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西盟斯律师事务所 科技、传媒和电信法中国研讨会

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We Survived GDPR – what next?!

我们安全度过了GDPR生效，下一步是什么？！

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2018年11月25日

Overview 概要

- Brief summary of GDPR
  欧盟《通用数据保护条例》的概述
- Overview of the effect of GDPR following the effective date / key developments
  《通用数据保护条例》在生效日和之后的主要发展
- Sanction cases and disputes since GDPR came into effect
  《通用数据保护条例》生效后的制裁案例及纠纷
- Looking ahead
  展望未来

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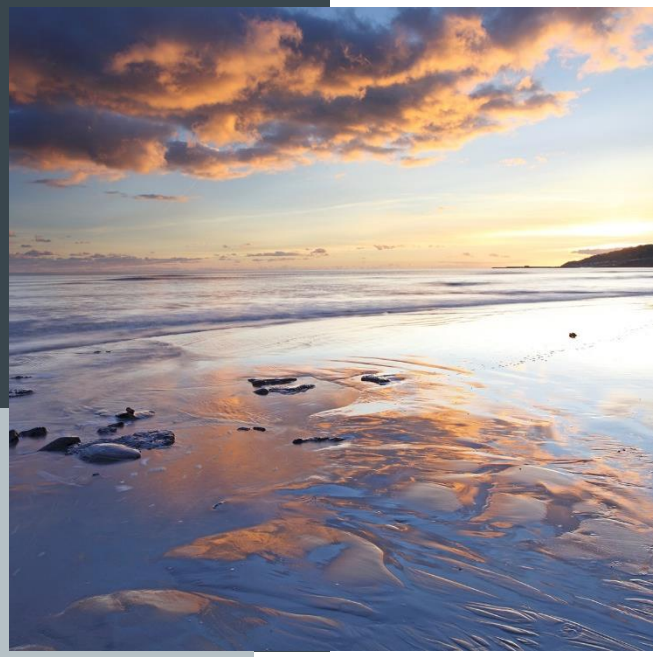
GDPR Summary
《通用数据保护条例》概述



GDPR: a brief summary (1/2)
《通用数据保护条例》：概述 （1/2）

- Came into force 25 May 2018, replaced existing national data protection legislation in the EU (but supplemented by national legislation)
  于2018年5月25日生效，取代了原来欧盟境内各国的数据保护相关立法；但允许欧盟各国立法对其进行补充

- Key changes include 重大变化包括:

Wider territorial scope 地域范围更广	Data protection impact assessment / privacy by design 数据保护影响评估 / 从产品设计着手的隐私保护
Increased sanctions 制裁力度更大	
Heavier administrative burden 为了合规的行政负担更重	

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GDPR: a brief summary (2/2)
《通用数据保护条例》：概述（2/2）

- **Fines**: Controllers: up to 4% global turnover / €20m; Processors: up to 2% global turnover / €10m
  罚款： 数据控制者：高达全球总收入的4% / 2000万欧元；数据处理者：高达全球总收入的2% / 1000万欧元

- **Investigatory powers**: Delivery up of information, Audit, Access to premises
  调查权力： 信息递交，审计，进场调查

- **Enforcement powers include**: comply with the law, notify breach to individuals, limitation/ban on processing, rectification/erasure of data, suspension of international transfers
  执行权力包括要求：合规，向个人发出本企业数据违法的通知，限制/禁止数据处理，修正/删除数据，暂停跨境传输

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GDPR vs. China Cybersecurity Law
GDPR与中国网络安全法对比

	GDPR 《通用数据保护条例》	China Cybersecurity Law 中国《网络安全法》
Territorial scope 地域范围	Extra-territory effect 欧盟域外效力	Within China 在中国境内的活动
Subject 保护对象	Personal information only 仅限个人信息	Personal information + important data 个人信息+重要数据
Content 内容	Privacy 隐私保护	Privacy + cybersecurity 隐私保护+网络安全
Lawful basis 法律依据	Consent, contract, legal obligations, vital interests, legitimate interests, etc. 信息主体同意，合同，法定义务，信息主体的重大利益、处理者的合法利益等	Consent based 基于信息主体的同意
International transfer 跨境转移	Within EU, adequate decision countries, model clauses, etc. 欧盟范围内，同等保护水平认定国家、欧盟批准的数据转移格式条款，等等	Security assessment 安全评估
Sanctions 处罚	Administrative fines 行政罚款; Other administrative penalties 其他行政处罚措施; Private rights of action for affected individuals 受影响的信息主体有权提起诉讼	Administrative fines 行政罚款; Cease of business 关停业务; Personal liability (fines, criminal liabilities, bar from relevant industry) 个人责任（包括罚款、刑事责任、禁止从业等）

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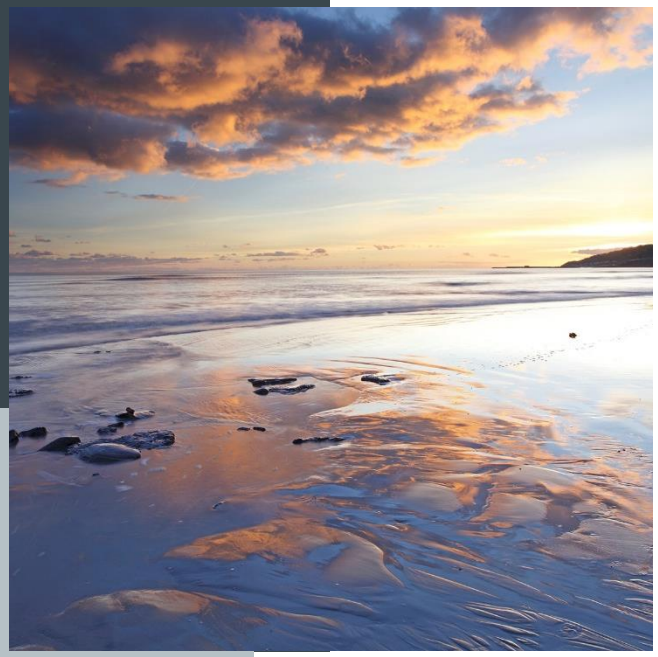
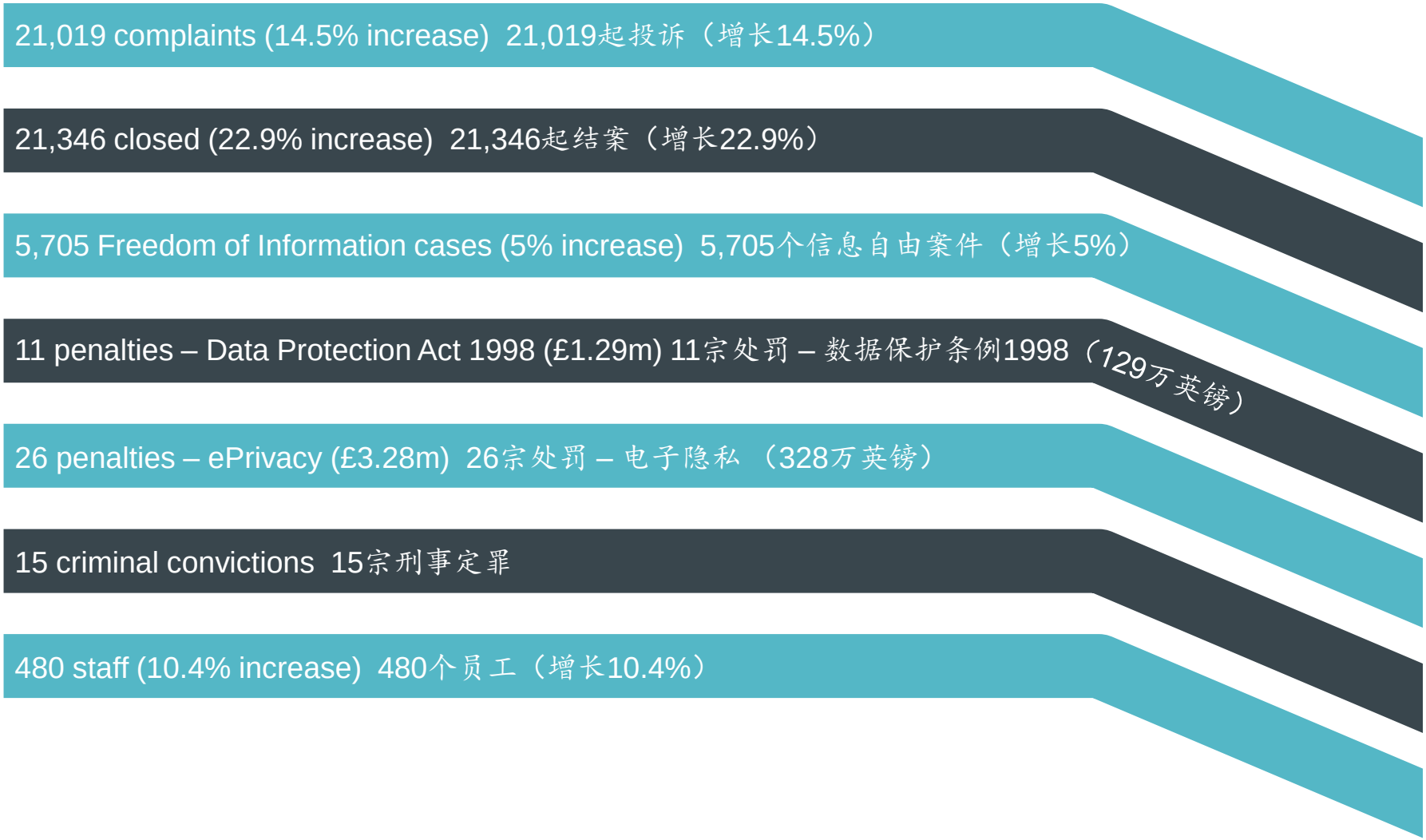
The impact of GDPR so far
《通用数据保护条例》目前产生的影响



Reality of enforcement – the ICO in numbers (2017/2018)
执行的现实情况 - 英国信息专员办公室的数据（2017/2018）



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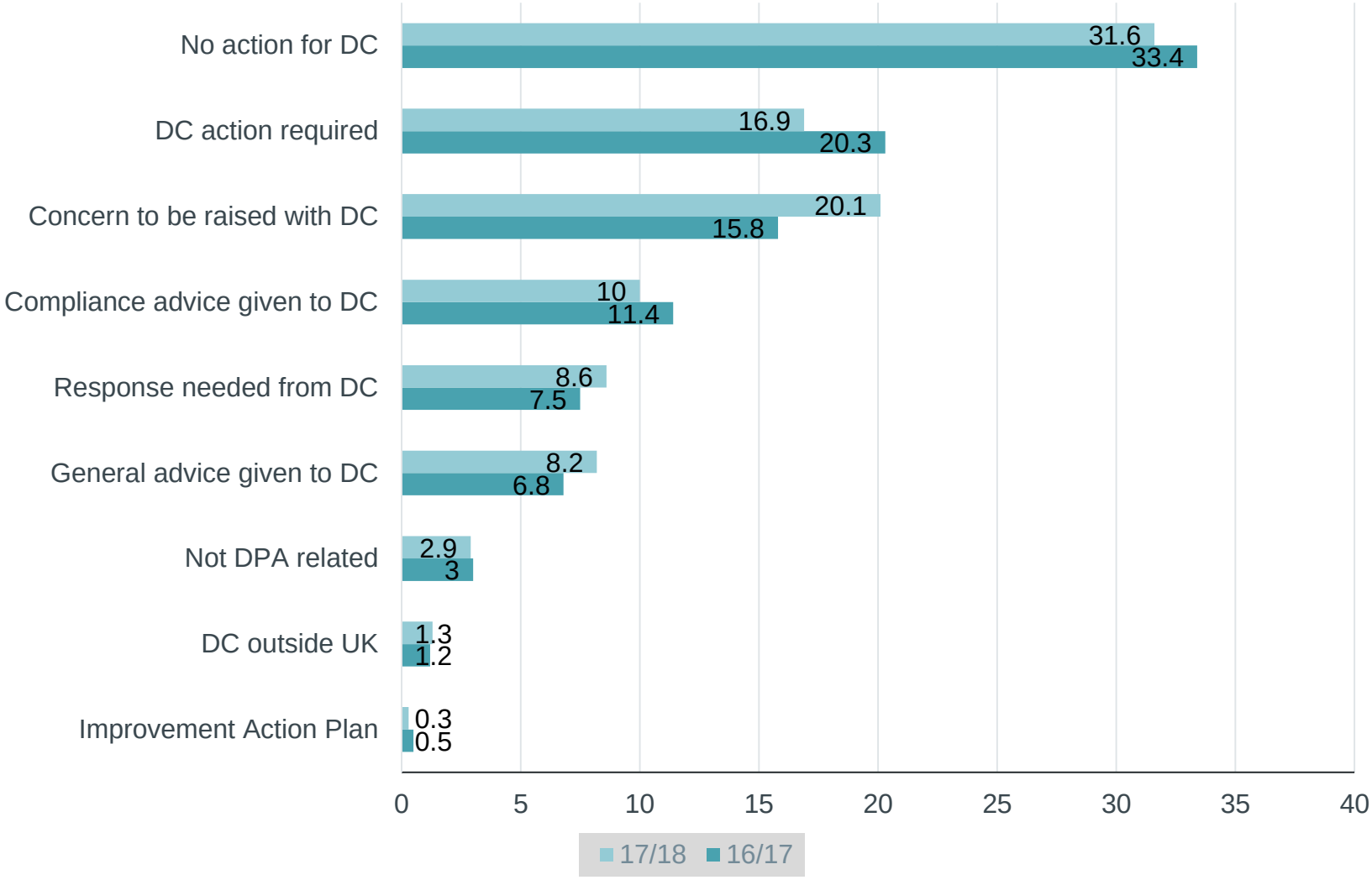
ICO enforcement action: 16/17 & 17/18 (% of outcomes)



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Topic Area 主题范围	% of complaints – 2016/2017 占投诉总量的百分比 – 2016/2017	% of complaints – 2017/2018 占投诉总量的百分比 – 2017/2018
Subject access 主体访问	42%	39%
Disclosure of data 数据披露	17%	16%
Inaccurate data 不准确数据	11%	11%
Security 安全性	7%	9%
Right to prevent processing 阻止处理的权利	7%	8%
Use of data 数据的使用	5%	6%
Fair processing 适当处理	5%	4%
Obtaining data 获取数据	2%	2%
Excessive / irrelevant data 过量的/无关的数据	2%	2%
Retention of data 数据保留	1%	2%

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Activity we are seeing since GDPR implementation
自《通用数据保护条例》实施以来我们看到的情况

Increased number of subject access requests ("SAR")
主体访问请求数量的增加

Management difficulties and costs/bureaucracy
管理难度及费用/官僚主义

Data subject's confusion about their rights
数据主体对其权利的困惑

Confusion about need to notify regulator
对是否需要通知监管者的困惑

Concern from organisations about what their peers are doing
机构对于其同行正在做的事情的担忧

GDPR warning letters
《通用数据保护条例》警告函

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Example enforcement case: Facebook (1/2)
执行案例：Facebook（1/2）

- 24 October 2018 – Facebook Ireland Ltd and Facebook Inc fined £500,000 by UK ICO in the wake of Cambridge Analytica scandal
  2018年10月24日 – Facebook爱尔兰有限公司及Facebook公司因剑桥分析丑闻 事件被英国信息专员办公室罚款50万英镑

- Commissioner considered that Facebook companies had breached the first and seventh data protection principles under pre-GDPR legislation:
  专员认为Facebook违反了通用数据保护条例生效前，适用法律规定中数据保护原则第一和第七条：
  - 1st principle: personal data shall be processed fairly and lawfully
    第一条原则： 应适当地且合法地处理个人数据
  - 7th principle: appropriate technical and organisational measures shall be taken against unauthorised/unlawful personal data processing and against accidental loss/destruction/damage to personal data
    第七条原则：应采取适当的技术及机构措施防止未授权/违法的个人数据处理及防止个人数据的意外丢失/摧毁/损坏

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Example enforcement case: Facebook (2/2)
执行案例：Facebook（2/2）

- Commissioner thought the Facebook companies knew or ought to have known that there was a serious risk that the contravention would occur and be likely
  专员认为Facebook已经知道或应该已经知道，存在将发生或可能发生违法行为的严重风险

- Points to note需注意的点
  - Fines likely to be larger under post GDPR laws
    《通用数据保护条例》下的罚款数额可能更大
  - The relevant data protection principles still apply under GDPR
    原有适用的数据保护原则，在《通用数据保护条例》下继续适用

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One to watch: British Airways (1/2)
关注案例：英航（1/2）

- British Airways reported a cybersecurity breach to UK ICO
  英航向英国信息专员办公室报告了一起网络安全违法事件

- Lasted between 21 August 2018 – 05 September 2018
  事件持续时间为2018年8月21日至2018年9月5日

- BA claim data stolen included names, billing addresses, email addresses and bank card details were at risk but not travel or passport details
  英航声称被盗数据（包括姓名、账单地址、邮箱地址及银行卡资料）存在风险，但旅行及护照详细资料没有被盗

- BA chief executive has said the airline was “100% committed to compensate” passengers
  英航首席执行官已声明航空公司“百分百承诺赔偿”乘客

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One to watch: British Airways (2/2)
关注案例：英航（2/2）

- ICO's latest statement on 25 October 2018: ICO investigation is ongoing, people who may have been affected should be vigilant
  信息专员办公室最近的于2018年10月25日发布的声明：信息专员办公室正在进行调查，可能受影响的人群应密切关注

- Personal data breach: "*a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*"
  个人数据破坏："会导致对传输、储存或其他方式处理的个人数据的意外或非法摧毁、丢失、篡改、未授权披露或访问的安全破坏"

- SARs likely to follow
  接下来数据主体很可能提出访问要求

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Looking ahead
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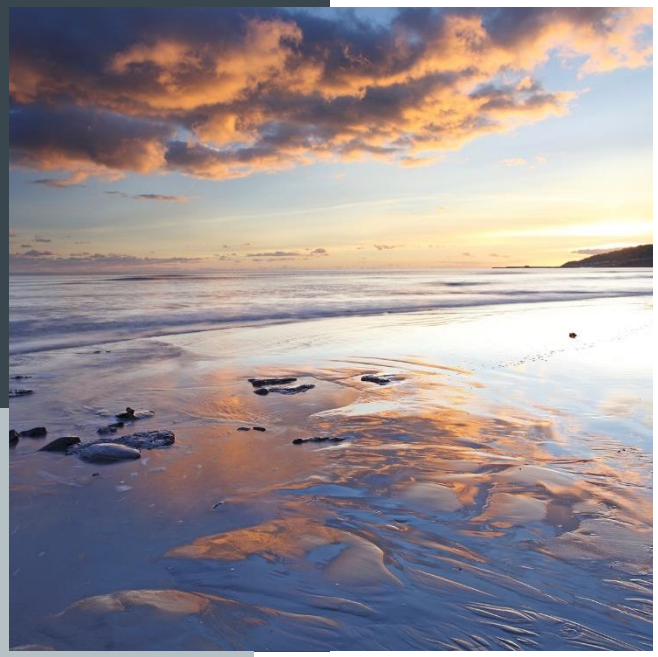

e-Privacy Regulation (1/3）
电子隐私条例（1/3）

- Intended to be introduced with GDPR, but now to be expected after “Brexit date” (29 March 2019) and the EU Parliamentary elections in May 2019
  原计划和《通用数据保护条例》一起公布，但现在公布时间计划延迟至英国脱欧（2019年3月29日）及2019年5月的欧盟议会选举之后。
  - full implementation likely in 2020
    很可能于2020年内全面实施。

- **Aim**: to modernise ePrivacy Directive
  目标： 更新过去的《电子隐私指引》以实现与变化的现实情况相匹配

- Designed to compliment GDPR
  作为《通用数据保护条例》的补充

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e-Privacy Regulation (2/3)
电子隐私条例（2/3）

- **Wide scope**: applies to any business providing communication services to individuals and any using business cookies or tracking technology on devices, in the EU
  涵盖范围广泛：适用于所有在欧盟范围内向个人提供通讯服务、或使用商业cookies或在设备上使用跟踪技术的业务主体

- **Key changes 主要变化：**
  - content data vs. metadata 内容数据 vs. 元数据
  - cookies and tracking technologies cookies 及跟踪技术
  - unsolicited electronic communications 未经请求的电子通信

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e-Privacy Regulation (3/3)
电子隐私条例（3/3）

- **Considerations for businesses**: Minimal immediate risk given implementation timeline
  企业需考虑的问题：考虑到距条例实施还有一段时间，暂无急迫风险
  - update to cookie consents and any other “tracking” technologies used by marketing
    更新cookie同意设置及其它因营销需要使用的“跟踪”技术
  - marketing “opt out” lists and B2B marketing activities
    对于营销活动的“拒绝”；B2B营销活动
  - stricter processes around monitoring consents and use of the “soft opt-in”
    围绕监管同意书及“软性选择进入”的使用实施更严格的处理

- **Consequences of non-compliance 不合规的后果：**
  - mirrors GDPR
    参照《通用数据保护条例》
  - fines of up to 4% turnover / €20m; Processors: up to 2% turnover / €10m
    罚款高达公司全球收入的4% / 2000万欧元；数据处理者：高达全球收入的2% / 1000万欧元

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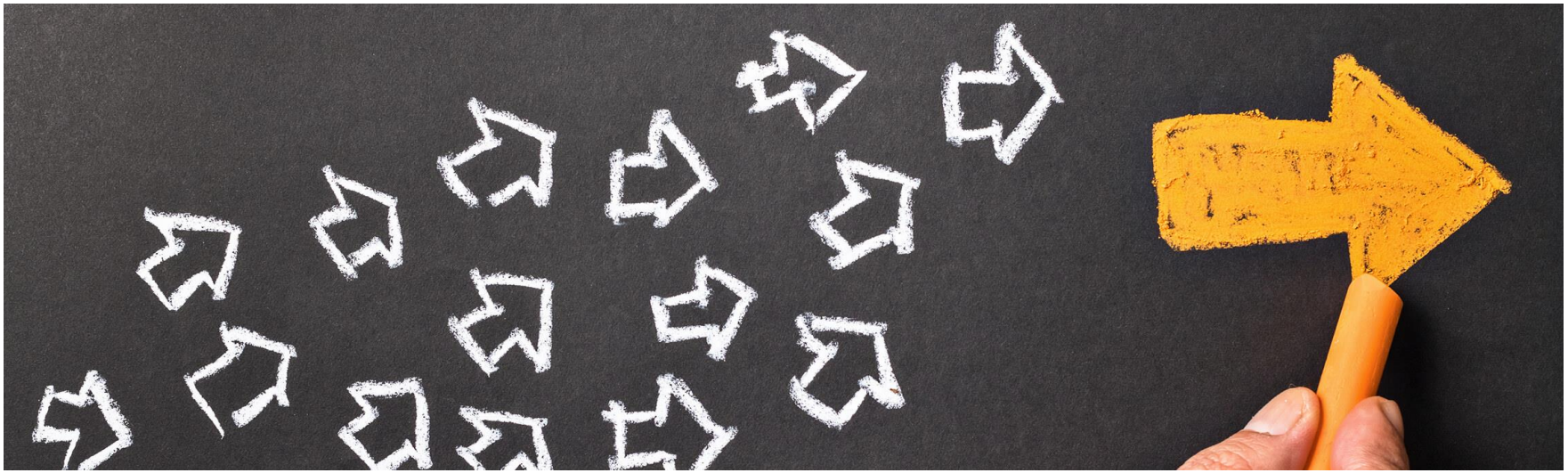
Trends / subjects to watch
未来需关注的趋势/主题

- Resourcing and approach of the authorities
  监管机构的组成及执法方法
- Low value but frequent claims
  低价值但发生率高的索赔要求
- Brexit and data transfer agreements
  英国脱欧及数据传输协议
- The use of technology in respect of SARs
  运用技术应对主体访问请求
- Blockchain
  区块链
- Risk of class actions and insurance
  集体诉讼的风险及保险



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