# InsureInsight

## Insurance Sector Trends 2024

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# Contents

# Introduction

## Today’s insurance sector is a vibrant ecosystem featuring innovation, agility and a laser focus on understanding the ever-evolving needs of its customers. As 2024 dawns on the insurance industry with a sense of both opportunity and challenge, we delve into the key trends shaping the sector, analysing the forces driving change.

2023 brought a dynamic landscape that demanded adaptability and innovation. Ongoing geopolitical turmoil and economic disruption featured constantly throughout the year, testing the resilience of a market already heavily impacted by continued events in Ukraine and increasingly frequent natural catastrophe events. In addition, technological disruption, regulatory complexity and the need to address climate-related risks meant that the industry faced a multitude of factors that demanded forward-thinking strategies. That will continue to be the case into 2024, and leveraging emerging opportunities will be crucial for driving sustainable growth and resilience in the years ahead.

In this report, our experts delve into some of the key trends and themes we expect to influence the sector during this coming year. We hope that you find these insights useful for the decisions you have to make in your own business, in relation to both existing issues and those emerging.

If you would like to discuss any of the topics raised in this report further, please get in touch with the relevant team member or myself, and we will be delighted to engage in a further discussion or arrange any follow up with you.


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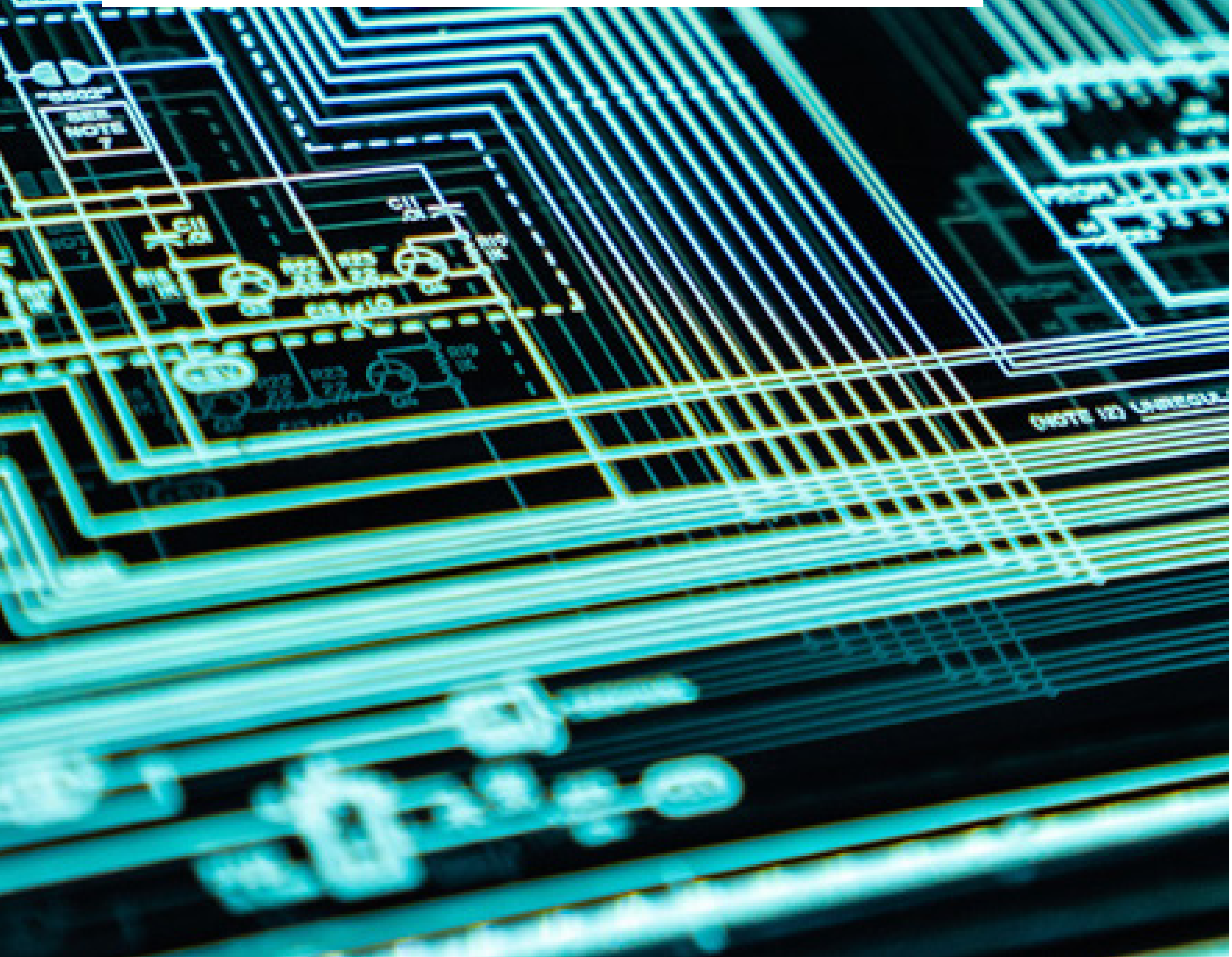
# Data protection and cyber security

The heightened focus on data protection and cybersecurity underlines the need for robust measures to safeguard sensitive information and mitigate cyber threats. Regulatory compliance, such as GDPR, drives stricter data governance. Insurers are increasingly adopting more robust cybersecurity frameworks, encryption and secure cloud solutions to safeguard sensitive data.

Additionally, the industry is exploring privacy-preserving techniques to balance data analytics with individual privacy, while addressing emerging risks related to cyber threats and ensuring transparent communication with policyholders about data usage and protection measures.



# What does 2024 hold for data protection claims and cyber risk?

We examine the impact of recent case law on data protection compensation claims in 2024 and beyond. We also discuss recent trends in cyber attacks and predict what this might mean for the year ahead.

From an insurer's perspective, 2021 proved to be a good vintage for case law helpful to defending data protection claims. Several High Court[1] decisions dealing with issues such as establishing de-minimis thresholds for damages and the availability of misuse of private information as a cause of action in cyber-attacks were all crowned at the end of the year by the Supreme Court's judgment in *Lloyd v Google*, confirming compensation for distress required proof of damage. Together, those decisions somewhat dampened Claimant firms' confidence in litigating modest data protection damages claims.

In 2023 we also saw a rise in cyber-attacks that resulted in the extortion of victims, but which did not feature ransomware, with the MOVEit breach being a high-profile example of this, at scale. With more organisations adopting secure back-ups and more threat actors using smash-and-grab tactics, we anticipate a continued increase in extortion without encryption attacks alongside ransomware threats to businesses and sectors with less mature security measures.

As we assess the position in 2024 and consider the future of (individually) low-value damages claims from data protection breaches, the claimant community might be hoping that 2021 represented the peak for case law favouring data controllers.

At the coalface of dealing with these claims, we have observed a change in the tactics by claimant legal representatives over the past year, together with an increasing confidence to once again pursue litigation.

In response to a helpful run of High Court decisions that pointed towards the small claims track as being the most appropriate forum for the management of these claims, claimant legal representatives are increasingly obtaining expert evidence from a psychologist (or similar) and re-framing their claims from pure distress claims to personal injury claims. This appears to be designed, in part, to circumvent allocation to the small claims track, to enable legal costs to be recovered.

We expect this trend to continue and it carries several consequences for how such claims are managed. There are potential impacts to track allocation and the recoverability of costs, and also to the recoverability of ATE insurance premiums, pre-action protocols, limitation periods, and the adjustment of defence strategy in response, particularly in challenging expert medical evidence based on recent Supreme Court[2] authority.

We anticipate the trio of recent decisions from the European Court of Justice[3] (ECJ) on the scope of damages under Article 82 of GDPR will result in fresh challenges in the UK courts about the proper interpretation of UK GDPR and the appropriate compensation threshold (and also quantum). While collectively these ECJ decisions may be welcomed by claimants, it remains uncertain what, if any, impact they will have on domestic courts.

The cumulative costs of bulk third-party data breach claims following a cyber-incident will continue to be one of the largest risks for cyber insurers to manage, and with fresh legal challenges anticipated we expect further disruption on the horizon.

## Final thoughts

The data and cyber security to-do list for 2024 looks as busy as ever, with the introduction of new laws containing security duties and breach notification obligations[4]. We anticipate certain cyber attack trends to accelerate throughout 2024 including those attacks where the supply chain is used as the attack vector and also in attacks against cloud infrastructure. In addition, the technology arms race with threat actors will continue and we anticipate an increasing use of tools such as automation and AI in cyber attacks. This should provide a strong incentive for organisations to reassess their security posture and to critically review the suitability of their incident response plans, playbooks and simulations for 2024.

1. *Warren v DSG Retail Ltd [2021] EWHC 2168*
   *Rolfe & Ors v Veale Wasbrough Vizards LLP [2021EWHC 2809 (QB)*
   *Johnson v Eastlight Community Homes [2021] EWHC 3069 (QB)*
   *Cleary v Marston (Holdings) Ltd [2021] EWHC 3809 (QB)*
2. *TUI UK Ltd v Griffiths [2023] UKSC 48*
3. *UI v Österreichische Post AG (Case C 300/21)*
   *Natsionalna agentsia za prihodite (Case C-340/21)*
   *ZQ v Medical Service of Health Insurance North Rhine (Case C-667/21)*
4. *Examples include: Digital Operational Resilience Act, NIS 2.0, Cyber Resilience Act, Product Security and Telecommunications Infrastructure Act, Telecommunications Security Act*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# AI and the insurance sector

Increased adoption of AI has brought a profound transformation in traditional operational processes across underwriting, claims management, customer service and risk assessment, leading to enhanced efficiency, streamlined processes and improved customer experiences. However the industry is also faced with the need to ensure responsible and transparent AI deployment, addressing issues concerning data privacy, algorithmic bias and regulatory compliance.

As AI continues to permeate all parts of the insurance sector, the strategic integration of governance mechanisms is essential to harness the full potential of AI, while upholding ethical standards and regulatory requirements.

# Is AI the future of insurance?

Artificial Intelligence technologies are increasingly being adopted and implemented across industries and sectors. This article explores how AI is likely to impact the insurance sector and how the industry can prepare itself for this change.

While AI has been a hot topic recently, the insurance industry has been exploring and utilising artificial intelligence for several years in various forms, including large language models (similar to ChatGPT), natural language understanding, machine learning and Generative AI. AI continues to disrupt the insurance industry in a number of ways including customer service, underwriting, pricing and fraud detection, as well as creating new products and channels.

## How will AI change the insurance industry?

**Customer Services**: The insurance industry currently relies heavily on human expertise and manual processes (particularly when processing claims and issuing new policies). The ever-increasing uptake of 'consumer-connected devices' such as cars, fitness trackers, home assistants and mobile phones will create a vast amount of data that will allow insurers to accurately evaluate and understand current insureds' and potential insureds' requirements. This will enable insurers to provide: (i) a more automated and personalised service including recommending appropriate insurance products; and (ii) more accurate pricing by identifying key trends and optimising processes to make data-driven decisions in all areas.

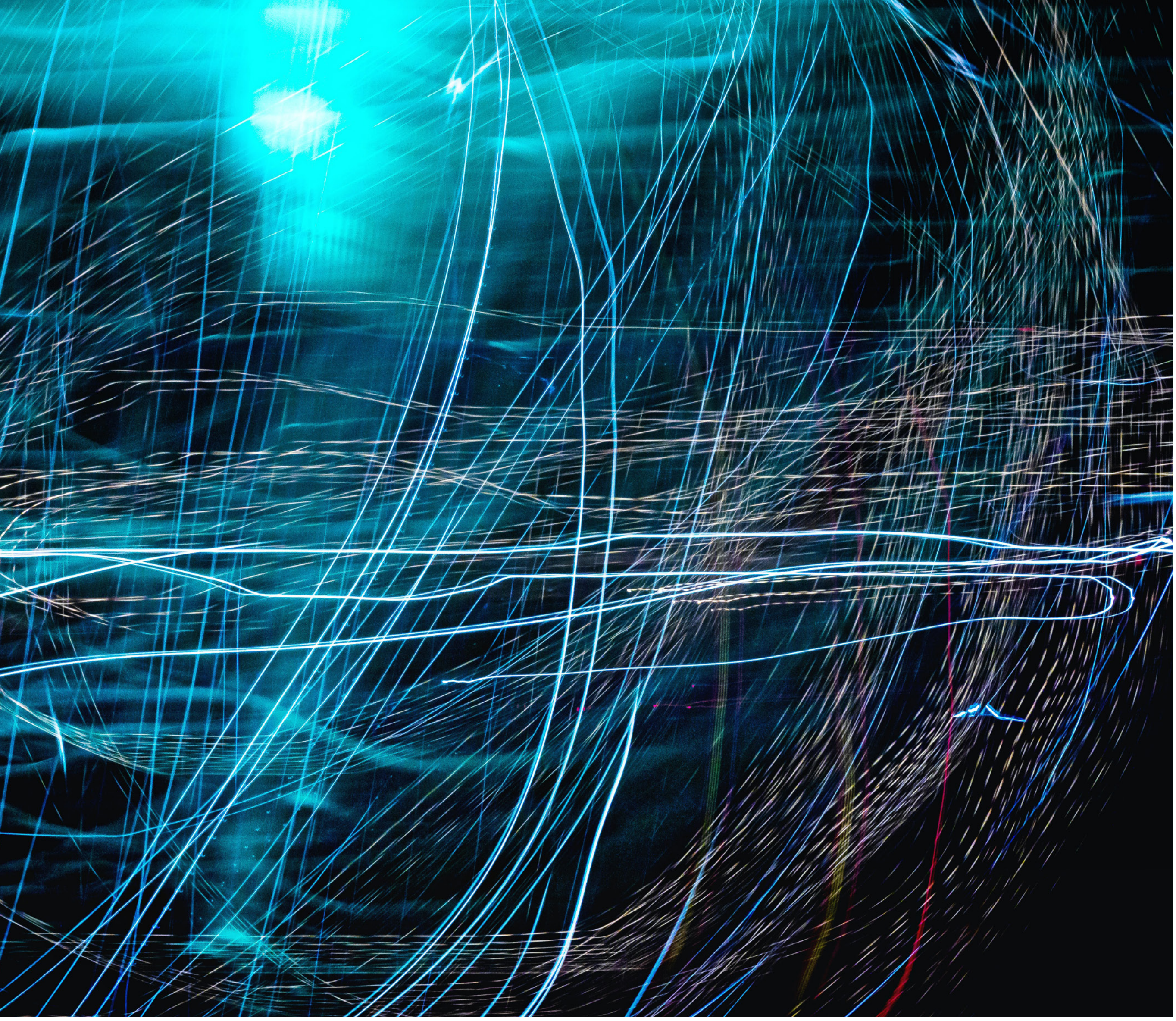
AI virtual assistants also have the potential to revolutionise the claims experience by reducing wait times and providing 24/7 support. Many insurers already use intelligent ChatBots powered by AI that can be used to guide the insured through a claims process and provide necessary information ensuring customer satisfaction.

**Fraud Detection**: AI tools provide insurers with the ability to analyse large amounts of data from various sources, assess risk factors and identify anomalies. Advanced algorithms can also detect suspicious activity allowing insurers to identify claims that require further investigation sooner or which may have been missed entirely by a human-only review.

**New Products and Channels**: AI can expedite the development of new insurance products such as usage-based insurance products, including 'pay as you drive products' which may increase/decrease depending on where, when, and how a customer drives a vehicle. AI also allows insurers to create personalised insurance products specific to a customer's precise needs and risk profile.

## How can the insurance industry prepare for this change?

**Governance and Control**: Insurers need to adapt their governance and control frameworks to provide clear boundaries for when, where and how AI can be used as part of systems. AI is getting plenty of regulatory attention, which should hopefully promote fairness and inclusion. Insurers should invest in the development and testing of AI systems to ensure they are aware of any associated risks and biases that may be contained in the AI output, continuously monitor this output and prepare clear use documentation.



**Collaboration**: Insurers must collaborate with other insurers as well as technology providers and regulators to ensure knowledge of AI adoption is shared, and react appropriately to lessons learned. Insurers should also ensure all areas of the business are involved in the adoption of AI (not just the IT team), as it is key to highlight where and how AI is likely to disrupt typical business processes.

**Plan**: Insurers need a clear and well-evaluated plan to ensure that the adoption of AI supports existing business strategy. Ideally, insurers should have a clear roadmap of any required pilots and discovery periods prior to utilising AI in a live environment. It is also key to have a comprehensive data strategy to assess what data is being inputted into the AI system and establish whether any bias or hallucination is likely to occur.

**Balance**: Insurers should review the need for innovation against customer protection and should pay close attention to emerging guidance from regulators. Some of the key principles to be considered in this regard are proportionality, fairness, transparency, explainability, data quality, security, robustness and human oversight.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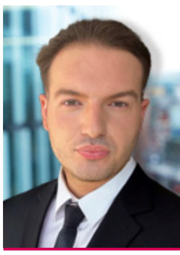


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# AI and the need for governance in the insurance sector

**Increased adoption of AI to drive efficiency requires robust governance frameworks to ensure responsible and ethical practices. AI governance should address issues of fairness, transparency, accountability and explainability to build trust and mitigate potential risks.**

Artificial intelligence is contributing substantial value to many insurers by delivering savings, efficiencies and growth, but the widespread adoption of Generative AI is still in its early stages. In recognition of its undoubted future importance, several use cases continue to gain traction as insurers continue to explore the value chain for a competitive advantage.

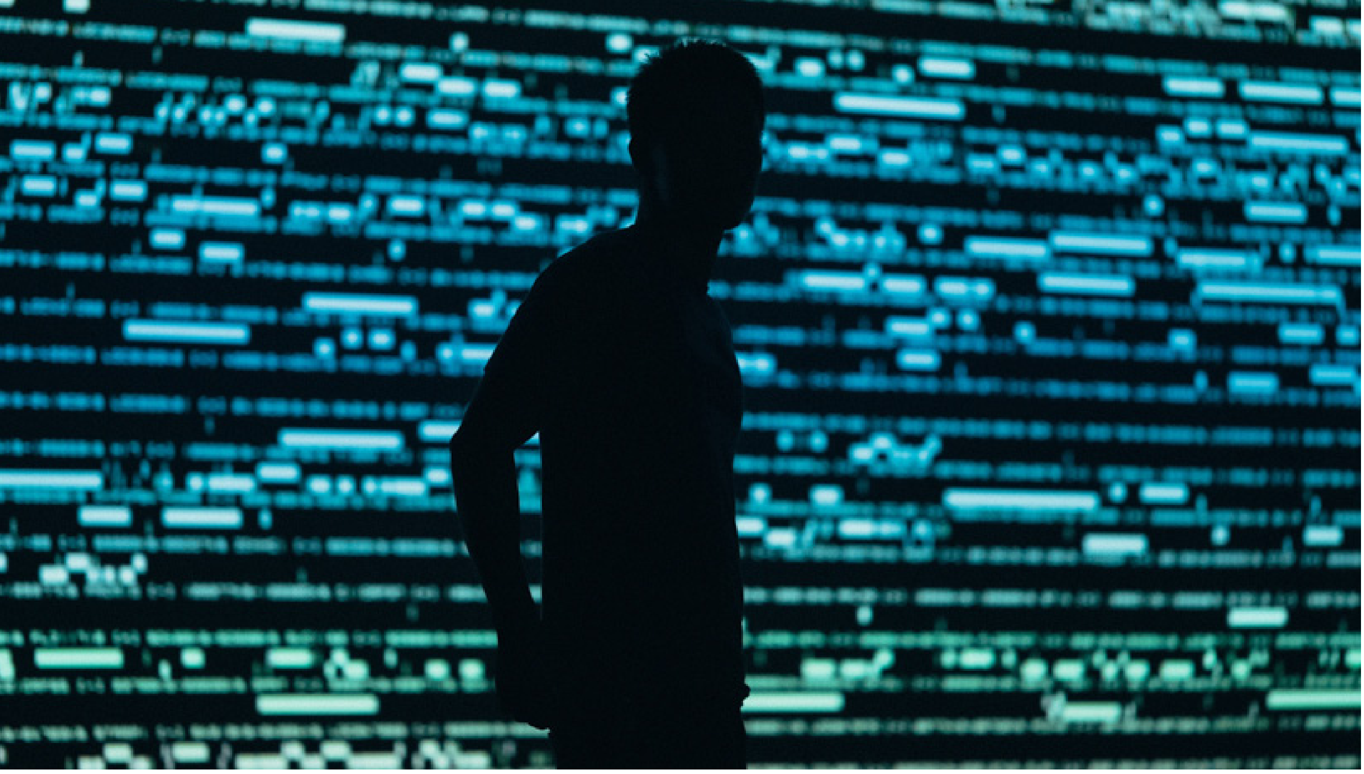
## The current landscape

The UK seeks a central role in global AI regulation with a pro-innovation approach that fosters responsible AI development and deployment, while safeguarding public trust and ethical principles. This approach is characterised by contextual principles and existing conduct-related regulations, tailored to specific sectors. However, it is acknowledged that as the speed of AI evolution quickens, collaboration with stakeholders from all perspectives is necessary to ensure that a balanced and regulatory framework results in respect of AI. This aligns with existing expectations of good governance under the UK Corporate Governance Code and the FCA's Senior Managers & Certification Regime, to name just a few current overarching frameworks through which prudent conduct relating to AI is incumbent in the expectations of senior managers in firms.

The inaugural global AI Safety Summit in the UK brought together 30 leading AI nations, technology companies, researchers and other parties to foster a global dialogue on the potential risks and challenges associated with frontier AI, emphasising the need for responsible AI development and collaboration on AI safety research and initiatives. This resulted in the signing of a historic shared communique, 'The Bletchley Declaration'.

> The EU's AI Act establishes a comprehensive framework for regulating AI and aims to ensure the safety, reliability and fairness of AI systems. Recognising generative AI as a sign of the rapid evolution of AI technology, the AI Act aims to retain the flexibility to adapt to developments, but certain characteristics suggest additional measures may be necessary for implementation in the insurance sector.

The UK has adopted an outcome-based approach built on regulating the outcomes of AI use, ensuring that AI systems are fair, transparent and accountable. The government and the FCA are seeking a more prescribed framework for governance and the regulation of AI. The FCA places responsibility for financial data with Big Tech firms, and companies



designated as Critical Third Parties by the FCA and PRA will potentially ensure stability. The Consumer Duty provides enhanced standards of consumer protection across financial services and is seen as the foundation for the governance of AI until a specific framework of governance and regulation is established.

## Core principles

When comparing and contrasting the expectations from the UK government, the European Bloc and The US Executive Order relating to the governance of AI, some common tenets are clear in terms of Transparency, Human Accountability, Safety, Security and Fairness. An example is the European Insurance and Occupational Pensions Authority (EIOPA), which published a report outlining AI governance principles for the European insurance sector, emphasising the need for a robust governance framework to ensure that AI is used ethically and in a way that protects consumer interests and promotes responsible innovation.

The report consolidated the findings of a consultative expert group on the opportunities and risks of increased AI adoption in insurance across Europe. Among the results was that insurers must be accountable for the decisions made by their AI systems, understand the reasoning behind those decisions and take responsibility for the outcomes. Furthermore, AI systems should not amplify or perpetuate existing biases or prejudices, ensuring fair and non-discriminatory outcomes.

A further recommendation was that insurers be transparent about their use of AI and provide clear information to consumers. It also emphasised the importance of human oversight for ensuring safe and responsible use and that robust data governance practices are essential to protect the privacy and security of data used in AI models. Lastly, insurers should adopt a comprehensive approach to managing the risks associated with AI models, including identifying, assessing and mitigating potential hazards. As the adoption of AI increases, there is a clear need to introduce the same sound governance principles as for any other area of business risk management. The regulatory landscape continues to evolve but, in the absence of a formal process, firms should take the lead in embedding processes suited to their unique operations.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# Staying sharp: Legal operations in the evolving AI-powered insurance era

**Legal operations need to evolve alongside legal teams to navigate new opportunities and challenges introduced by the growing use of AI. We present three guiding principles to stay sharp in this changing landscape.**

The introduction of artificial intelligence (AI) has become a force multiplier for the insurance industry, providing increased efficiencies and precision. As AI continues to reshape the industry, legal professionals within the sector are going to find themselves at the forefront of this paradigm shift.

Legal teams in turn are also grappling with introducing AI techniques into their workflows. AI-powered contract data extraction, drafting support, playbook comparison and analytics provide both new opportunities and challenges.

Legal professionals must not only understand the intricacies of evolving AI applications but also play a pivotal role in ensuring compliance, risk mitigation and ethical considerations. Legal Operations must evolve in tandem with the rest of your legal team to keep pace. Your legal operations team and partners should at the very least enable your business to concentrate on its daily activities. Ideally, legal operations will not only support business as usual, but also be well prepared to address emerging challenges and information related to the use of AI.

The following guiding principles can help shape your legal operations strategy to reap the rewards of innovation in a shifting landscape.

### 1. Turning your data into 'smart data'

Legal operations have made great strides in leveraging structured data within legal teams to save time. Document automation and playbooks can be used to generate first drafts of contracts or do the first-pass comparison of third-party contracts. However, AI-based platforms utilizing Generative AI can swiftly extract valuable information from large, complex agreements that defy automation or playbooks. Similarly, AI-based extraction techniques can perform bulk ingestion of legacy contracts and make them both text and clause searchable.


### 2. Aim for an end-to-end process, not silos

When looking at process improvement in the insurance sector, it is important to take a bird's eye view. Are you managing contracting using a Contract Lifecycle Management (CLM) system? If yes, you can integrate additional information like precise pricing generated by AI models as metadata to accompany the parent contracts. Similarly, if a ChatBot cannot answer a query it can trigger a request for the legal team. Data from the CLM, legal front door and the ChatBot could inform not just the legal team's workload but could shed light on the type and frequency of work over a period. All this and more is possible if legal operations are seen as a unifying function between the business and the legal team, and the wider business in turn employs processes that augment data from different teams to feed into legal advice.

### 3. A formal plan that facilitates testing new technologies through pilot projects

There are many new AI-based technologies on the market for the legal team. However not all of them are good or safe for a particular business. A few years ago, it was safer and easier to let the market determine technology winners for the industry and adopt them. However today waiting is risky, and you should jump into the fray armed with a plan for a small team to pilot test the new technologies. Your legal operations team or consulting partners should be able to support with this.

Remember that the AI landscape is dynamic, and staying sharp in this era is not just a choice but also a strategic imperative.

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# Regulatory horizon

In 2024, the regulatory landscape for the UK and EU insurance sector is marked by ongoing efforts to enhance consumer protection, strengthen market resilience and adapt to emerging risks. Both jurisdictions are prioritising sustainable finance and climate-related disclosures, aligning with global ESG trends. The UK is navigating post-Brexit regulatory autonomy and tailoring policies to its specific market needs. Meanwhile, the EU continues to refine its Solvency II framework and explore digital innovation in insurance services.

Collaboration between regulators and industry stakeholders remains crucial for fostering stability and innovation, while ensuring compliance with evolving standards in this dynamic insurance landscape.

# The calm after the Brexit storm for the insurance market?

The post-Brexit period brought expectations of regulatory calm in European insurance, however the UK and EU witness ongoing legislative changes. In this article we explore why insurers must stay vigilant amid evolving regulation throughout 2024.

After the intense activity of the Brexit period for both the UK and the EU, it was anticipated that there would be a relative period of calm in the regulation of the European insurance and reinsurance markets. However it has transpired that, partly for political reasons, there continues to be a flurry of further legislative and rule changes in both the UK and EU.

As the UK government seeks to highlight the advantages of the UK leaving the EU and aims to bolster investment in the UK economy, it has been progressing with some significant changes in the UK Solvency II based regime by seeking to free up capital in the insurance sector for investment in infrastructure, including certain “green” assets. Whilst also recognising the need for some reform of Solvency II, the UK prudential regulator (the PRA) is keen to ensure that changes do not expose policyholders to an unacceptable level of risk.

In addition, and unusually given that it is in the reinsurance sector, the PRA launched a consultation on funded reinsurance in November 2023, following earlier indications that it was looking closely at this type of arrangement. The consultation paper contains a variety of proposals, many of which appear to formalise procedures already familiar to insurers. Others however, could prove challenging to implement, particularly for larger firms engaged in complex reinsurance activities or for firms that use large reinsurers with complex business models.

In other areas, it appears that the UK government does not wish to diverge significantly from the current rules. Therefore, while the retained EU law relating to the Insurance Distribution Directive will be revoked from 5th April 2024, this follows proposals from the UK conduct regulator (the FCA) issued in September 2023, confirming that the current regime applying to the distribution of insurance products will not change substantively.

Both the UK and EU will continue to have a focus on operational resilience for 2024 as the UK regime will become fully applicable, making 2024 the last year for insurers to embed the new requirements. In particular, the FCA has notably raised concerns about insurers’ level of governance, oversight and contingency planning on outsourced services in its 2024 letters to property and casualty and wholesale firms. Meanwhile, The Digital Operational Resilience Act in EU regulation will fully apply in January 2025. Similar to its UK counterpart, 2024 will also be the final implementation year, during which secondary standards providing key technical detail will be finalised.

The overall picture, therefore, is one of a continuing raft of changes in both the UK and EU. Thus, all participants in the market will need to maintain oversight of what is approaching on the regulatory horizon.

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# ESG and the insurance sector

The increasing emphasis on ESG factors has compelled insurers to integrate sustainability considerations into their strategic planning, reflecting a broader commitment to ethical and responsible business practices. As insurers navigate these strategic considerations, proactive and adaptive approaches are needed to ensure resilience and sustainable growth in an increasingly dynamic industry landscape.

An increasing emphasis on DE&I means that insurers are prioritising the creation of inclusive workplaces that attract and retain diverse talent, and are recognising the benefits of varied perspectives and experiences in driving innovation and resilience. As the sector continues to evolve, shaping a sustainable and competitive workforce will rely on maintaining a strategic focus on retaining talent, promoting DE&I and embedding a culture of continuous development.

# Upholding integrity in sustainability commitments and ESG reporting

**Navigating the ESG (Environmental, Social, Governance) landscape in the insurance sector continues to demand high levels of integrity in public commitments and reporting, presenting some risks but also opportunities to build trust, resilience and sustainability. As the ESG narrative moves from strategy to action, we outline key considerations for insurers.**

### Prioritising culture

A sustainability-focused corporate culture that prioritises ethical practices, encourages insurers to embed environmental and social considerations into their core values and decision-making. Companies fostering a culture of responsibility and strong employee engagement are far more likely to align their commitments with genuine actions.

### Is it time to phone a friend?

Industry collaboration is an essential aspect of ensuring the integrity of commitments. Insurers should share best practices, develop industry standards and address common challenges collectively. This approach enhances individual insurers' credibility and contributes to the overall resilience of the industry in addressing environmental and social risks. Ongoing work to develop insured emissions standards is a prime example of how collaboration can drive accountability around activities covered by insurance policies. Through collective action, the insurance industry can be a key driver of change in sustainability commitments and behaviours.

### Advocacy

By actively engaging with policymakers, insurers can use their influence to advocate for stronger environmental regulations and incentives through the development of regulatory frameworks, as insurers have a powerful platform to champion responsible business practices across sectors. However, if insurers do engage in such advocacy, their intentions must be transparent to avoid an integrity gap. The scrutiny on insurers has intensified regarding the policies they provide and how these align with their net-zero commitments. For instance, ahead of the 28th Conference of the Parties (COP28) last year, it was widely reported that some countries used the conference to strike oil and gas deals with various nations, highlighting the significance of maintaining transparency to avoid an integrity gap. Insurers are increasingly scrutinised in terms of the policies they provide, to whom and for what, and how that aligns with their own commitments to the net zero agenda.

## Bringing together the "E" and the "S"

Alongside environmental commitments, the integrity and effectiveness of an insurer's social impact are critical to demonstrating authenticity. Supporting community resilience amongst those most impacted by climate-related events and providing accessible and affordable solutions and insurance products to underserved communities, demonstrate the key role insurers can play in promoting financial inclusion. They can help deliver a 'just transition', ensuring that the substantial benefits of a green economy transition are shared widely, while also supporting those who stand to lose economically.

### The insurance conundrum

There is a pressing need for new technologies and ventures to enable Carbon Capture and Storage, circular economy ventures and renewable solutions. However, providing investment and insurance for pioneering businesses in these areas can be perceived as challenging and risky. Despite the expense and time required for returns, advancing these solutions is crucial in addressing climate risks and their impact on the industry. It is therefore clear that the insurance sector should collaborate, within legal boundaries, to pursue investment and enable the urgently needed transformation.

## Regulation continues to dominate so be prepared

The European Union Corporate Sustainability Due Diligence Directive (CSDDD) will add new regulations to the sector's approach to sustainability. Insurers will be mandated to conduct thorough due diligence on ESG factors throughout their value chains, holding them accountable for environmental and social impacts.

It is a 'comply or pay' obligation, with potentially significant financial penalties for non-compliance, compelling insurance companies to integrate sustainability criteria into risk assessments and coverage decisions. SMEs within the value chain could be notably affected, emphasising the role insurers have to play in supporting them. In addition, the CSDDD requires the publication of a Climate Transition Plan, offering another opportunity to demonstrate commitment to the net-zero transition and the integration of climate risks and opportunities into the broader strategic planning.

## Final thoughts

The integrity of environmental and social commitments is vital for addressing challenges on climate change, human rights and their impact on communities. Insurers must go beyond discussion and demonstrate their dedication to sustainability through tangible actions, transparency and collaboration.

The continued advancement of technology and growing regulatory pressure will only increase the awareness of data and reporting shortfalls, readily highlighting any lack of integrity in public commitments that will compromise reputation, and consequently damage future talent pipelines, market share and long-term value.


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# Unlocking the transformational power of Diversity, Equity and Inclusion across the insurance sector

## Many initiatives fail to meet the expectations of driving change when it comes to DE&I. Why is that? What can insurance leaders do to unlock the power of DE&I and deliver transformational change?

Combining transformation and diversity, equity and inclusion (DE&I), can deliver a significant multiplier effect on business performance. Aristotle said, “The whole is greater than the sum of its parts”. You could apply this philosophy to the blending of transformation and DE&I. Embracing DE&I as a strategic platform for change that permeates across organisational boundaries, rather than a discrete initiative that ticks boxes and generates binary numbers, creates a whole greater than the sum of its parts.

### What this means for the insurance sector

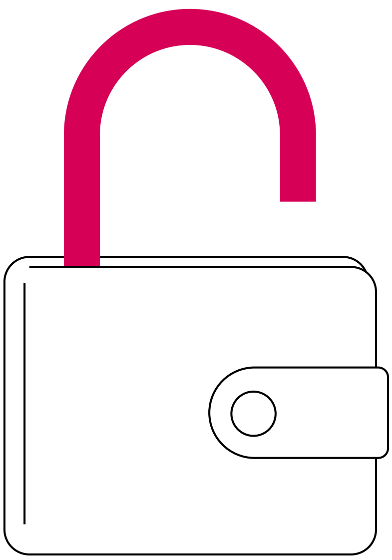
Innovation, social purpose and fairness are three transformational drivers of DE&I in the insurance sector. For example:

1. Fairness and equity for thousands of insurance employees empowering them to reach their full potential, regardless of their background;
2. The ability to deliver a competitive edge in the insurance market based on a more diverse and inclusive workforce is well evidenced, including greater innovation and creativity; and
3. The social purpose and community impact of insurance; bringing peace of mind to customers and their families, who together reflect the full diversity of our society.

These strategic imperatives are often not aligned with DE&I. There is a disconnect between longer-term business goals and shorter-term DE&I 'projects' or siloed initiatives focusing on characteristics such as gender, ethnicity, LGTBQ+, social mobility, neurodiversity and disability. Where this gap exists and is not actively managed, the opportunity to fully realise the benefits of DE&I integrated initiatives is lost, and the multiple barriers to inclusion remain entrenched.

## How to unlock the transformational power of DE&I

Unlocking transformational power hinges on leaders' intercultural competence, which involves integrating the different ways we live as humans into daily work without classifying differences as inherently good or bad, but instead accepting them as part of the positive experience of being human. In the insurance sector, where specialisation and 'prized' expertise often never cross paths, embracing differences can be counter-cultural. Compartmentalising differences by gender, ethnicity, sexual orientation, etc. only contributes to increased division.



## The opposite of integration is segmentation

Segmentation happens when we separate our lives into things we think about and things we do not think about, people we talk to and people we do not talk to, or topics we discuss and topics we do not discuss. However, reliance on segmentation is not sustainable. It does not match our lived reality and our interwoven human experience. This is why short-term, disconnected DE&I initiatives often fail to live up to expectations.

Leaders must recognise that the route to integration and hardwiring fairness, social purpose, and innovation into processes and procedures to achieve inclusion, lies in the ability to:

a. understand the capital value they bring to business, and

b. dismantle the systemic barriers purposefully erected to protect specialism and exclusivity. Otherwise, nothing will change.

## Leaders of our time

Nina Simone, one of the most influential recording artists of the 20th century, said, "An artist's duty, as far as I am concerned, is to reflect the times". The same can be said for the most inclusive leaders of our time. They can truly understand and activate diversity through inclusive action, to develop the intercultural competency that challenges barriers, and engage purposefully with people whose values depart from their own. This transformational mindset allows them to understand that a conversation with someone different does not negate what they hold dear. Indeed, it is often the choice not to reach out and engage that is antithetical to our values.

Do not let your firm be an exercise in segmentation. Instead, embrace cultural integration as a fundamental aspect of human existence. Let us elevate insurance to be a sector where humanity and business can work together to deliver more than the sum of its parts.

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# Securing and retaining talent

Retaining talent and fostering high-performing teams has gained prominence, primarily driven by the increasing emphasis on DE&I. Insurers are prioritising the creation of inclusive workplaces that attract and retain diverse talent, recognising the benefits of varied perspectives and experiences in driving innovation and resilience. Moreover, the prevalence of restrictive covenants and team moves within the industry has underscored the significance of implementing robust talent retention strategies, including mentorship programmes, career development initiatives and competitive compensation packages.

The cultivation of a learning culture has emerged as a pivotal element in nurturing high-performing teams, empowering employees to acquire new skills, adapt to evolving market dynamics and contribute to the long-term success of organisations.

# Competition for talent: Getting restrictive covenants right

**Increased competition for talent within the insurance industry means that organisations must have robust post-termination restrictive covenants in place to prevent former employees from competing with their business following departure.**

In the post-Brexit and post-COVID insurance world, there is heightened competition between organisations striving to attract and recruit top individuals.

Employees leaving a business will usually be subject to post-termination restrictive covenants ("PTRCs") in favour of their former employer. These covenants are usually set out in their employment contract and, if applicable, a shareholders' agreement if that employee holds any shares or securities in their former employer or its group of companies.

## Types of restrictive covenants

The common types of PTRCs found in employment contracts and/or shareholders' agreements comprise the following:

- **non-compete**: prevents former employees from joining a competing business or establishing a competing business;
- **non-solicit**: prevents former employees from approaching current or prospective clients of their former employer;
- **non-dealing**: prevents former employees from providing services to current or prospective clients of their former employer;
- **non-poaching**: prevents former employees from soliciting employees of their former employer;
- **non-disclosure**: prevents employees from using or disclosing confidential business information of their former employer; and
- **non-disparagement**: prevents former employees from making disparaging statements about their former employer.

Shareholders' agreements often include PTRCs to protect the interests of an organisation and to act as a deterrent. When employee shareholders leave an organisation, they are usually required to transfer their shares or securities back to the company or specified persons, as per the agreement or Articles of Association. Breaching any PTRCs, such as joining a competitor as part of a team lift, usually classifies the employee as a 'Bad Leaver' and they receive little to no value for their shares or securities.

## Enforceability

As a general rule, Courts will enforce PTRCs that reasonably protect the employer's legitimate business interests. What is considered 'reasonable' in the context of enforcing PTRCs principally depends on the specific facts of a case.

Precedent has shown that Courts generally take a more flexible approach to PTRCs in shareholders' agreements compared to those in employment contracts, considering they are negotiated agreements, whereas employment contracts are heavily in favour of the employer and carry less bargaining power for the employee.

It is therefore common to see PTRCs in shareholders' agreements drafted with a wider scope and duration than that in employment contracts. However, if PTRCs are too wide then they risk being unenforceable, emphasising the importance of drafting covenants appropriately and reasonably, taking account of the impact of particular employee shareholders leaving the business.

It is also worth noting that Courts may assess PTRCs within a shareholders' agreement from an employment perspective if the particular facts dictate that this would be more appropriate – for instance, if the employee shareholder holds few shares and/or securities and/or occupies a junior position within the organisation.

## Duration and Geographical Scope of PTRCs

When drafting PTRCs, it is crucial to consider the duration and geographical scope. PTRCs drafted too widely risk being struck out by the Court in their entirety (i.e. it will not be re-imagined according to what the Court deems to be reasonable). Great care should therefore be taken when drafting, as it is almost always better to have the protection afforded by a less restrictive PTRC than be left with no protection at all.

It may be advantageous to take a 'tiered' approach to ensure individual PTRCs are tailored to specific classes of individuals dependent on seniority and/or size of shareholding.

## Duration

Restrictive covenants, excluding non-disclosure and non-disparagement, should be limited in time. Within the insurance industry, a 12-month duration is considered 'standard' and has previously been enforced by the Courts. However, this depends on the factors related to the shareholder, including seniority, access to clients and confidential business information, level of commercial sophistication, size of shareholding, ease of replacement and the potential impact of their departure on the business.

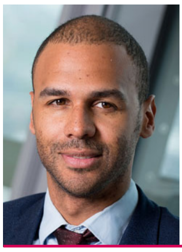
Extending PTRCs beyond 12 months requires justification for why that is reasonable and necessary to protect the organisation's legitimate business interests. Given restraint of trade regulations, PTRCs are rarely extended beyond three years but can extend to 24 or 36 months for employee shareholders with substantial shareholdings (who therefore stand to gain more value than others if they sell their stake) in the organisation.

## Geographical scope

The Courts are unlikely to enforce a PTRC with a geographical scope deemed too wide. Typically, the geographical areas for employee shareholders are based on their involvement and position in the organisation. If the PTRC extends to a wider area, the organisation will have to justify why that is reasonable in protecting its legitimate business interests.

## Conclusion

Whilst the Courts have generally shown greater flexibility in enforcing PTRCs contained in shareholders' agreements versus employment contracts, covenants should still be drafted carefully to provide businesses with as much scope as possible for successful enforcement, particularly in light of the ongoing competition to recruit talent within the insurance sector. PTRCs should also be reviewed frequently to take account of any legal or statutory updates, as well as the ongoing legitimate business interests of the organisation, which may change over time. If the drafting of PTRCs is too wide in scope or duration, the Courts will unlikely uphold the enforcement of them, leaving organisations exposed.

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# Restrictive covenants and team moves: Additional considerations for employment contracts

Many of the factors set out in the previous article are applicable to restrictive covenants in employment contracts, however, there are some further important employment considerations to note when protecting a business against a senior departure or a team move.

## Legitimate commercial interests and employment contracts

Restrictive covenants in employment contracts must be reasonably necessary for the protection of the employer's legitimate commercial interests to be enforceable, and the courts scrutinise the reasonableness of employee covenants much more closely than business sale covenants or shareholder covenants, on account of the inequality of bargaining position. The length and scope of the restriction must be focused on potential business risk. The justifiable length of a client covenant will depend on how long it will take to cement the client relationships; employee poaching should reflect how long it should take to replace the employee; and the legitimate duration of employee non-competes mostly depend on the period for which confidential information likely to be in the employee's possession will remain genuinely confidential. For the more junior employees for whom client and employee covenants provide sufficient protection, blanket non-competes may not be enforceable at all.

The scope of client restrictions should be limited to clients, prospects and intermediaries with whom the employee has had material recent dealings, and the pursuit of the same class of business. Similarly, employee covenants should be limited to those colleagues with whom the employee has had material dealings in, say, the last twelve months.

## The value of garden leave

Although not technically a restrictive covenant, insurance market employers wishing to ensure the maximum protection for the business should consider the benefits of a well-drafted, possibly quite lengthy, garden leave clause. Garden leave is essentially sending an employee home and requiring them not to carry out any business activities for the employer or anyone else, during the notice period or part of it.

Garden leave comes at a cost to the employer, because the employee remains employed and entitled to their salary; however, it is far and away the most secure way to limit the activities of a departing employee. It is rarely challenged on legal grounds and the employee's activities are effectively controlled, as they are not allowed to carry out any business activity during garden leave, even if the activities are arguably not quite competing. Accordingly, it may be worth extending the notice periods of senior employees who could inflict particular harm on the business if they moved to a competitor.

## Further protection

In addition to the covenants listed earlier, the employer can also rely on confidentiality provisions and fiduciary duties to limit potentially damaging activity. It can also be valuable to require employees to notify the employer of any offers of employment that they receive and to inform any potential future employer of the restrictions to which they are subject.

## Do not let covenants go stale

It is important to remember that the reasonableness of restrictive covenants is determined at the contract's inception, so employers should ensure covenants are restated or enhanced on promotion.

## Reform is on the horizon

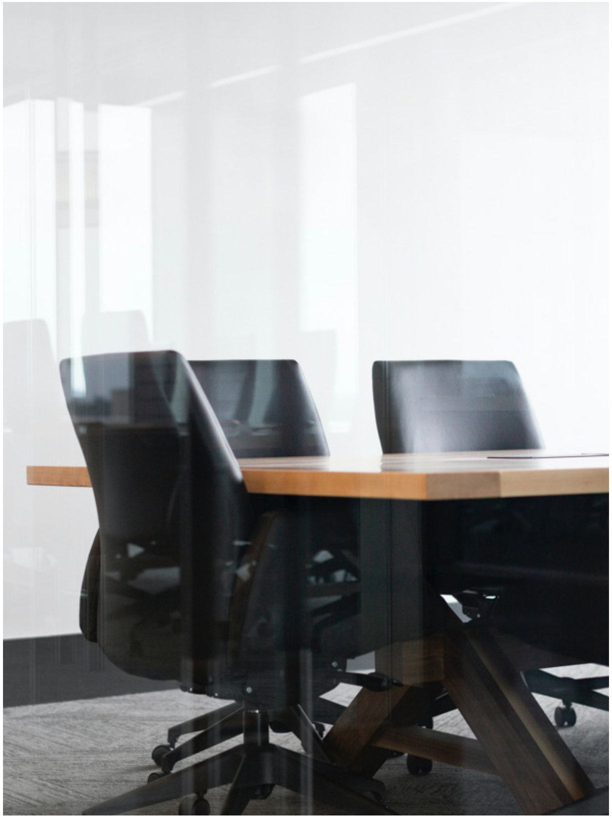
A government consultation confirmed that a statutory cap of three months on non-compete clauses in employment contracts (but not other forms of covenant and not non-competes outside the employment context) will be introduced "when Parliamentary time allows". Government guidance on non-compete clauses is expected. Please see the government's **response** to the consultation.

Please also see our **Legal Updates** for a consideration of restrictive covenants across the globe.

## What is a team move and what is the risk for employers?

Team moves are a constant feature of the insurance sector, where entire teams move to a competitor or set up their own business. This can significantly impact an organisation with lost client relationships, a threat to confidential information and trade secrets, and ultimately affect the bottom line. It can also create a less stable environment and make other teams feel more vulnerable.

Numerous legal issues arise when there is a team move, often involving unlawful activity and legal consequences for both the departing employees and the hiring firm. The legal position is especially complex for the head of the team if they orchestrate the team lift. They will often be in breach of their implied duties of good faith and fidelity, trust and confidence, and fiduciary duties by their actions during employment while the team move is in the planning stages. Team heads and hiring firms in particular need to take early legal advice to ensure that they navigate these complex interlocking obligations in a strategic and nuanced manner.



## Key considerations for insurers

**Contractual protection** is essential. Ensure robust, regularly reviewed and updated restrictive covenants are in place. Garden leave clauses offer the most effective control over the employee's activities during their notice period. Disclosure of wrongdoing clauses and disclosure of new offers of employment clauses provide further protection.

**Share incentive arrangements including shareholder covenants**, as already discussed, can also provide a useful tool, as courts may be less employee-favourable when enforcing covenants against substantial shareholders.

**Take legal advice at an early stage**. Whether you are the departing employees, the hiring firm or the aggrieved insurer it is crucial to take legal advice as early as possible. Movement of senior employees and teams involves risk, and strategic advice can make the difference between a smooth transition with minimum disruption and significant legal costs for all parties.

**Collect evidence**. The success or failure of legal proceedings will depend on whether unlawful action can be proved, so collecting WhatsApp messages, emails, texts and phone records is essential for the aggrieved employer, and conversely for the departing employees it is vital to minimise the electronic paper trail.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# The importance of creating a thriving learning culture to retain talent

## Creating a learning culture has many advantages but 'culture' is a broad term and can be difficult to define. So what are the benefits and tangible business practices needed to create a positive learning environment?

An organisation that promotes continuous learning is more likely to attract and retain top talent, gain competitive advantage and be 'front and centre' when it comes to operational efficiency so they can quickly respond to emerging market trends.

Fran Burgess, CEO of specialist Insurance learning provider at Zing365, says:

> "Investing in training is non-negotiable. Insurance organisations must provide learning and development opportunities to ensure their workforce stays future-fit in a complex and ever-changing environment. However a learning culture is not created by providing the same old 'tick box' training, it requires an innovative 'top-to-bottom' approach to blend technical expertise, cutting-edge technology, and contemporary delivery methods".

So why is it important? A proven high-impact learning culture:

- Addresses real business problems and skill gaps Tailoring learning initiatives to specific business challenges ensures that employees acquire practical skills that directly contribute to overcoming obstacles and fulfilling organisational needs.
- Helps to both attract and retain top talent. Establishing a reputation for investing in continuous learning makes the organisation a much attractive employer to top talent, creating a workforce driven by a shared commitment to growth and development.
- Ensures employees and the business have a growth mindset and improves productivity. Fostering a growth mindset not only transforms individual perspectives on challenges but also cultivates a collective organisational mindset that views continual improvement as essential, thereby boosting overall productivity.
- Encourages teams to collaborate. Promoting a learning environment creates a natural synergy among team members, fostering collaboration as they share knowledge, insights, and skills, creating an environment where teams can collectively thrive.

- Encourages considered risk-taking and embracing change as an opportunity for growth. Nurturing a culture of learning supports a mindset that sees risk-taking as a calculated endeavour and perceives change as an avenue for innovation and organisational advancement.
- Allows people to feel valued and establish feelings of connectedness even when working remotely. In a remote work setting, a commitment to ongoing learning provides opportunities for virtual collaboration, recognition, and skill development, fostering a sense of value and connectedness among employees, irrespective of physical location.

## How do you create and maintain a positive learning environment and dynamic learning culture?

1. **Leadership Commitment**
   Securing leadership commitment to learning and development is vital. Leaders must champion a culture that values continuous learning.
2. **Define Learning Objectives**
   Identify key competencies and skills required for each role. This ensures that learning initiatives are purposeful, contributing directly to the organisation's success and the professional growth of employees.
3. **Encourage Continuous Feedback**
   Regularly seek feedback about the quality and relevance of formal and informal training to ensure continuous improvement.
4. **Promote Knowledge Sharing**
   Foster an environment that encourages knowledge sharing. This can include regular team meetings, knowledge-sharing sessions, or a dedicated platform for employees to share ideas and best practices.
5. **Recognition and Reward**
   Recognise employees for their commitment to learning. Establish a system that acknowledges and celebrates achievements in professional development.
6. **Mentorship Programmes**
   With almost a quarter of the experienced insurance workforce predicted to retire in the next five years, mentoring is vital for knowledge sharing and informal learning.
7. **Link Learning to Career Advancement**
   Clearly articulate how learning is linked to career advancement within the organisation. Employees should understand that investing time in acquiring new skills enhances their professional growth and opportunities within the industry.
8. **Flexible Learning Opportunities**
   Recognise that employees have different learning preferences. Offer a mix of formal and informal learning opportunities, allowing employees to choose the format that best suits their needs. Modern learning platforms provide flexibility and ensure that learning is accessible and adaptable to diverse learning styles.

In conclusion, creating a learning culture within any organisation requires commitment from leadership, strategic alignment, investment in modern learning tools and a focus on employee recognition and flexibility. By fostering continuous learning, the organisation can adapt to industry changes, enhance employee capabilities and maintain a competitive edge in a dynamic insurance sector.

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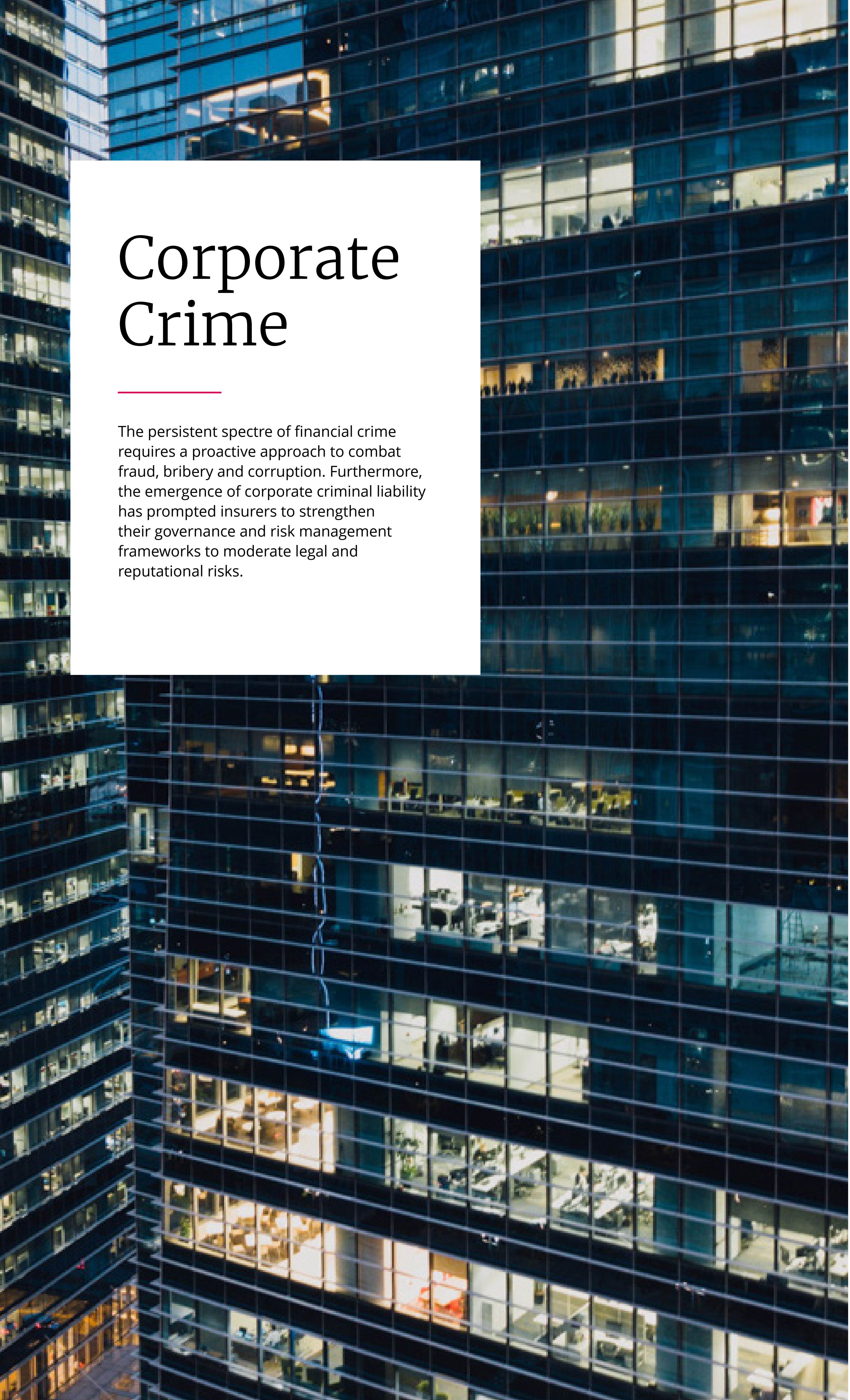


# Corporate Crime

The persistent spectre of financial crime requires a proactive approach to combat fraud, bribery and corruption. Furthermore, the emergence of corporate criminal liability has prompted insurers to strengthen their governance and risk management frameworks to moderate legal and reputational risks.

# The regulatory direction of travel for financial crime

**Financial Crime remains at the forefront of the agenda for regulatory authorities and supervisory bodies worldwide. We consider the wider intelligence and the present business plan to provide an educated view of the regulatory priorities for 2024.**

### The general message from the FCA (Financial Conduct Authority)

Regulators continue to prioritise Financial Crime prevention, with no indication of a shift in focus in 2024. The regulator has highlighted key areas of concern and is presently consulting on what the focus will be in 2024. Notably, the FCA publications in late 2023 signposted several areas of concern through its assessment of sanctions systems and controls in Financial Services firms. In addition, there was a focus on the Consumer Duty, where in November the FCA published examples of the Duty in action, which included the need for firms to strengthen their anti-fraud systems and give better treatment to victims of fraud. These were expanded upon and discussed more widely at the FCA Financial Crime Consultancy Forum held in late November 2023.

During the session, the FCA emphasised their approach to supervision will remain targeted, intrusive and assertive - including wider use of 'short notice' and 'unannounced visits'. Consequently we expect to see an uptick in the level of data requests and supervisory engagement with firms resulting in a greater number of Skilled Person reports commissioned concerning Financial Crime.

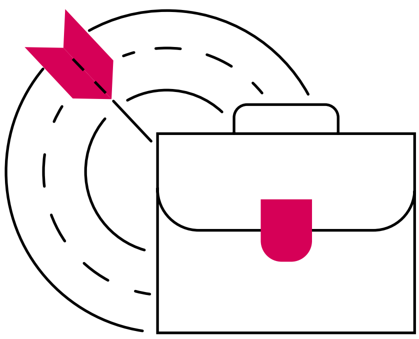
Given the evolving nature of Financial Crime across the globe, firms need to ensure their systems and controls are appropriate and adaptable to maintain pace with Financial Crime risks. Short-notice visits will permit less last-minute remediation of processes by firms in advance of information requests, as has sometimes been the case in recent years.

Therefore we suggest that you start 2024 by asking yourself, would your business be ready if the FCA arrived tomorrow?

### Sanctions compliance

Sanctions compliance is currently a major focus within the insurance sector and the FCA's supervisory approach relating to sanctions compliance covers Engagement, Testing, Reacting and Remediating. Shortcomings by firms were set out in the above-mentioned publication, based on a thematic review, which employed the above approach and will now be implemented more widely.

The FCA has also indicated that the focus will be on firms' Customer Due Diligence, Know Your Customer, risk assessments, screening capabilities, list and alert management and reporting of breaches. Firms should review our **summary** of the recent thematic review on sanctions systems and strengthen controls where necessary to keep ahead of FCA supervisory activity, and to ensure businesses responsibly manage the risk of dealing with a Designated Person flagged on sanctions lists.



## Politically Exposed Persons (PEPs)

As required under legislation, the FCA is undertaking a periodic review of its approach towards the classification and treatment of Politically Exposed Persons (PEPs). In its review, the FCA focuses on the issues highlighted and the firm's arrangements for dealing with PEPs including, but not limited to, how they conduct proportionate risk assessments and apply enhanced due diligence and ongoing monitoring.

The review will report by late June 2024, potentially leading to new regulations and revisions to the FCA's Financial Crime Guide. While the outcome remains months away, it could be material later in 2024. However the key takeaway from the Financial Crime Consultancy Forum is an overwhelming swell of opinion from FCA supervision teams and from consultants that firms do not understand current UK PEP rules and many do not apply them correctly. This area is worthy of self-review in 2024 and a commitment by firms to keep a watch on developments this year.

## A 'fraud epidemic'

The FCA has raised concerns about a 'fraud epidemic', with data from leading industry body UK Finance highlighting an increase of 22% in Authorised Push Payment (APP) Fraud compared with 2022. The FCA emphasised that firms need to protect consumers from fraud and prevent themselves from being used as enablers by ensuring they have effective governance, controls, and MI to detect, manage and reduce APP Fraud. While seemingly not a high priority to the insurance sector, as recipients and transmitters of payments from or to customers, leading firms can find their brands used to give legitimacy to scams and target unsuspecting customers. Firms are therefore encouraged to embed routine checks to ensure that their brand is not being fraudulently used as part of a scam.

Another notable development impacting the insurance industry is the new Failure to Prevent Fraud offence, which holds large organisations criminally liable for failing to demonstrate reasonable procedures to prevent fraud. Additionally, the extension to the identification principle for economic crime increases the likelihood of companies being prosecuted for economic crimes due to the actions of senior managers. For further details, please read on to the next article on this new and fast-developing topic.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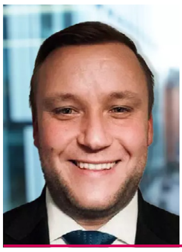


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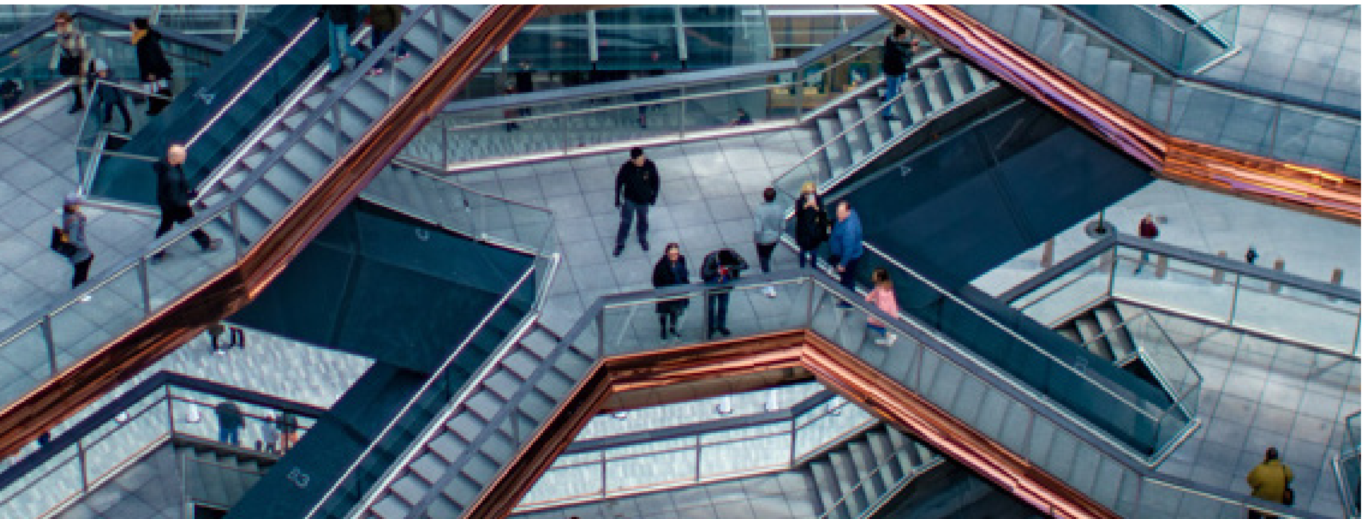

# The expansion of corporate criminal liability

## The Economic Crime and Corporate Transparency Act 2023 introduces a new offence of Failure to Prevent Fraud and expands the identification principle which attributes criminal liability to companies in respect of economic crime.

### Failure to Prevent Fraud offence

The Failure to Prevent Fraud (FTPF) offence will be similar in form and function to existing 'failure to prevent' offences, such as the failure to prevent bribery offence in **Section 7 of the UK Bribery Act 2010 ("UKBA")** and the failure to prevent facilitation of UK tax evasion offence in **Sections 45 and 46 of the Criminal Finances Act 2017**.

A corporate will be guilty of the offence where:

- an employee, agent, or another person who performs services for or on its behalf commits a specified fraud offence; and
- the fraud is intended to benefit (whether directly or indirectly) the corporate.

### Who does the FTPF offence apply to?

The new offence will capture only large corporates which meet at least two of the following three criteria:

- more than 250 employees
- more than £36 million turnover
- more than £18 million in total assets.

### Defence to the offence

Companies will have a defence if they have 'reasonable procedures' in place to prevent fraud. In some circumstances an organisation might argue its risk of fraud is such that it might be reasonable for that organisation to have no procedures in place to prevent fraud.

The penalty for this offence will be an unlimited fine, mirroring the approach taken in the existing failure to prevent offences. The Government is expected to publish guidance on 'reasonable procedures' in the first quarter of 2024.

### Anticipated impact of the offence

Law enforcement agencies such as the Serious Fraud Office have long sought the introduction of this offence. The FTPF offence is expected to make it easier to pursue prosecutions against corporates, but the success of these prosecutions remains to be seen.

### What should companies in the insurance sector be doing to prepare?

Companies should review their systems and controls to ensure they have reasonable anti-fraud procedures in place aligned with the anticipated guidance.

### Expansion of the identification principle

The Economic Crime and Corporate Transparency Act 2023 expands the identification principle, making it easier to attribute criminal liability to a corporate for economic crime offences. It has become increasingly difficult to identify who is the "directing mind and will" of the company, as companies have grown in size and feature more complex structures.

Under the extension to the identification principle, senior managers acting within their authority and committing relevant offences will now be captured and hold the corporate liable for economic crimes.

## Who will be considered a "senior manager"?

The test to identify senior managers replicates the definition of a senior manager in the Corporate Manslaughter and Corporate Homicide Act 2007. This test focuses on roles and responsibilities and the level of managerial influence rather than their job title. It applies to individuals who play a significant role in decision-making for the whole or a substantial part of the activities of the body corporate.

## Anticipated impact of the offence

The expansion of the identification principle aims to update the law to reflect modern company structures, where the directing mind is spread across different functions of business. It is likely to lead to prosecutions of corporates and senior employees, with the possibility of unlimited fines for convicted companies.

The Criminal Justice Bill, if passed, will extend the expansion of the identification principle to all criminal offences and make it easier to prosecute corporates for any offences committed by their senior managers acting within the scope of their authority.

## How will all of the above impact the insurance sector?

Large organisations, including insurers and intermediaries, will need to establish reasonable systems to prevent fraud to avoid liability under the FTPF offence. They should seek to do so as soon as possible once the guidance on reasonable systems is published.

The organisations will also need to update their internal policies and procedures to address the roles and responsibilities of senior managers to limit exposure from the widening of the identification principle, which took effect on 26 December 2023.

On a practical level, these changes are likely to lead to more criminal investigations for economic crime and an increase in the need for insurance cover, resulting in more claims and greater exposure for insurers.



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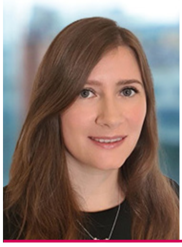


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# Recent key developments in the sector

The insurance sector must maintain a keen awareness of how class action funding continues to shape the industry's risk landscape. Similarly, insurers and insureds should remain mindful of the impact of pension contribution changes, tax litigation and legal insurance, as government interventions and regulatory changes can significantly influence these areas.

Furthermore, the sector must remain vigilant and responsive to developments impacting competition law and adapt its business practices and strategies to navigate potential challenges and leverage opportunities. Finally, insurers need to stay alert to potential claims related to reinforced autoclaved aerated concrete (RAAC) to uphold their commitment to policyholders and proactively manage any emerging liabilities within the construction and property insurance segments.

# Managing the Reinforced Autoclaved Aerated Concrete risk: Practical strategies for the insurance sector

Following high-profile news coverage in late 2023, we consider the question what is Reinforced Autoclaved Aerated Concrete and how can the insurance sector plan for 2024 to ensure any risk it presents be mitigated?

## What is RAAC?

Reinforced Autoclaved Aerated Concrete (RAAC) is a low-cost, lightweight form of concrete used extensively in buildings constructed from the 1950s to the mid-1980s.

RAAC allows the use of concrete for walls and roofing that is lightweight due to its 80% air content. Very effective at its primary function of providing thermal insulation in walls, it has been adapted to incorporate light reinforcement which has enabled it to be used to span walls as a roof panel. Reinforcement and normal concrete work well together, but aerated concrete and reinforcement do not have a durable synergy.

Early use of RAAC after World War 2 was based on manufacturer's information and borrowing analysis methods from 'normal' concrete design, which was a tenuous analogue. Finally a much needed European standard was published in 2013, but by then thousands of buildings included RAAC within their fabric.

The reality is that buildings where RAAC has been used are now exceeding their intended design life, which is well known to decline significantly after 40 years. Unless refurbishment work led to the discovery of RAAC in an insurer's property portfolio, this may be a risk requiring further investigation.

## Why is there concern about RAAC?

Given the significant decline in RAAC over four decades and doubts about its continued integrity, RAAC poses a risk to the insurance sector property portfolios and is likely to have a significant impact on the property insurance markets, which may lead to increases in premiums over the next renewal cycle.

There is currently no register of buildings utilising RAAC construction. It is known to be widespread in properties that were initially constructed for the public sector, but there are also examples of RAAC found in privately constructed properties.

It is important to remember that the most critical RAAC elements are typically in flat roofs, which may have asbestos content in ceilings, so an asbestos survey may well be required before or alongside any of these suggested actions.

Concerning the impact on the property insurance markets and this leading to likely increases in premiums over the next renewal cycle, the insurance industry should be looking to control this new risk and bracing for block claims being made before current policy periods expire.

## What does the insurance sector need to do?

If you are concerned that any building in your portfolio contains RAAC, you should take the following actions:

1. Review your existing portfolio to identify the volume and extent of RAAC in your properties. It will likely be necessary to instruct experts to carry out a risk assessment of affected properties. Note, in respect of leasehold properties, the leases should be reviewed to confirm the split in responsibility between the landlord and the tenant;
2. Take immediate steps to mitigate the health & safety risks posed by RAAC. This may involve closing certain premises, transitioning commercial operations to a remote/hybrid structure, or finding alternative premises for staff and customers;
3. Develop strategies to appropriately manage the risks posed by RAAC. The Chancellor of the Exchequer has promised to 'spend what it takes' to tackle the problem, so it can be expected that central government funding will be made available, with the potential for the Building Safety Fund to be extended to include RAAC remediation.


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# Navigating the evolving landscape of Competition Law in insurance

**Environmental sustainability agreements and how to protect against the impact of Big Tech are two key focus areas of competition law. Here we discuss recent developments concerning each, and their effect on the insurance sector.**

## Big Tech

Regulatory bodies worldwide are increasingly concerned about the influence of dominant multinational technology companies (Big Tech) on financial services and insurance companies. The EU has implemented the Digital Markets Act, and US lawmakers are considering antitrust bills to prevent competition harm by Big Tech.

In the UK the Government and the relevant watchdogs, the Competition and Markets Authority (CMA) and Financial Conduct Authority (FCA), have also been responding to these growing competition law risks. These initiatives are outlined below in more detail.

Firstly, the Digital Markets, Competition and Consumers Bill (DCMM) (coming into effect in mid/late 2024) will create a new regime to increase competition in digital markets by conferring powers on the CMA to regulate competition. In particular, the CMA will be able to designate Big Tech companies as having 'Strategic Market Status' where they are very powerful in relation to digital activities and will consequently have the power to impose conduct requirements. The DCMM Bill is expected to have a direct impact on the insurance sector, as Big Tech companies are anticipated to enter through numerous routes: as an intermediary, as a provider of third-party or business services, or as a direct insurer.

The Bill will also introduce changes to the merger control regime and the CMA's enforcement powers under consumer protection laws, which will also apply to the insurance sector.

Secondly, in 2024 the FCA will continue its work on the potential competition impacts of Big Tech companies' entry and expansion in retail financial services, including insurance.

A prominent theme of the FCA's work is the data asymmetry and data sharing mechanisms between Big Tech firms and financial services firms, and its potentially significant adverse implications on competition. Financial services firms, including those within the insurance sector, are unable to access Big Tech companies' data sets, which currently sit outside of data-sharing initiatives. However, financial services data can be accessed by Big Tech firms. The FCA aims to analyse whether the data asymmetry could lead to Big Tech firms gaining entrenched market power in financial services, including insurance.

Similar measures and initiatives feature in other jurisdictions, and companies in the insurance sector can proactively engage with regulators to raise concerns and views regarding their engagement with Big Tech companies.

## Sustainability agreements

The CMA has published new guidance explaining how businesses can comply with competition law when entering into environmental sustainability and climate change agreements with competitors. The guidance helps to counteract a perceived reluctance by businesses to enter into sustainability agreements with competitors due to a lack of understanding of whether such agreements will comply with competition law.

The highest profile example of this widespread concern and uncertainty is the Net Zero Insurance Alliance, which aims to bring together insurers in committing to transition their insurance and reinsurance underwriting portfolios to net-zero greenhouse gas emissions by 2050. However, several prominent insurers left the Alliance in 2023, citing concerns about exposing their organisations to antitrust risks in the US and other jurisdictions.

In the UK, the new CMA guidance is therefore particularly relevant to businesses within the insurance sector who are considering their environmental and sustainability strategies. It provides explanations of how competition rules apply to sustainability agreements, and gives examples of the types of agreements which are likely and unlikely to infringe on competition law.

Concern with green agreements also extends to Europe, with the European Commission's revised guidelines on horizontal agreements - also published in 2023 - containing a chapter on sustainability agreements, with its provisions broadly aligned with the CMA guidance.

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# The future of Class Action funding

## In July 2023, the Supreme Court handed down judgment in PACCAR, which rocked the class action claimant funding market. We consider the impact of PACCAR and what this means for the insurance sector – will this stop the claimant march?

In July 2023, the Supreme Court ruled in the landmark judgment of *R (on the application of PACCAR) Appellants v Competition Appeal Tribunal and others 2023 UKSC 28*, that litigation funding agreements constitute damages-based agreements, and are therefore, unenforceable pursuant to s58AA(2) Courts and Legal Services Act 1990.

This decision means that insurers will face a period of uncertainty and the potential for disputes with funders.

### What might this mean for the future of funding class actions?

**The background**

In 2016, the European Commission made findings of anti-competitive behaviour of five truck manufacturers.

As such, UK Trucks Claim Ltd and the Road Haulage Association (together the 'Applicants') sought to obtain a Collective Proceedings Order (CPO) to pursue a claim against the truck manufacturers, such as PACCAR.

Under the CPO regime, the Applicants were required to:

i. Establish adequate funding arrangements to bear their own costs; and

ii. Ensure those funding arrangements were adequate to bear any potential adverse costs arising out of the litigation.

In these proceedings, the Applicants relied on Litigation Funding Agreements (LFAs) to satisfy the above requirements. Under an LFA, if the Applicants were successful in the action, the funders would be liable to yield a percentage of any damages recovered.

However, the manufacturers contended the Competition Appeal Tribunal (CAT) should not make a CPO on the basis that the LFAs were DBAs, which were unenforceable because they did not satisfy the regulatory requirements for a DBA.

### CAT Decision

The CAT needed to rule whether the LFAs were DBAs pursuant to section 58AA Courts and Legal Services Act 1990 (CLSA), which defines a DBA as "an agreement between a person providing advocacy services, litigation services or claims management services".

Section 419A(1) Financial Services and Markets Act 2000 defines 'claims management services' as 'advice or other services in relation to the making of a claim'

The CAT ruled that the LFAs fell outside the definition of 'claims management services', and were, therefore, enforceable on success pursuant to section 58AA CLSA.

### The PACCAR appeal

On appeal, the manufacturers sought to argue that 'claims management services' should be given a wide reading insofar that they could incorporate DBAs and, therefore, LFAs.

The Supreme Court overturned the CAT decision, ruling that the LFAs were covered by 'claims management services'.

The LFAs were by definition DBAs and, therefore, unenforceable. By virtue of the judgment, the Applicants could not be awarded a CPO and could not bring the collective proceedings.

## Impact on class actions

Does this mean the end of litigation funding in class actions?

In PACCAR, the LFA was measured as a percentage of any damages recovered, rendering it a DBA and thus unenforceable. Therefore, an LFA measured by something other than the damages recovered would not make it an unenforceable DBA.

Whilst that is the obvious legal answer, funders may encounter difficulties putting this into practice, depending on the litigation stage.

Funders aim to restructure LFAs, which may be problematic. A restructuring could involve aligning the DBA to comply with s58AA(2) of CLSA or amending the basis for remunerating funders for a successful outcome.

In the recent case of Therium Litigation Funding A IC v Bugsby Property LLC [2023] EWHC 2627 (Comm) ('Therium'), the LFA provided for three types of payment to the funder by the funded party: (i) a return of the funding provided, (ii) a return calculated as a multiple of that funding, and (iii) a return calculated as a percentage of damages/settlement sums above a certain threshold.

Whilst the third type, involving a DBA, was unenforceable, the Court held that the rest of the LFA was not necessarily rendered unenforceable, with only the 'damages-based agreement' part of the contract unenforceable (leaving the rest of the contract untouched). Alternatively, the offending part of the agreement could be severed based on the ordinary principles of severance.

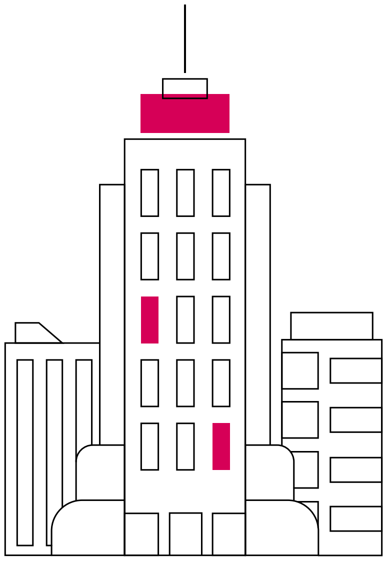
## Impact on the insurance sector

PACCAR has undoubtedly sent shockwaves through the litigation funding market. However, even in the months following PACCAR, both the market and the Courts, as seen in the case of Therium, are working to mitigate its adverse effects.

We therefore believe that the effects of PACCAR will likely be temporary and only affect a few unlucky funders who might simply be at the wrong stage of litigation at the wrong time. Insurers will, however, face a period of uncertainty and the potential for disputes with funders.

After the event (ATE) insurers may find that the funder is unable to recover a success fee from claimants, and a coverage dispute ensues (particularly where there has been a failure to notify of possible invalidity of LFAs).

Insurers should review their existing portfolio of third-party-funded class actions to identify any affected by PACCAR and revise policy wording to improve protection.

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# Compliance and opportunity: What Defined Contribution Pensions changes mean for providers

As defined contribution pension funds approach £1 trillion assets under management in the UK, we are seeing significant shifts in fees, investment strategies and retirement planning support. These changes are expected to present great opportunities for insurers.

Defined Contribution pension funds are projected to hit £1 trillion of Assets Under Management (AUM) by 2030. The emergence of the first generation of UK adults retiring with an entirely defined contribution pension has brought significant impact and challenges, making the investment and drawdown methods for defined contribution pensions a primary focus for both the Government and the financial sector.

Currently, less than 20% of total UK pension fund assets are in defined contribution, whereas Australia and the US have 85%+ and 65%+ of their assets in defined contribution respectively.

**In 2023, the Chancellor set the groundwork for ambitious changes to defined contribution pensions, with key areas of focus including:**

- Consolidating the pensions market
- Investment in less liquid assets
- Transition to value for money instead of annual management charges
- Supporting members with retirement planning and decumulation

## Consolidation

The debate on whether UK pension savers would benefit from consolidation, creating a smaller number of large pension funds, has persisted. Australia and Canada have been cited as jurisdictions where consolidation appears to produce better outcomes for members compared to the UK.

Legislation has been a key driver behind the consolidation and expansion of defined contribution plans in Canada, while in Australia targeted investment strategies have been instrumental in fostering the growth of the pension system.

As the UK moves towards this model, many employers are closing pension schemes and enrolling employees in master trusts or group pensions. In November, the Chancellor announced his intention for the majority of pension savers to be in funds of £30bn plus AUM by 2030.

This acceleration towards consolidation is likely to benefit insurers with pension offerings who are likely to see their AUM grow substantially over the next few years. It is also likely that larger insurer funds will be better placed to diversify into less liquid assets.

## Investment in less liquid assets

The Chancellor's 'Productive Finance' initiative aims to encourage UK pension funds to invest in less liquid assets, a move endorsed by the British Venture Capital Association and already practised by Australian and Canadian pension funds.

Advocates highlight that including such assets in a diversified portfolio generally leads to improved risk-adjusted returns for members. Barriers to this approach have included restrictions on charges, trustee capabilities and reaching a sufficient size to invest in such assets.

Efforts are underway in the financial and pension sectors to facilitate this form of investment, including the FCA re-categorising long-term asset funds (LTAFs) to make them more suitable for pension fund investment. Several insurers have already obtained authorisation for LTAFs, with more expected to follow.

## Fees v Value for money

Countries have taken varying approaches to ensure value for money in defined contribution pensions. Some, including the UK and many European countries, have focused on capping annual management charges, leading to a competitive race to lower costs.

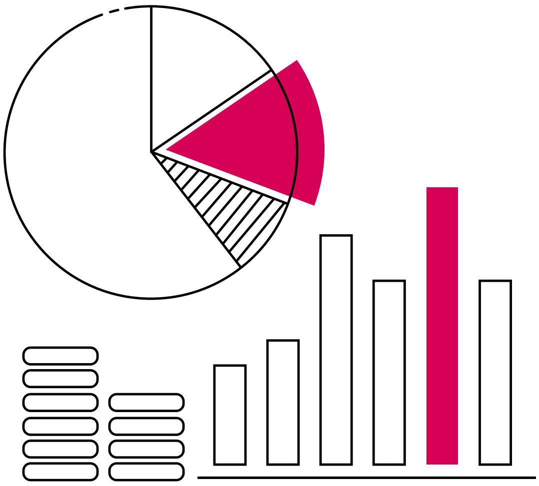
Others, such as The Netherlands and New Zealand, have reformed investment regulations to bring greater competitiveness and clarity to fees, while regulatory bodies globally consult with pension providers to enhance value for pension savers. These initiatives are of significant interest to insurers, who can enhance their pension offerings under the evolving framework.

## Supporting members with retirement planning and decumulation

Historically, the focus on pensions has been on 'accumulation', involving investment, returns and fees. However, attention has turned to 'decumulation', the point when savers stop saving and start spending their pensions. Whilst insurers and commercial master trusts provide tools and products to support this stage, limited regulatory guidance and no formal structure currently exists to support savers at retirement.

The Chancellor's Autumn statement announced plans to mandate trustees of occupational pension schemes to offer savers decumulation services and products of an appropriate quality and price. It remains unclear whether similar obligations will be proposed for insurers who provide pension products. However, insurers should monitor developments closely as they may inform their product offering and create commercial opportunities as trustees look to provide these services.

Next year is set to be an exciting one for insurers operating in the pensions space. The above changes, coupled with an increasing focus on ESG from pension savers, are likely to see the nature of pension investments and retirement planning change substantially, all of which present great opportunities for insurers.

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# Tax litigation and legal insurance: The fight is on

**With a general election expected, any incoming Government will inherit record levels of tax, public spending and debt interest payments. Insurance companies and insureds can expect to be impacted by the new Government's fiscal measures.**

Whatever the composition of the next Government, there will be continued efforts to clamp down hard on tax fraud, evasion and avoidance, with changes to tax regimes to remove the opportunity for exploitation by taxpayers. The UK's tax system, compounded by Brexit, devolved taxes, new taxation regimes, and changes to existing regimes, make it increasingly difficult for businesses to understand and meet their obligations. Insureds will be impacted as the Government looks to close the tax gap and tackle non-compliance, leading to an anticipated rise in disputes and tax litigation.

In its Autumn Statement, the Government announced tougher measures on those promoting tax avoidance along with a number of regime changes to reduce the opportunity for tax fraud. Legislation is being passed to introduce a new criminal offence for promoters of tax avoidance schemes. The offence holds companies criminally liable for failing to prevent the facilitation of tax evasion, with the only defence being the presence of reasonable prevention procedures or reasonable justification for not having such procedures in place. In addition, HMRC has new powers to bring disqualification action against company directors involved in promoting tax avoidance. The maximum sentence for tax fraud is also being increased from seven to fourteen years.

## Construction industry scheme

The Government is targeting the construction industry with the aim of tackling potential fraud. From April 2024, changes to the Construction Industry Scheme, specifically concerning when organisations can obtain gross payment status (GPS), a valuable status enabling businesses to be paid gross rather than being subject to a 20% or 30% deduction. Businesses must demonstrate compliance with VAT obligations to qualify, and late VAT returns or payments could lead to its cancellation. Loss of GPS can be catastrophic for cashflow and often results in the collapse of the business. Additionally, HMRC will have more scope to immediately cancel GPS if there are reasonable grounds to suspect fraud.

## Research and Development tax credits

Research and Development (R&D) tax relief is designed to encourage investment in innovation and economic growth. Tax credits are valuable to companies in almost all sectors and of all sizes.

In its Autumn Statement, the Government announced a number of changes to the existing R&D regime, including:

- significant regime change from April 2024, as the existing two R&D tax relief schemes are merged;
- enhanced support for R&D intensive SMEs - it is anticipated that a further 5,000 R&D intensive SMEs will be eligible for enhanced relief; and
- with effect from November 2022, restrictions to ensure that tax credits will no longer be assignable to a third party.

These changes aim to simplify the system and expand eligibility for SMEs. However, HMRC's stringent methods in assessing R&D claims and adoption of a 'volume compliance' approach has led to numerous legitimate claims being rejected, prompting businesses to challenge HMRC's decisions through statutory review, complaints, and appeals to the tribunal, resulting in increased litigation for many businesses.

## VAT/Brexit

Following Brexit, the Government has published legislation to clarify the interpretation of VAT and Excise Legislation from 1 January 2024, in light of the Retained EU Law (Revocation and Reform) Act 2023 (REULA).

The aim is to preserve the general principles as they existed on 31 December 2020, while diminishing the relevance of EU law. Specifically, the Government is removing the right to rely on EU Treaty rights and rights arising from directives, abolishing the principle of supremacy of EU law and the general principles of EU law.

While the Value Added Tax Act 1994, which is based on the EU VAT regime, is expected to remain in its current form, issues related to EU VAT Directives and case law could create more uncertainty for businesses, leading to an increased risk of litigation.

Post-Brexit, challenges persist in the movement of goods across borders, especially to the EU, potentially leading to more litigation due to seizures of goods by UK Border Forces. As the UK and EU legislation diverges further, insurers may face increased risks related to insured goods and claims under business insurance policies to appeal the seizures.

## Conclusion

For insurers, an understanding of the impact of HMRC's complex taxing regimes and increased scrutiny is necessary for assessing the risks associated with insureds across all sectors. It is inevitable that businesses will challenge HMRC decisions impacting them, especially where insurance policies are in place to cover legal expenses, leading to lengthy tax litigation.


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