Pike
Partner

As we enter 2025, the UK's Financial Conduct Authority (FCA) finds itself at a key juncture. Over the past year, it has made progress in refining its enforcement strategy, adopting a more proactive approach to interventions, and increasing the pace and focus of at least some of its investigations. These efforts reflect the FCA's ongoing commitment to improve efficiency and may give firms opportunities to negotiate terms to avoid enforcement, or to seek more favourable settlement. At the same time, the FCA has continued to focus on familiar themes: tackling financial crime, safeguarding consumer protection, and strengthening market integrity. These developments, however, come alongside broader calls for reform, including a recent parliamentary report that underscores the need for greater transparency and cultural change both across the financial sector and within the FCA itself.

Looking ahead, key areas of attention will likely include continued emphasis on consumer redress and the introduction of new policies including those addressing non-financial misconduct. We explore these evolving themes below and offer insights into what we expect from the regulator in 2025.

ENFORCEMENT REFLECTIONS FROM 2024

Over the past 12 months, the FCA's enforcement strategy has continued to evolve, driven by both strategic shifts and recurring themes. The number of open investigations decreased from 224 to 188. This appears to reflect continuing effort by the FCA to close long-running investigations, and the opening of a relatively small number of new investigations, and reflects efforts to streamline the enforcement caseload under the new leadership in the Enforcement Division. Key factors contributing to the trend towards fewer enforcement investigations include the FCA's claims to have "raised the bar" for opening investigations and strengthening its pre-investigative triage processes to prioritise cases "most likely to deliver industry wide deterrence". The pace of some investigations has also improved, further contributing to the higher rate of closures.

Another significant trend in 2024, that likely also contributed to streamlining the regulator's enforcement caseload, was the FCA's shift towards more proactive interventions. This was evident in the sharp rise in skilled person reviews, which nearly doubled. This greater use of intervention powers highlights the regulator's stated preference for early remediation measures over formal enforcement action. A notable example of this strategy were the circumstances that gave rise to the £28.9 million fine imposed on Starling Bank in October 2024: the FCA gave the firm multiple opportunities to remediate before ultimately launching a formal enforcement investigation.

At the same time, the frequency and size of financial penalties increased modestly in 2024, reaching approximately £176 million, a marked increase from the relatively low total of £53 million in 2023. Notably, large penalties were imposed on several firms for unfair customer treatment. Volkswagen Financial Services received a fine for failing to treat customers in arrears or financial difficulty fairly. Similarly, TSB Bank and HSBC were fined for shortcomings in their treatment of customers in arrears or financial distress. Forex TB was fined for pressuring customers to put their money at risk through "contract for differences" trading. Challenger banks also faced increased scrutiny for deficiencies in their financial crime controls, with institutions like Coinbase, Metro Bank, and Starling Bank receiving substantial penalties. However, the year's highest fine of £40 million (for Barclays) related to listing rule breaches that occurred more than 15 years ago during the 2008 financial crisis.

CONSUMER REDRESS IN THE SPOTLIGHT

Consumer redress also emerged as a central theme in 2024, shaped by significant regulatory actions, judicial decisions, and the FCA's reform proposals. The FCA's decisions last year against H2O and Link Fund Solutions highlighted a clear strategic shift toward prioritising compensation for harmed investors. In both cases, the regulator chose to prioritise securing substantial redress schemes from the firms' limited resources rather than imposing financial penalties, signalling a commitment to restitution as a primary enforcement goal.

Adding another dimension to the evolving landscape in 2024 was the Court of Appeal's landmark ruling in *FCA v BlueCrest Capital Management*. In its ruling the Court of Appeal effectively broadened the scope of the FCA's own initiative requirement (OIREQ) powers under the Financial Services and Markets Act 2000 (FSMA), allowing the FCA, in principle, to mandate a single firm redress scheme without needing to establish that there has been loss, breach of duty, or causation, as would be required in a multi-firm scheme. This interpretation of the relevant provisions in FSMA has sparked concern amongst industry participants, as subject to any appeal to the Supreme Court, the decision gives the FCA a wide, largely untrammelled power to impose redress requirements on single firms.

The FCA's focus on consumer harm also extended to its ongoing review into motor finance commission arrangements, initiated in early 2024. This review examines whether certain types of commission arrangements, which were banned in 2021, caused harm to consumers prior to the ban. A particularly key development in this area came in the form of the Court of Appeal's decision in *Johnson and Wrench v FirstRand Bank* and *Hopcraft v Close Brothers*, which found that car dealers could not receive commission without fully disclosing it to customers and obtaining informed consent. This judgment goes beyond the standards set by applicable regulatory rules and guidance and its appeal to the Supreme Court will likely shape the FCA's future approach to its motor finance review.

At the same time, following a commitment from the Chancellor "to create a surer climate for investment", the FCA and the Financial Ombudsman Service (FOS) launched a joint "Call for Input" to modernise the consumer redress framework. This initiative aims to address inefficiencies in managing large numbers of complaints about similar issues, which have surged in areas like motor finance and consumer credit affordability.

Taken together, these regulatory reforms, judicial decisions, and the FCA's evolving priorities point to a potentially transformative period for consumer redress. These developments will undoubtedly shape the landscape into 2025 and beyond.

WHAT'S ON THE AGENDA FOR 2025?

The behaviour of business leaders remains under intense scrutiny, with high-profile resignations and investigations drawing attention to the personal conduct of senior figures. Reflecting this trend, the FCA is increasingly addressing workplace misconduct. A key development in this area is the FCA's anticipated policy statement on diversity and inclusion (D&I), which will integrate non-financial misconduct (NFM) into the regulator's conduct rules and fitness and propriety assessments. This move underscores a broader shift towards holding individuals and firms accountable for unethical leadership and workplace standards, extending beyond the traditional focus on financial misconduct.

Another key policy change expected to be finalised in 2025 is the FCA's proposals to publicly name firms under investigation. The original proposals generated a storm of criticism from stakeholders, prompting the regulator to reconsider and outline revised plans for further engagement. Under the revised proposals, firms will now receive 10 days' notice of an announcement (up from one day), with an additional 48 hours' notice if the FCA decides to proceed with a public disclosure. The FCA also proposes to explicitly consider the potential reputational impact on firms as part of the public interest test - an element that was absent from the original proposals. Despite these adjustments, the updated proposal may still pose increased reputational risks for firms under investigation. A final policy decision is expected in the first quarter of this year.

NEW RISKS ON THE HORIZON

As we look ahead, firms in the regulated space face an increasingly complex risk landscape that could extend beyond FCA enforcement. A notable trend is the risk of section 90/90A FSMA claims in the wake of deferred prosecution agreements (DPA) or guilty pleas in relation to criminal investigations conducted by the Serious Fraud Office. In these cases, investors have sought redress for losses tied to allegedly misleading public statements or omissions in disclosures related to the conduct underlying the DPA or prosecution. This trend raises the prospect of similar securities claims arising from FCA enforcement actions, particularly in cases involving high-risk disclosures, such as ESG reporting or significant litigation updates. If this trajectory continues, listed firms may face a new wave of investor litigation linked to regulatory outcomes, adding to the associated risks of enforcement action and significantly lengthening the "tail" of consequential risks that can follow on from enforcement action.

CONTACT US TO FIND OUT MORE

Nick Bonsall
Partner
T +44 (0)20 7090 4276
E nick.bonsall@slaughterandmay.com

Gayathri Kamalanathan
Partner
T +44 (0)20 7090 3032
E gayathri.kamalanathan@slaughterandmay.com

Ewan Brown
Partner
T +44 (0)20 7090 4480
E ewan.brown@slaughterandmay.com

Ross Francis-Pike
Partner
T +44 (0)20 7090 3713
E ross.francis-pike@slaughterandmay.com

2025 ACTIVISM PLAYBOOK

Trends, expectations, and corporate preparedness

Claire Jackson
Partner

Filippo de Falco
Partner

WHAT WERE THE KEY TRENDS AND HOT TOPICS IN 2024?

Globally, shareholder activism in 2024 continued to rebound from the pandemic downturn, with campaign activity nearly at the record levels reached in 2018.

The US and APAC remained the focus for global activism, representing 44% and 29% respectively based on campaigns initiated, while the level of activity in Europe slightly declined compared to the highs of 2023, from 28% to 21% (Barclays Shareholder Advisory Group, 2024). Within Europe, the UK continues to be the most popular jurisdiction for activism, accounting for 39% of European campaigns.

We have also seen a number of developments, including a change in activists' demands, tactics and identity. The trend of targeting large and mega-cap companies has intensified, as more activists move away from their traditional mid-cap "sweet spot". There have been notable examples of this both in the US (Starbucks, Texas Instruments, BlackRock) and in the UK (Reckitt). It is a trend that is particularly prevalent in Europe, with 21% of campaigns in Europe related to companies with a market cap over $25bn, compared to 15% in the US.

Though M&A has remained a primary demand of activist campaigns, there has been a greater focus on businesses' strategy and operations than in 2023, featuring in almost a third of global campaigns. Board and management changes also remain a popular activist demand. Additionally, there has been a significant number of ESG campaigns, led by climate activists such as Follow This and ClientEarth, in relation to climate targets and greenwashing. Alongside campaigns to try to tackle climate change, we have seen pressure in the other direction from purely financial activists: for example, in July 2024 Bluebell published a letter to BP attacking "wasteful" spending on UK solar capacity and urging management to refocus on oil and gas.

In the UK we have seen a surge in companies (such as Rio Tinto, Glencore and Watches of Switzerland) facing activist calls to relocate their primary listing to the US or other jurisdictions, in the wake of some recent high-profile relocations. Activists may present the relocation in very straightforward terms, but the issues are frequently more nuanced, and it is not necessarily the case that the grass is greener on the other side.

We are also seeing increasing public engagement with boards and voicing of concerns that are more in line with US-style activism. Many traditional investors who have historically been reluctant to publicly criticise management are more readily backing activist campaigns or adopting activist tactics themselves. We are seeing activists use ever more innovative tactics in their campaigns, including social media. For example, Elliott Investment Management created a podcast as part of its bitter boardroom feud with Southwest Airlines.

WHAT CAN COMPANIES EXPECT FOR 2025?

Looking ahead, we expect levels of global activism to remain high and for UK companies to remain key targets in Europe, due to lower share price valuations and the UK's relatively activist-friendly legal and corporate governance environment.

We also expect to see the recent upturn in M&A activity to continue. This may lead to a return of "bumpitrage" tactics - where activists take stakes to try and sweeten announced deals - and more active calls for major spin-offs and break-ups in 2025. The Trump election may accelerate this trend in the US, as promises of deregulation and tax cuts for businesses provide a boost in the M&A market. However, the promise of protectionist policies could also dampen inbound and outbound M&A. The evergreen themes of governance change and strategy will remain high on the activist agenda.

The spectrum of activists has broadened in recent years, with new players entering the fray and institutional investors lending increased support to activist agendas. Alongside this, we have seen increased engagement from occasional activists and the growing prevalence of activist "swarms", where multiple activists target a company over a particular issue, either as a coordinated group or separately. This can exacerbate the complexity of adopting effective defensive strategies, especially as in cases such as Reckitt, the activists' demands are not always aligned.

We expect that some UK-listed companies will continue to face calls to relocate their primary listings, to the US or elsewhere, supported by arguments of higher valuations and access to greater liquidity. However, investors may start to take a more sceptical approach to some of these arguments as the experience of companies which have relocated start to serve as cautionary examples.

In relation to ESG, we expect companies will continue to face pressure from both climate-focussed and traditional activists, calls which may pull in different directions. We have seen that the increasing rules around ESG reporting are having a stimulating effect on ESG-driven activism, and this will likely continue. As companies navigate the journey to net zero, they will need to devise long-term strategies that balance the economic demands of shareholders with their societal and regulatory responsibilities.

As established activists continue innovating their playbook, and there are more campaigns by first-time and occasional activists, activist tactics are becoming increasingly unpredictable. We expect mainstream institutional investors will continue to take an increasingly "activist" position with investee companies. However, we anticipate this will continue to be largely via private engagement and off-record briefings to the press.

WHAT SHOULD COMPANIES DO TO PREPARE?

The old adage that companies should be their own activist remains true. Activists are generally looking for a short- to medium-term return and will push for an actionable corporate event that can deliver that. Thinking like an activist, boards should consider possible lines of attack. Assessing what kind of changes an activist could seek, how it can rebut those challenges and defend its strategy. It should also use this exercise to stress-test strategy and see if changes should be made.

This will enable companies to be well advised to engage with major shareholders, ensure that their views are heard, and that the agreed strategy is communicated to and understood by them. Getting buy-in from institutional investors is vital and ensures that they do not use a live public situation as a chance to voice broader discontentment with management on strategy. It is also important for the board and management to show a united front on strategy, as activists will often exploit signs of division.

Day-to-day, companies should continuously monitor the share register for any signs of "stakebuilding" and should have a plan in place for dealing with initial contact from an activist.

As the landscape of activism continues to evolve with new players, tactics and demands, companies must remain vigilant and proactive in their strategies. By anticipating activist approaches and fostering strong relationships with shareholders, businesses can better navigate the challenges of activism and maintain resilience in an increasingly demanding environment.

CONTACT US TO FIND OUT MORE

Claire Jackson
Partner
T +44 (0)20 7090 5089
E claire.jackson@slaughterandmay.com

Filippo de Falco
Partner
T +44 (0)20 7090 5335
E filippo.defalco@slaughterandmay.com

M&A DISPUTES

A reminder on high risk areas for disputes and the latest on managing them

Smriti Sriram
Partner

Tahlia Brysha-Pullen
Senior Counsel

Liu Hui
Senior Counsel

Following a period of geopolitical instability and economic uncertainty, while M&A activity has come back, it has brought with it an uptick in disputes between parties looking to get out of bad deals or, at the less extreme end of the spectrum, parties seeking to use litigation to redress mismatches between their expectations and the financial reality of the deals they have done. In addition to the resurgence in traditional M&A disputes, we anticipate disagreements crystallising in disputes in frontier areas such as the treatment and valuation of AI and digital assets, the impact of ESG commitments, targets or disclaimers on contractual obligations, the consequences of unwelcome intervention of shareholder activism, and the impact of regulatory action.

To better anticipate what the year could bring, corporates should proactively assess what risks their portfolios carry (or could carry). This is a timely reminder of the key principles that apply to such disputes – in particular, when they are most likely to arise, and if they do, how you can quickly get to the bottom of what the contract says (expressly or by implication).

HEIGHTENED RISK?

The stage of the transaction plays a critical role in the nature and likelihood of a dispute.

- **Are you storing up problems?** Deals done quickly with high materiality thresholds applied for due diligence can present significant challenges during the life of the contract. Are the warranties, representations and indemnities fit for purpose? Is the risk appropriately calibrated in any limitation of liability framework?
- **Mischief between signing and completion:** What are the brakes to completion? Disputes on the satisfaction of conditions precedent, endeavours clauses and material adverse changes or effects are on the rise. Have deteriorating financial health of a target or material changes to the business (including from litigation risk or regulatory intervention) or changes of control been sufficiently catered for?
- **Recovery to compensate for bad deals:** Claims for misrepresentation, warranty and indemnity claims, early termination or earn-out and completion account skirmishes could present value opportunities to businesses under significant financial strain.

Litigation funding and alternative fee structures are likely to continue to facilitate the threat and commencement of claims, as up-front legal costs and/or costs exposure can be offset by potential claimants.

WHAT DOES THE CONTRACT SAY?

Clear and unambiguous drafting avoids litigation. When drafting the contract or considering the prospects of a potential dispute, it is worth bearing in mind how a court or tribunal will approach any dispute on contractual interpretation. It is an objective exercise of how a reasonable person would interpret the meaning of the contract (looking at the factors below), rather than what the parties subjectively intended.

- The natural and ordinary meaning of the clause (which is the starting point and is usually given primacy).
- Any other relevant provisions of the contract.
- The overall purpose of the clause and the contract.
- The facts and circumstances known or assumed by the parties at the time of entry into the contract.
- Commercial common sense.

When an ambiguity arises, corporates should consider whether this presents a risk or, on the flipside, an opportunity. For example, is there "factual matrix" evidence (i.e. contemporaneous material which shows the surrounding circumstances or commercial purpose) which helps to steer the interpretation in your favour? There is often, however, a tension between admissible factual matrix evidence on the one hand, and inadmissible evidence of the parties' subjective intentions and aspirations, or of what was said or agreed in pre-contractual negotiations, on the other.

> In the recent case of *RTI Ltd (Respondent) v MUR Shipping BV (Appellant) [2024] UKSC 18* (concerning the suspension of performance under a force majeure clause), the Supreme Court followed long-established principles of contractual interpretation, placing emphasis on the importance of the parties' freedom of contract, the need for certainty, and the importance of using clear language to ensure that the boundaries of performance are well stated and easily understood. In other words, what the words actually say is critical.

WHAT ADDITIONAL DUTIES MIGHT BE OWED?

To avoid any unpleasant surprises, it is worth considering whether additional duties should be expressly provided for or carved out.

- What would a duty of good faith add to the express provisions of the contract?
- Conversely, should express provision be made to exclude or limit any duty to act in good faith?
- Even if there is no express good faith term in the contract, a court or tribunal might imply such a duty in certain circumstances – such as:
  - Where the so-called "Braganza" duty applies (i.e. where there is a genuine discretion under a contract, that discretion must be exercised in good faith).
  - Where the contract is "relational" (i.e. involves a long-term relationship and a considerable degree of commitment from both parties). This is particularly relevant for certain types of arrangements such as joint ventures, franchising and distribution agreements, and Private Finance Initiative (PFI) contracts.

These considerations arose recently in *Phones 4U Ltd v EE Ltd* [2023] EWHC 2826 (Ch). In this case, the judge held that the relevant agreement (whilst having some features of a relational contract) was not relational, and in any event, this did not matter because no general duty of good faith was to be implied and there was no breach of good faith by EE on the facts of the case.

Depending on your position and the dispute you are facing, the duty might be used as either a sword (for example, to force your counterparty to do something or to build a claim against them) or a shield (for example, to justify your own conduct). When drafting the contract and agreeing the terms, it is important to think about the ways in which a duty of good faith (whether express or implied) might play out in future and be used either by you or against you.

OTHER RISK AREAS

Some other important considerations include:

- ensuring that the dispute resolution clauses are clear and consistent across the suite of contracts, to avoid disputes on the applicable law, dispute resolution mechanism or any escalation steps;
- giving careful consideration to clauses relating to damages, including liquidated damages and limitation of liability clauses (remembering that liquidated damages must be set at a reasonable level and must not be punitive);
- keeping in mind that tortious liability (for example, negligence, fraud and economic torts such as inducing or procuring breach of contract) can also arise instead of or in parallel to contractual claims; and
- recognising that a dispute may not solely arise between the buyer and seller (for example, directors and shareholders may threaten claims against directors and officers, lenders may seek to challenge the deal on various bases including misrepresentation, and in public M&A class actions may arise from the contents of offering documents).

LOOKING FORWARD

If you are looking to bring a claim against, or are facing a claim from, a counterparty, there are several practical considerations to work through:

- ☐ Have you (or your counterparty) complied with any contractually mandated dispute resolution steps?
- ☐ If you are looking to serve notice of the claim on your counterparty, have you complied with all requirements under the contract (including with respect to form, service details and time limits)?
- ☐ Do you need to implement document holds and consider broader document preservation policies?
- ☐ Are you ensuring that discussions (and any related document preparations) are limited and covered by legal privilege?
- ☐ If you are looking to start court proceedings, have you complied with any applicable Pre-Action Protocols?
- ☐ Can you take the wind out of the sails of a potential dispute by relying on the limitation of liability provisions in the contract?

In any event, when a dispute arises, it is important for corporates and their advisers to get on top of the key facts and allegations quickly. On the claimant-side, you will want to be confident in your story from the get-go and apply as much pressure as possible. On the defendant side, you will want to look for deficiencies and weaknesses in your counterparty's claim (looking at both substantive defences and any procedural mechanisms which may be used to undermine or stall the claim).

CONTACT US TO FIND OUT MORE

Smriti Sriram
Partner
T +44 (0)20 7090 3718
E smriti.sriram@slaughterandmay.com

Tahlia Brysha-Pullen
Senior Counsel
T +44 (0)20 7090 3556
E tahlia.brysha-pullen@slaughterandmay.com

Liu Hui
Senior Counsel
T +44 (0)20 7090 5387
E liu.hui@slaughterandmay.com

"ALL CHANGE" FOR CONSUMER PROTECTION

What you need to know

Tim Blanchard
Partner

Recent years have seen consumer protection propelled to the top of the agenda for policymakers and regulators. In Spring 2025, long-awaited reforms under the Digital Markets, Competition and Consumers Act (DMCC Act) will overhaul the UK consumer law regime and increase the stakes for non-complying businesses. There are also clear signs of more action to come in this area at the EU level, as the new European Commission gears up for its upcoming 2025-2030 Consumer Agenda.

In 2025, consumer-facing businesses operating in the UK and EU should prepare for increased public and private enforcement of consumer protection rules, particularly on hot topics such as greenwashing and online choice architecture.

CONSUMER LAW ENFORCEMENT – THE NEW ANTITRUST?

This Spring, the UK Competition and Markets Authority (CMA) will see its investigation and enforcement toolkit bolstered by the DMCC Act. For the first time, the CMA will gain the power to issue infringement decisions for consumer law breaches and directly impose fines of up to 10% of a business' global turnover, bringing the regime more closely in line with the CMA's existing antitrust enforcement regime. Currently the CMA can only accept undertakings from a company under investigation or otherwise apply to court to seek an enforcement order.

The magnitude of the fines issued by the CMA, and whether they will match the levels we have seen in antitrust cases, remains to be seen. So far, the fining guidance published by the CMA signals that it intends to replicate some aspects of its approach in Competition Act cases, such as taking account of aggravating factors and the availability of settlement discounts. The introduction of potentially large financial penalties should act as a significant deterrent for non-compliance.

The CMA has already stated that it is "carefully considering and preparing for [its] first cases" under its new enforcement arsenal. We expect the CMA will start implementing its blueprint for these investigations in the coming year, as set out in its new Guidance on direct consumer law enforcement. Over time, we will likely see the courts scrutinising the CMA's application of its new fining powers. Looking beyond the CMA's remit as the main consumer protection authority, the current UK focus on consumers has also materialised through several sectoral reforms and initiatives, including the Financial Conduct Authority's (FCA) Consumer Duty, which came into force across 2023-2024 and for which we still await the first test cases.

These UK reforms are in line with EU trends towards enhanced enforcement. We are continuing to see consumer organisations submitting pan-European complaints to the EU Consumer Protection Cooperation (CPC) network, a cross-jurisdiction mechanism aimed at streamlining consumer enforcement via coordinated action in the

EU. The CPC network, coordinated by the European Commission, is also proactively conducting consumer law "compliance sweeps". The new Commissioner in charge of the EU consumer protection portfolio, Michael McGrath, has signalled his intention to propose further enhancements to the Commission's role in enforcing consumer laws across the EU.

ALL EYES ON GREENWASHING, "DARK PATTERNS" AND ESSENTIAL SPENDING

Recent years have seen a marked uptick in enforcement action related to companies' environmental claims. We can expect greenwashing to remain a key area of focus for consumer protection authorities. To date, the UK has not introduced any cross-sectoral legislation targeting greenwashing specifically. However, alongside pursuing enforcement action, the CMA has been highly active in publishing a Green Claims Code and sector-specific guidance. The FCA also introduced an anti-greenwashing rule for financial services firms in May 2024. In the EU, the Directive on Empowering Consumers in the Green Transition was adopted in March 2024, while the proposed Directive on Green Claims is progressing through the legislative process. Companies should ensure they stay informed of developments in this area, including any emerging regulatory divergence.

This year, the CMA and other consumer law enforcers will likely continue to grapple with consumer harms linked to online choice architecture and so-called "dark patterns", such as "drip pricing" practices and misleading scarcity or popularity claims. To facilitate enforcement in this area, the package of UK reforms in the DMCC Act modernises existing consumer rights and creates novel areas of protection for the digital age. This includes, for example, new rules on fake reviews and subscription traps, with the latter being subject to transitional arrangements. At the EU level, the European Commission has recently signalled appetite to address similar policy concerns, with suggestions of a proposal for an EU Digital Fairness Act. Authorities are also expected to be vigilant of any consumer protection threats that may derive from the deployment of AI technology.

Considering cost-of-living constraints, we can also expect enforcement to focus on areas of essential spending and where consumers are under particular financial pressure, such as housing and accommodation, transport, groceries and everyday household items.

CONSUMER LAW AND COMPETITION LITIGATION: ARE THE BLURRED BOUNDARIES HERE TO STAY?

In the past few years, mass competition damages claims have continued to gain momentum in the UK, including on a "standalone basis" where there is no prior enforcement decision by a regulator. However, the UK's opt-out collective proceedings regime is not currently available in respect of consumer law breaches. The attractiveness of this regime has led claimants to seek to push the boundaries of what qualifies as a breach of competition law, with a view to bringing high-value claims on an opt-out basis (for example, characterising consumer law issues as an abuse of dominance). We expect this trend to continue this year.

There have already been calls by some to extend the UK's collective proceedings regime to cover consumer law breaches, in addition to competition law, due to the disconnect between the respective public enforcement and private enforcement models. A proposal to do so was ultimately excluded from the final version of the DMCC Act despite being raised during the bill's reading. It remains to be seen whether the Labour government will revive this proposal in 2025 (or beyond).

At the EU level, many Member States are completing their implementation of the EU Directive on Representative Actions. This will pave the way for more collective consumer claims across the EU. The Directive leaves it at the discretion of Member States to provide for opt-in or opt-out mechanisms, or a combination of both, with some Member States adopting enhanced consumer redress regimes going beyond the minimum standards set out in the Directive (so-called "goldplating").

Consumer-facing businesses operating in the UK and the EU should carefully monitor this emerging stream of potential mass consumer claims, as their outcomes could incentivise claimants to bring ever-larger and (in the case of the UK) more creative claims – increasing litigation risk for businesses.

CONTACT US TO FIND OUT MORE

Tim Blanchard
Partner
T +44 (0)20 7090 3931
E tim.blanchard@slaughterandmay.com