# Regulatory Outlook

## Helping you succeed in tomorrow's world

November 2016

# Contents

# Introduction

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## A message from Catherine Wolfenden

In our latest edition of Osborne Clarke's Regulatory Outlook we include a special 'in focus' section, looking at enforcement issues across a wide range of business regulation. We also identify current issues and dates to put into the diary, to help businesses plan ahead.

As this Outlook highlights, 'enforcement' has different meanings for different areas of regulatory law. Whilst enforcement strategies vary, it is clear that regulators have a common objective: to drive compliance by changing behaviours. Regulators also have the shared constraint of having to do so using finite, indeed often very limited, resources.

To achieve this, regulators have to strike a balance between robust enforcement – to demonstrate that those who do not comply with regulatory law will face serious punishment – and a positive message of promoting awareness of 'good' compliance.

### Enforcement strategies

Regulators' strategies for enforcement are constantly evolving. For example, new sentencing guidelines now apply to environmental and health and safety offences, linking fines to turnover. This has already resulted in the owners of Alton Towers being fined £5 million following a rollercoaster accident. The intention is that this will help to change culture and behaviours at large corporates.

A number of regulators are increasingly focusing their enforcement powers on individuals. The targets are both those who are actually engaging in non-compliant behaviour, and also senior executives who have failed to establish effective compliance programmes. The message is that the culture of a business is integral to its compliance function and regulators are using the threat of enforcement against individuals to drive a change in that culture from the top down.

The approach favoured by the Financial Conduct Authority and the Serious Fraud Office is to target a few high-profile, high-value targets and impose record-level sanctions, to act as a deterrent to others. The FCA is also increasingly targeting individuals. In 2015, 27 individuals were prosecuted by the FCA, up for the first time in four years, but fines against corporate bodies fell for the first time in the same period. The FCA says that it wants to stamp out the culture of 'gaming' new regulations, by holding the most senior executives to account for compliance failings on their watch.

The corollary of this approach is that regulators are positively encouraging a culture of self-identification and self-reporting of non-compliance. This emphasis on culture is also part of a wider trend towards greater corporate transparency and an emphasis on 'good corporate citizenship'. Whether deciding how to ensure the absence of modern slavery in the supply chain or being more open about tax arrangements, attitudes to transparency and regulatory risk are both functions of corporate compliance strategy, underpinned by the values of the individuals on the board. As regulators know, it is that strategy that drives decision-making from the highest levels down.

### Private enforcement is a growing trend

Enforcement does not just mean regulatory fines. It could mean having conditions imposed on a licence, public censure – which can be damaging in its own right – or criminal prosecution, with the risk of custodial sentences, for individual directors or managers.

And increasingly, civil claims are also being used as a form of 'private enforcement' of regulation. The £14 billion claim recently filed against MasterCard was the first to be issued on behalf of all UK consumers under powers established by the Consumer Rights Act 2015. Private claims are already common in areas like procurement, financial services and employment, and are set to increase in areas such as data protection and cyber security.

### Regulating the digital economy

Previously, we have commented on the challenges for regulators and regulatory law of keeping pace with technological change. We are now starting to see some of that regulatory action coming to fruition, but of course there are plenty of other new technologies for regulators to examine.

Chief among the raft of new regulations aimed at the digital economy are those being proposed under the European Commission's Digital Single Market initiative. The package of measures proposed so far includes regulations on geo-blocking and the portability of audiovisual content, directives on telecoms and digital content, and significant changes to copyright law. In the UK, the government is set to introduce a modern transport bill, intended to encourage investment in driverless cars, and the Civil Aviation Authority is working with Amazon to test the viability of drones for delivering goods.

Newer technologies that will or are already taxing regulators include drones, artificial intelligence and blockchain, along with disruptive business and work models such as the rise of the 'gig economy'. The regulatory approach to these developments raises important questions about how to balance innovation with societal protection, for the benefit of the economy and society as a whole.

### The impact of an impending Brexit and the change of regime in Washington

By the time we publish the next Regulatory Outlook in spring 2017, President-elect Donald Trump will have taken office, Article 50 may have been triggered, and either way we should start to have a better picture of what the post-Brexit regulatory landscape might look like.

For now, early indicators of change in the UK government's approach to regulation may come from reading between the lines on new policy statements and updated guidance. For example, when considering competition and state aid regulation, what should businesses be deducing from the government's recent support for Nissan's UK manufacturing operations?

Can anything be taken from the Cabinet Office's recent procurement guidance to public bodies to place more weight on *'social and wider economic'* considerations when tendering for high value contracts?

UK regulation may also be affected by a change in direction by the US, in the form of President-elect Trump's 'America First' agenda. During campaigning, he indicated that he would repeal the Dodd-Frank Act, and advocated pulling out of the North American Free Trade Agreement and imposing steep duties on imports from China and Mexico. A US President can also change the regulatory agenda by influencing the most senior positions at regulators, such as at the Securities and Exchange Commission. If this does translate into major change to the regulatory and business environment in the US, it could add weight to those pushing the UK government to take a more business-friendly approach to regulation once the UK is out of the EU, if not before.

### Osborne Clarke Women in Regulatory Law event

The sheer number of regulatory laws and enforcement regimes that apply in the UK means that regulatory compliance should remain a permanent, top-level issue for in-house lawyers and boards. Osborne Clarke's next Women in Regulatory Law event in January 2017 will involve a panel discussion of regulators, business leaders and lawyers engaging with each other on the most effective ways for in-house lawyers and compliance officers to get board level buy-in for decisions, initiatives or projects relating to regulatory compliance issues.

### Translating a positive compliance culture into a competitive advantage

However the landscape might change in the future, this should not distract from the more immediate need to keep up-to-date with regulation.

Establishing a clear and positive corporate compliance strategy helps to manage regulatory risk, improve management oversight and enhance the public perception of a brand. While there are increasing risks for those who get it wrong, getting it right can confer a real competitive advantage.

# Advertising and Marketing

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## Current Issues

**Brexit and advertising regulation:** Regardless of whether we get a 'hard' or 'soft' Brexit, it seems unlikely that advertising regulation will change significantly in the short to mid-term. The Committee of Advertising Practice has said there are unlikely to be any changes in the short term to the Codes enforced by the Advertising Standards Authority (ASA) or to the ASA's overall regulatory activity. There are certain areas of European law where some advertisers might hope to see a new approach post-Brexit. One is comparative advertising, where the doctrine of 'riding on the coat-tails' potentially helps entrench the position of dominant market-players to the detriment of challenger brands. Another is of health and nutrition claims relating to foods, which is currently regulated under an EC Regulation which has caused considerable frustration for many food and drinks advertisers.

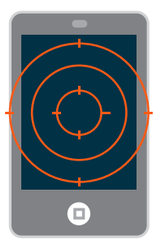
**ePrivacy Directive:** In July 2016, Article 29 Working Party (WP29) and the European Data Protection Supervisor (EDPS) issued their opinions on the evaluation and review of the e-Privacy Directive. Both the WP29 and the EDPS recommend that opt-in consent is required for all types of unsolicited marketing communications, irrespective of the means. Unlawful direct marketing is one of the areas in which regulators, including the UK's Information Commissioner's Office, are most active in exercising their enforcement powers.

**Advertising HFSS products:** A response is awaited from the ASA on how it wishes to proceed in light of the closure of its consultation on 22 July 2016 into the advertising of foods high in fat, sugar or salt (HFSS). New rules could be significant for advertisers in this sector.

**Misleading and Comparative Advertising Directive:** As part of its Smart Regulation policy, the European Commission is running a Regulatory Fitness and Performance Programme (REFIT), aiming to simplify law, reduce regulatory costs and contribute to a clear, stable and predictable regulatory framework. This process includes a review of the Misleading and Comparative Advertising Directive. The period of consultation ended on 12 September 2016 and the Commission's report is expected in the second quarter of 2017.

**Clearcast not subject to judicial review:** The High Court has rejected an application for judicial review by Diomed Direct Limited on a decision given by Clearcast, holding that Clearcast *'exercises no statutory/public law power; nor does it exercise any public law function. The fact that private arrangements are used to secure public law objectives is insufficient'.* This decision confirms to advertisers that judicial review is not an available option to challenge a decision by Clearcast, and that advertisers should ensure their proposed ad complies with the BCAP Code before approaching Clearcast.

**Tobacco and Related Products Regulations 2016 (TRPRs):** The TRPRs came into force in the UK on 20 May 2016 and contained significant restrictions on ads for nicotine-containing e-cigarettes, except for those licensed as medicines by the Medicines and Healthcare products Regulatory Agency. Broadly, the TRPRs will prohibit ads with a direct or indirect effect promoting e-cigarettes and/or e-liquids.



## In Focus: Enforcement

Historically, advertising regulation in the UK has been dominated by the self-regulatory/co-regulatory regime operated by the ASA. However, other regulators also have roles to play and are becoming increasingly more active in some key advertising and marketing areas.

This year, we have seen enforcement action by Trading Standards in its role as back-stop enforcement body for upheld ASA complaints. The advertisers, who had failed to amend claims even after the ASA had ruled them misleading, were eventually subject to criminal prosecution. This development may help the ASA finally shed its reputation as a 'toothless' regulator.

**The data-driven nature of marketing**

The data-driven nature of marketing has also led to an increasingly active role for the Information Commissioner's Office (ICO) in regulating this area. Throughout the past six months, the ICO has continued to launch investigations against marketers, particularly in the context of nuisance calls and direct marketing without adequate consent. In the last year alone, the ICO has issued over £2.3m worth of fines. On a global scale, the ICO announced in June 2016 that it had signed a memorandum of understanding with 10 enforcement authorities across the world to commit to sharing intelligence about nuisance calls.

Finally, the Competition and Markets Authority (CMA) has focused recently on certain advertising-related issues. One is transparency in advertising whether in the context of so-called 'native advertising' of online bloggers and influencers or otherwise. The other – in which the European Commission has also shown considerable interest – is the issue of 'platform liability' for online content, including ads. We see no sign of the CMA's (or the Commission's) interest in these issues abating as we move into 2017.

## Dates for the diary

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| **31 October 2016** | The strengthened approach by the ASA to broadband price claims came into force. The new approach follows on from a joint investigation by the ASA and Ofcom which concluded that consumers were likely to be misled about the cost of broadband services. Future ads should therefore show all-inclusive and monthly costs and give greater prominence to contract length, post-discount pricing and up-front costs. |
| **Autumn 2016** | A full report following the e-Privacy Directive consultation is to be published. A summary report was issued on 4 August 2016. |
| **Q2 2017** | The European Commission's 'Fitness Check' of the Misleading and Comparative Advertising Directive and the Unfair Commercial Practices Directive is expected to be completed during Q2 2017. |
| **2017** | The public consultation concerning the manufacture, presentation and sale of tobacco and related products under the Tobacco Products Directive closed on 4 November 2016. Following the consultation, the European Commission aims to have meetings with stakeholders to discuss. |
| **25 May 2018** | The General Data Protection Regulation will become directly applicable across all EU Member States. |

# Business Crime, Anti-Corruption and Bribery

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## Current Issues

**New corporate offence: Failure to prevent economic crime:** In September 2016, the government announced a consultation on this proposed new offence, and we expect legislation to be enacted during 2017. The offence will be based on the existing corporate offence in the Bribery Act and have wide extra-territorial reach. In our view, it will greatly extend the exposure to criminal liability that companies currently face.

**Financial Crime: AML compliance:** The Financial Conduct Authority's (FCA) Business Plan for 2016–17 has tackling financial crime as a top priority. The FCA intends to make the UK financial system a *'hostile sector for money launderers'*. The oversight gained from the new Senior Managers Regime and Financial Crime Annual Data Return, plus continued scrutiny of authorisation applications, will increase the compliance burden on financial services firms and lead to tougher sanctions.

**Corruption: ABC compliance:** The Bribery Act is now five years old but there is little clear compliance guidance available in relation to the adequate procedures defence. The International Standards Organisation has recently published a draft standard *'ISO 37001 – Anti-bribery management systems'*, which is intended to reflect international good practice on anti-bribery and corruption. Businesses will be able to apply for certification and compliance with the ISO standard, which may in future be scrutinised by enforcement agencies.

**SFO prosecutions:** The Serious Fraud Office has a number of significant, long-running investigations ongoing, on which decisions are likely in 2017. Many involve pre-eminent UK businesses and the outcomes achieved by the SFO in these matters may have a significant bearing on the future of the agency. In turn, this may impact on the government's objective of ensuring that businesses engage constructively with law enforcement authorities.

## In Focus: Enforcement

Enforcement of criminal offences committed by companies has historically been achieved through prosecution, conviction and the imposition of fines. Prosecutors have, though, long struggled with the difficulty in prosecuting companies, due to the need to establish that the underlying criminal conduct was committed by the 'controlling mind' of the company.

The Bribery Act 2010 sought to redress that imbalance with the enactment of an effectively strict liability offence of failing to prevent bribery. As discussed above, the government looks set to extend that principle to cover all offences on economic crime.

The authorities in the UK have also been keen to seek greater cooperation from the business community in tackling corporate crime. To this end the Crime and Courts Act 2013 introduced the possibility of a company securing a Deferred Prosecution Agreement (DPA). DPAs in many ways replicate the system in the US but, in contrast to the US, require a significant degree of judicial oversight and ultimate approval, following an objective assessment of all relevant issues.

There is no obligation on the SFO to offer a DPA, but if one is proceeded with, it is likely to set out a number of terms, including:

- the payment of financial penalties and compensation;
- providing full cooperation with the investigation – including cooperating with future prosecutions of individuals; and
- monitoring arrangements to ensure that the terms of the DPA are complied with.

The SFO's position is that a DPA is only likely to be offered if the company concerned has self-reported the issues to the authorities.

To date we have only seen two DPAs, involving Standard Bank and XYZ Limited (XYZ has been anonymised by the court due to a related ongoing prosecution). Both companies self-reported and demonstrated full cooperation. In contrast, Sweett Group PLC did not, in the SFO's view, show sufficient cooperation, and was therefore prosecuted and pleaded guilty to failing to prevent bribery.

What these cases show is that the courts, in appropriate circumstances, will be prepared to adopt a flexible approach to ensure that any proposed sanction is reflective not just of the wrongdoing, but also of other relevant facts, such as the financial health of the company concerned and the involvement or otherwise of any related parent company.

We expect to see continuing and increasing use of DPAs in the future, but the decision to self-report should only be taken after very careful consideration, having received all necessary expert legal advice.

## Dates for the diary

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| **27 June 2017** | Final date for implementation of the EU's Fourth Anti-Money Laundering Directive (MLD4). MLD4 will apply to more firms and transactions than the previous regime and contains specific provisions for tax crimes, trusts and sanctions. |
| **2017** | Anticipated enactment of a new offence of failing to prevent economic crime. |

# Competition

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## Current Issues

**E-commerce sector inquiry:** The European Competition Commissioner, Margrethe Vestager, has made clear that businesses offering online sales and/or cross-border distribution should consider the preliminary findings of the sector enquiry, which was published in September 2016, and assess whether their commercial arrangements comply with competition law. The preliminary findings suggest that the growth of internet sales has led to an increase in vertical restraints and to manufacturers using selective distribution. We anticipate further investigation into competition concerns as a result of this, and await the final report, due in the first quarter of 2017. Regulations are already being considered (explored further below) in response to the inquiry, and in relation to geo-blocking and to use of copyright.

**Water industry overhaul:** Proposed changes to the water industry, prompted by criticisms of Ofwat for allowing 18 privately owned companies to become monopoly suppliers, would open up the water market to retailers, energy suppliers and telecommunication companies. Such companies would be able to buy water in bulk and offer customers packages, bundling water with other utilities.

**State aid tax investigations:** Businesses should be mindful of the European Commission's ongoing crackdown on preferential tax rulings and settlements, and consider whether the tax they are paying might breach the State aid rules. In particular, inter-company profit transfers and payments for IP rights should be at market value, or risk scrutiny by the European Commission. Several large corporations have already been caught out and investigations continue into the tax affairs of many other companies.

**Damages Directive:** Due to be implemented in the UK by the end of 2016, this Directive aims to make it easier for direct and indirect purchasers who have suffered loss because of a cartel to be able to claim for follow-on damages. These claims are generally worth exploring; litigation funders are keen to finance them and collective actions can mean that businesses can bring claims with minimal time and cost outlay.

**Energy market investigations by the CMA:** Ofgem has consulted on amendments to the Confidence Code, including rules around tariff comparability, marketing and the requirement for Price Comparison Websites (PCWs) to show the tariffs being offered by the entire market. Ofgem has reported its findings to the Competition and Markets Authority (CMA), which is also investigating PCWs. The amendments are designed to remedy market failures identified in the CMA's energy market investigation, including a lack of customer engagement and switching.


## In Focus: Enforcement

Competition law enforcement is constantly adapting to keep pace with market trends and technological advances.

In the EU, competition law is enforced by the European Commission (where there are cross-border effects), national competition authorities (such as the CMA in the UK) and specialist sector regulators (such as Ofgem, Ofwat and the Office of Rail and Road). Regulated conduct includes mergers, agreements with anti-competitive effects, abuses of dominance, and the granting of State aid (the anti-competitive use of state resources). Regulators have wide investigatory powers, including the ability to conduct dawn raids, compel disclosure of documents and to question employees.

The CMA can order businesses to cease offending conduct and can issue fines up to 10% of worldwide turnover, or alternatively can accept binding commitments or approve voluntary redress schemes. Private litigants can also bring actions to recover losses suffered as a result of infringing conduct.

### The Brexit effect

Brexit, over time, will affect competition law enforcement in the UK. Whilst much of the substantive law is likely to remain unchanged (the key competition law prohibitions are directly mirrored by UK law), Brexit is likely to mean that the European Commission will lose the ability to take enforcement action for conduct with UK-only effects. In addition, businesses will be required to notify mergers to both the CMA and the European Commission (where the relevant thresholds are met) and the UK will no longer be part of the EU Merger Regulation's 'one-stop shop' regime. The UK may introduce new laws to replace the EU's State aid rules, which are likely to drop away on Brexit.

A key trend in competition law enforcement in the UK is the increase in private enforcement, which may increase as a result of the Damages Directive (outlined earlier in the 'Current Issues' section). This trend is illustrated by the first antitrust class action to be brought in the UK, filed in May 2016, on behalf of aggrieved pensioners who purchased overpriced mobility scooters. Following this, a £14bn 'opt-out' class action has been filed against MasterCard on behalf of UK consumers for anti-competitive card fees.

### 'Big data' and competition

Across the EU, competition regulators are grappling with the competition law consequences of the increasing use of 'big data' for commercial gain. For example, the amount and type of data held by potential acquirers and targets is becoming a relevant consideration in merger control decisions, and the European Commission is considering whether to introduce new merger control thresholds to catch a greater number of transactions involving big data. Other concerns include maximising innovation and interoperability of connected technologies (such as connected cars and household appliances) and data pooling whilst avoiding sharing of competitively sensitive information.

Finally, competition authorities are focused on the development of competition law enforcement in the ever-increasingly digitised world. An outcome of the e-commerce sector inquiry is legislative proposals around cross-border sales of physical goods and certain digital content over the internet. The proposed geo-blocking regulation prohibits geo-blocking of an online interface (an app or website platform), redirection of a customer to a local version of a website, and stipulation of different conditions of access to goods or services depending on, for example, whether cross-border delivery is needed. Further regulations are anticipated, including new regulations dealing with copyright.

## Dates for the diary

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| **Mid-December 2016** | Draft report on geo-blocking expected from the European Parliament. |
| **December 2016** | Deadline for implementation by Member States of the Damages Directive. |
| **January 2017** | Final report on the e-commerce sector inquiry expected. |
| **28 March 2017** | Interim findings of the CMA market study into digital comparison tools expected. |
| **April 2017** | Final committee vote on the geo-blocking report. |
| **April 2017** | Over 1.2 million eligible businesses and other non-household customers in England will be able to choose their supplier of water and wastewater retail services (implementing reforms introduced in the Water Act 2014). |

# Consumer Protection

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## Current Issues

**The Digital Single Market:** In May 2015, the European Commission published its Digital Single Market (DSM) strategy for Europe. Based around 'three pillars', including providing better access for consumers and businesses to digital goods and services across Europe, some of the DSM's proposed measures include harmonising consumers' rights across the EU for online purchases of goods and digital content, preventing website geo-blocking, and allowing 'portability' of digital content services. Overall, measures are going to affect consumers across the EU by enhancing their online and digital rights.

See our dedicated Digital Single Market site for more information.

**European Commission Fitness Check:** As part of its Smart Regulation policy, the European Commission runs a Regulatory Fitness and Performance Programme (REFIT) aiming to simplify law, reduce regulatory costs and contribute to a clear, stable and predictable regulatory framework. This process includes a review of a number of consumer protection directives, including the Unfair Commercial Practices Directive, the Sales and Guarantees Directive and the Unfair Contract Terms Directive. The consultation period has ended and the Commission's report is expected in the second quarter of 2017.

**Consumer Rights Act:** On 6 September 2016, the government confirmed that the Consumer Rights Act 2015 will apply to all transport services, including passenger rail services, from 1 October 2016. The government had initially provided a 12-month exemption from one of the compensation provisions in the Act to allow time for operators to move to a consistent compensation scheme.

**Digital Economy Bill:** The Digital Economy Bill was introduced in the House of Commons on 5 July 2016 and the government is aiming for Royal Assent in 2017. The Bill aims to (amongst other things): empower consumers and provide better connectivity, to ensure everyone has access to broadband, regardless of where they live; enable better public services, using digital technologies; provide important protections from spam email and nuisance calls; and protect children from online pornography.

**Consultation on terms and conditions in consumer contracts:** Between 1 March and 25 April 2016, the government ran a consultation seeking views from the public, consumer representatives, businesses, trade bodies and regulators with a view to making terms and conditions more accessible for consumers. Simultaneously, the Department of Business, Energy and Industrial Strategy is investigating whether fair competition between businesses could be better supported by a wider range of enforcement tools, including the ability to issue fines for breaches of consumer protection legislation. We are currently awaiting the feedback from these consultations.

## In Focus: Enforcement

Consumer law is enforced in the UK by various authorities, using powers including criminal prosecutions and injunctions. Two of the main bodies are the Competition and Markets Authority (CMA), which took over many functions of the Office of Fair Trading, and Trading Standards. Consumer protection laws are also enforced through claims brought by private individuals (on their own or collectively).

### Public enforcement

The CMA focus remains centered on consumer protection: its responsibilities include enforcing consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice.

Trading Standards, on the other hand, gathers information from around the country to combat those in breach of consumer protection laws. It has set up a National Tasking Group in order to deal with intelligence development, assign investigations and take on enforcement matters both nationally and regionally.

Recently, the CMA is becoming more active in its enforcement and market study activities, and over the past 18 months it has looked at (amongst others) online reviews and endorsements, terms and conditions and, most recently, online gambling. Trading Standards, by contrast, has traditionally been seen as less active in enforcement, although this may change as the National Tasking Group gets up and running.

### Private enforcement

Following the adoption of the Consumer Rights Act (CRA) in October 2015, the UK is also about to see its first key test of the new legislative framework for private enforcement of consumer protection law.

On 8 September 2016, a collective action claim was filed with the Competition Appeal Tribunal (CAT) over the fees charged by MasterCard between 1992 and 2007. This was one of the first claims to be filed under CRA on behalf of UK consumers generally, taking advantage of the new opt-out mechanism it introduced. If the claim is successful, it could see MasterCard paying out around £14bn to consumers.

Now that the CAT has one of its first high-profile cases under this new scheme, it will be a chance to see the pros and cons of the new procedure and whether it opens the floodgates to more claims of this nature. If so, this could significantly increase the risk exposure for consumer-facing businesses when it comes to practices that infringe competition law.

Energy and Industrial Strategy is investigating whether fair competition between businesses could be better supported by a wider range of enforcement tools, including the ability to issue fines for breaches of consumer protection legislation. We are currently awaiting the feedback from these consultations.

## Dates for the diary

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| **Late 2016** | European Parliament report expected on the European Commission's draft Directive relating to online and other distance sales of goods. |
| **January 2017** | European Parliament decision expected on portability of digital content. |
| **Q2 2017** | Planned completion of the European Commission's REFIT programme. |
| **H1 2017** | Finalised European Directive relating to digital content. |

# Cyber Security

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## Current Issues

**NIS Directive:** The EU Network and Information Security Directive (NIS Directive) requires organisations affected by it to take certain measures to prevent and minimise the effect of cyber breaches, and to notify the relevant authority of any breaches that take place.

The NIS Directive will apply to providers of 'critical infrastructure' in the following sectors: energy, water, banking, financial markets infrastructure, transport, healthcare and digital infrastructure. It will also apply to providers of certain digital services, such as online marketplaces, search engines and cloud computing providers.

National governments have until May 2018 (when the EU General Data Protection Regulation (GDPR) also comes into force) to identify the providers of 'critical infrastructure' and set out the minimum standards that those providers need to comply with, along with sanctions for breach. Given the timing and nature of the NIS Directive, the UK is likely to pass and retain national cyber security legislation in this or a similar form, regardless of the shape Brexit takes.

**Vulnerabilities of connected devices:** The growing Internet of Things (IoT) raises a number of security issues. The fundamental concern is that connectivity is often built into devices, without sufficient attention being paid to cyber security. This can create obvious dangers to the users of those devices, such as the hacking of a connected car or the theft of sensitive personal data from wearables or other healthcare devices. Recent high-profile attacks have also shown how IoT devices can be hijacked and used to mount large distributed denial-of-service (DDOS) attacks.

These vulnerabilities have already led to a number of manufacturers issuing mass product recalls. With potential liability for cyber breaches likely to increase (see the following enforcement section), the incorporation of 'security by design' will be increasingly important for manufacturers and users of IoT devices.

**Ransomware:** Along with the sort of data theft and DDOS attacks that have been a focus for some time, there is a growing trend in 'ransomware' attacks, which involve locking down a computer or wider system, then demanding a payment to restore access. As with many cyber threats, ransomware often targets individual employees, as the 'weak link' in an organisation's cyber security system.

**Risk mitigation:** While a large proportion of cyber risks can be countered through simple steps such as employee training and policies, sophisticated attacks are much more difficult to stop, and any business could easily find itself the victim of a major breach.

Most businesses have some sort of crisis management plan, but it is vital to ensure that there is a dedicated cyber incident response plan, and that this has been thoroughly stress-tested. Along with technical measures such as locating and isolating attack vectors and protecting high-value IP, the plan will need to provide for early stage investigation, notification, PR management and any HR issues.

**Cyber insurance:** Specific cyber security insurance is becoming more common in the UK. The nature and extent of this insurance can vary widely, but with premiums in some other areas reducing, many businesses are now considering the addition of cyber security insurance. This is particularly important as industry surveys typically reveal a gap between the levels of cover that businesses think they have under non-specialist policies, and the actual levels of cover under those policies for cyber breaches.

## In Focus: Enforcement

Currently the UK does not have a designated cyber security regulator. However, businesses can face regulatory or private enforcement action following a cyber breach if they do not have appropriate safeguards in place against such attacks.

**Regulatory enforcement**
The Information Commissioner's Office (ICO) is responsible for enforcing data protection law in the UK. One of the principles under the UK Data Protection Act 1998 (DPA) is that appropriate technical and organisational measures must be in place to combat unauthorised or unlawful processing of personal data. The ICO also expects data security breaches to be reported to it, particularly where there is the potential for harm to individuals.

The ICO has a range of enforcement powers that it can call on to enforce data security obligations, including statutory information requests, or requiring organisations to give undertakings to improve their compliance. The ICO can also issue fines, currently up to £500,000, and it has already issued a fine of £400,000 for a major cyber security breach. Publicity around the enforcement can be equally as damaging as the fine itself. In the press release relating to the fine of £400,000, Information Commissioner Elizabeth Denham made the point that *'yes hacking is wrong, but that is not an excuse for companies to abdicate their security obligations.'*

When the GDPR comes into force in May 2018, the maximum amount for a fine will increase very significantly, to the greater of €20 million or 4% of annual worldwide turnover. The GDPR also includes a specific obligation to notify the ICO within 72 hours of becoming aware of a data security breach, and the ICO may require the organisation to notify affected data subjects.

As well as the GDPR, the NIS Directive will also implement specific regulatory obligations for those affected by it (operators of 'critical infrastructure' and certain digital businesses), around minimum standards and breach notification. However, the NIS Directive is not prescriptive as to what exactly these requirements will be; this will be a matter for national governments when it comes to implementing legislation. It remains to be seen whether the UK will opt for a new cyber security regulator to enforce the obligations under the NIS Directive, and if so, what powers and sanctions that regulator will have available to it.

**Private enforcement**
Along with enforcement by the ICO, individuals can bring private claims for breaches of the DPA if they have suffered 'damage' as a result. The 2015 Court of Appeal case of *Google v Vidal-Hall* confirmed that, applying the meaning of the EU directive that the DPA implemented, 'damage' could include personal distress. Google had been given permission to appeal that ruling to the Supreme Court, but settled the case before its appeal was heard.

The *Google* judgment means that where an organisation has suffered a cyber breach leading to the loss or misuse of personal data, and the organisation did not have appropriate security measures in place, affected individuals may have claims against that organisation.

The GDPR has enshrined this right for individuals to bring a claim if they have suffered 'material or non-material' damage as a result of any breach of the GDPR. With cyber attacks ever increasing in number and magnitude, we are likely to see a rise in group claims brought by individuals whose data has been compromised against the organisation that has suffered the attack.

## Dates for the diary

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| **9 May 2018** | Deadline for the NIS Directive to be implemented into national law. |
| **25 May 2018** | GDPR comes into force. |

# Data Protection and Privacy


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## Current Issues

**General Data Protection Regulation:**
After many years of debate, the European General Data Protection Regulation (GDPR) has finally been agreed and passed, and the date has been set for its implementation: 25 May 2018.

While the impact of Brexit is currently uncertain, it is highly likely that the UK will continue to implement the GDPR in the short term and would need to maintain a law similar to the GDPR in the longer term. For more information on the GDPR and how to comply, please see our publications here and here.

**International data transfers:** On 12 July 2016, the European Commission finally approved the much-debated EU-US Privacy Shield, which provides a compliance framework for US entities to safeguard personal data of EU citizens. Companies looking to self-certify should carefully review the obligations under the Privacy Shield and the consequences that a certification will have on their business. The Privacy Shield now contains stronger rules on data retention, onward transfers and additional safeguards related to the access to personal data by US law enforcement agencies. For more information, please see our note here. Meanwhile, the Irish Data Protection Commissioner is intending to seek declaratory relief in the Irish High Court and a referral to the Court of Justice of the European Union to determine the legal status of data transfers on the basis of the EU Model Clauses. The case will be heard in the Irish High Court in February 2017.

**e-Privacy Directive:** The e-Privacy Directive (which is implemented in the UK by the Privacy and Electronic Communications Regulations 2003 (PECR)) is intended to complement the existing EU Data Protection Directive, by setting out specific rules for the processing of personal data and the protection of privacy in the electronic communications sector. The e-Privacy Directive has been in need of review for some time, and the review has been accelerated by the adoption of the GDPR.

In July 2016, both the Article 29 Working Party and the European Data Protection Supervisor issued their respective opinions on the evaluation and review of the e-Privacy Directive.

In August 2016, the European Commission published a summary report on the contributions made to the consultation, and the trends emerging from them. The Commission is now carrying out an in-depth analysis of the responses, and a full synopsis report is expected to be published in autumn 2016.

**Digital Economy Bill:** The Digital Economy Bill, which was outlined in the May 2016 Queen's speech, is intended to ensure that the UK remains at the forefront of the twenty-first century economy. The Bill was introduced to Parliament on 5 July 2016 and is anticipated to gain Royal Assent in spring 2017.

The Bill is split into several parts, covering: the legal right to a fast broadband connection; consistent enforcement of intellectual property rights online and offline; and better sharing of publicly held data to improve public services and produce world-leading research and statistics. Amongst the proposals is a commitment to protect consumers from spam e-mail and nuisance calls. The suggestion is that opt-in consent should be obtained for direct marketing to individuals, irrespective of the channel used; and that guidance from the Information Commissioner's Office (the ICO) could be put on a statutory footing, meaning that it could be considered by the courts.

**Investigatory Powers Bill:** The draft Investigatory Powers Bill has continued its progression through Parliament. The Bill is attracting public controversy and a number of substantive amendments have been suggested during its parliamentary passage.

Meanwhile, on 19 August 2016, David Anderson QC, the independent reviewer of terrorism legislation, published his Bulk Powers Review – a review into the operational case for the four bulk collection powers set out in the Investigatory Powers Bill.

The text of the Bill was agreed on 16 November 2016. We expect the Bill to become law within weeks.

## In Focus: Enforcement

The ICO is an independent regulatory office responsible for, amongst other things, the enforcement of the Data Protection Act 1998 (DPA) and for the Freedom of Information Act 2000. The ICO has a number of tools available to ensure that the behaviour of companies and individuals is in line with the relevant legislation. These include criminal prosecution, non-criminal enforcement and audit.

Currently, the ICO may issue monetary penalty notices requiring companies to pay up to £500,000 for serious breaches of the DPA occurring on or after 6 April 2010. However, from 25 May 2018 when the GDPR comes into force, fines for data controllers could reach up to €20m or 4% of global annual turnover, whilst data processors could be fined up to €10m or 2% of global annual turnover.

The ICO's 2015/2016 annual report (available here) neatly summarises the ICO's aims over the last year, as well as demonstrating trends in enforcement over that period.

In the last year, monetary penalty notices have been issued for:

- failing to register data processing activities with the ICO;
- failing to properly respond to subject access requests;
- direct marketing in breach of the rules in the PECR; and
- failing to take appropriate technical and organisational measures to keep personal data secure.

## In Focus: Enforcement (continued)

**So, what about next year?**

On 18 July 2016, Elizabeth Denham replaced Christopher Graham as the UK's Information Commissioner. In Ms Denham's inaugural speech as Information Commissioner on 29 September 2016 (transcript available here), she made it very clear where her priorities lie. One of her main goals, she says, is to stay relevant. She proudly recalls work in Canada which made a difference to the public; where investigations 'pulled back the curtain' on new technologies to help the public better understand the technologies themselves and their impact on personal privacy.

Ms Denham's fundamental objective over the next five years is to build a culture of data confidence in the UK. How? By focusing the ICO's advisory, education, investigatory and enforcement work on:

–consumer control;
–transparency; and
–fairness.

Since that inaugural speech, the ICO's Head of Policy Delivery has re-iterated the vital importance of transparency.

In the past, some have criticised the ICO for an apparent lack of willingness to engage and investigate new technologies which have a potentially significant impact on privacy. That looks set to change under Elizabeth Denham; alongside her new chief technology advisor, and a boost in numbers for the ICO's technology team.

The GDPR represents a shift in mindset for many organisations; privacy compliance can no longer be seen as a 'tick box exercise', and is required to be at the forefront of a business' operations. The ICO – led by Elizabeth Denham – is very clearly, right behind it!

## Dates for the diary

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| **Autumn 2016** | The European Commission is expected to publish its full report on the review and evaluation of the e-Privacy Directive. |
| **Before end of 2016** | Royal Assent of Investigatory Powers Bill expected. |
| **7 February 2017** | The Irish High Court will hear the Irish Data Protection Commissioner's case over the legality of the EU Model Clauses. |
| **Spring 2017** | Royal Assent of the Digital Economy Bill is anticipated. |
| **25 May 2018** | The GDPR will become directly applicable across all EU Member States. |



# Dual-Use Goods and Export Control

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## Current Issues

**Modernisation of the European dual-use export control regime:** The European Commission has for several years been involved in an extensive consultation about the European dual-use export control system. On 28 September 2016, the Commission published a proposal (available here) to amend legislation underpinning the current European dual-use export control regime, the EU Dual Use Regulation.

The proposed changes to the Regulation aim to:

–harmonise controls across the EU on brokering, technical assistance and the transit of dual-use items;
–simplify and upgrade the administration of dual-use licensing controls, by, for example, introducing EU General Export Authorisations and simplifying the controls of technology transfers (for example, transfers of sensitive technology to the cloud); and
–introduce a 'human security' dimension to the European regime to stop, for example, exports of certain cyber-surveillance technologies (essentially used by intelligence and law enforcement agencies) that may be misused for committing serious human rights violations.

The proposals will now be decided upon by the European Council and the European Parliament in an ordinary legislative procedure. The Regulation is binding and directly applicable throughout the EU. Assuming the ordinary legislative procedure is exhausted in advance of the UK formally leaving the EU – and the proposals are implemented in Member States – businesses operating within the UK will need to comply with any amendments to the Regulation in respect of any controlled goods, software or technology they export within the scope of the EU dual-use list.

**Export Control Joint Unit:** The Export Control Joint Unit, which began operating on 18 July 2016, derives from the UK Government's 2015 Strategic Defence and Security Review and is intended to bring together resources and expertise. The export licensing process will remain unchanged, but should lead to a more harmonised approach to dealing with particular export issues.

**UK Strategic Export Controls Annual Report 2015:** The UK Strategic Export Controls Annual Report 2015 was published on 21 July 2016. The report provides details of strategic export controls policy and export licensing decisions for the period January to December 2015. You can read the Report here.

**Russian economic sanctions:** The European Council has extended the economic sanctions imposed on Russia until 31 July 2017. The restrictive measures include: an arms embargo; a prohibition on supply of dual-use items which are or may be intended for military end-use or for a military end-user in Russia; and the requirement to have an export licence for the export of certain energy-related equipment and technology to Russia (or any other country if such equipment or technology is intended for use in Russia).

**Department for International Trade:** The Department for International Trade (DIT) was formed on 14 July 2016 with overall responsibility for promoting British trade across the world. DIT will develop, coordinate and deliver a new trade policy for the UK, including preparing and negotiating free trade agreements and market access deals with non-EU countries.

Importantly for exporters of dual-use controlled items this new department will also take on the relevant trade functions of the former Department for Business, Innovation and Skills and will be responsible for overseeing the operations of the UK Export Control Organisation (ECO).

## In Focus: Enforcement

The ECO, which is now part of the newly-created DIT, is the UK Government department responsible for controlling and, where applicable, granting licenses for the export of strategic goods included in the UK Strategic Export Controls Lists. The ECO monitors export control compliance through regular and ad-hoc audits of licence recipients using predefined criteria agreed with HMRC.

Where a suspected compliance failing comes to the attention of the UK authorities, it will be investigated by the ECO, HMRC or the UK Border Force (or a combination of all three). Where justified by that evidence-gathering exercise, those organisations (with the additional involvement of the Crown Prosecution Service (CPS) in certain circumstances) will enforce the UK's strategic export and trade controls, sanctions and embargoes through a range of tools. The most common sanctions for breaching UK dual-use export control laws include:

- written warnings from the ECO;
- seizure of goods before they leave the UK;
- compound penalties – a penalty by which HMRC can offer companies the chance to pay a fine to settle a case which would justify being referred to the CPS for prosecution; and
- criminal prosecutions, should the CPS consider that the evidence obtained by HMRC (alone or in combination with the UK Border Force and/or ECO) supports a realistic prospect of conviction and whether it is in the public interest to commence criminal proceedings.

In recent years the UK Government has been keen to emphasise the high success rate of criminal prosecutions in the field of dual-use export controls – despite the CPS having not yet prosecuted a major international company for a breach of export or trade controls. Nevertheless, there has been a general shift towards HMRC using compound penalties in lieu of criminal prosecutions, with the objective of saving the taxpayer and company time and legal fees.

### Early engagement

Early engagement with HMRC to negotiate a compound penalty can often be the quickest way of avoiding a criminal prosecution and the adverse consequences it can bring. Criteria used by HMRC for calculating a compound policy – which should be directly addressed by businesses assessing the merits of a voluntary disclosure to the HMRC – include an exporter's previous history of offences and the types and value of the goods involved (including the strategic value of the goods).

The ECO's recent introduction of the 'First Contact' stage inspections (usually over the phone to first-time registrants of Open Licences within six weeks of being allocated to an inspector) has also proved successful. For example, in 2015 the ECO engaged 107 exporters in this initial process, finding that it helped to raise awareness amongst exporters, enable inspectors to engage with more businesses throughout the year and reduce non-compliance. We expect this trend of engagement and enforcement to continue.

## Dates for the diary

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| **12 December 2016** | Full day Export Control Forum planned for representatives of key stakeholders from civil society, industry and academics, as well as national governments, to discuss the Commission's proposals to modernise and strengthen the Regulation. |
| **Pre-1 February 2017** | The High Court has given permission for a judicial review into the legality of the UK Government's continued approval of new licences for the sale of arms to Saudi Arabia. The hearing will take place by 1 February 2017. If the UK Government's position is not supported, this could have major implications for the UK's legal and regulatory export control framework. |
| **July 2017** | The government will publish the UK Strategic Export Controls Annual Report 2016 in July 2017. This report will cover the UK's export control policy and practice during the period January 2016 to December 2016. |
| **Throughout 2017** | The Commission's proposals to modernise and strengthen will now move through the European Council and the European Parliament as part of the ordinary legislative process. |



# Employment and Contingent Workforce

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## Current Issues

**Holiday pay:** The Court of Appeal has decided that results-based commission must be included in statutory holiday pay calculations. Employers must also bear in mind that overtime forming part of normal remuneration should now be included in statutory holiday pay. Failure to include these payments in future holiday pay entitlements could result in claims under the Working Time Regulations or the deduction from wages provisions in the Employment Rights Act 1996.

**Gender pay:** The new gender pay reporting requirements require employers with 250 or more employees to publish a report containing prescribed gender pay gap data. So far, the government has only published draft regulations that provide a long-stop date of 29 April 2018 for employers to make their first gender pay report – bonus payments made from May 2016 are caught within the reporting obligation. An employer must report on a 'gender pay snapshot' taken on 30 April 2017. Pay awards made in the next 12 months will therefore form part of the employers gender pay calculations. The government is also consulting on gender pay reporting in the public sector and is looking to align the private and public sector requirements. We may therefore see further changes based on the outcome of this consultation, including the specific date in April 2017 on which the snapshot must be taken.

**Apprenticeship levy:** Funding of apprenticeships will change from April 2017. Employers operating in the UK will have to pay a levy, calculated at 0.5% of an employer's pay bill, although an 'exemption' will mean that in practice only employers with an employee pay bill of over £3m will be caught. An employer's levy payments will be paid into the government's new Digital Apprenticeship Service (DAS), from which they will be able to access the funds (plus a government top-up) to fund approved apprenticeship training. Employers should start planning how they will use this levy as it is paid into the DAS on a 'use it or lose it' basis, i.e. if an employer does not use its funds within its DAS account within a specific period, they will be made available to another employer.

**Taxation of termination payments:** The government is looking to introduce changes to the taxation of termination payments from April 2018. The main changes involve: removing the distinction between contractual and non-contractual PILON clauses, to treat both as fully taxable earnings; treating all other payments which cover part of the contractual entitlement (including the notice period even if the employee does not work it) as taxable earnings; and levying employer NICs on other termination payments above the £30,000 limit.

**Personal Service Company (PSC) engagement in the public sector:** The government announced in the 2016 Budget that rather than just being able to accept the assurances of PSCs engaged by the public sector about tax and IR35, as they do now, public sector engagers will face a new 'duty' to ensure all PSCs they use pay enough tax. Liability to pay the correct employment taxes will move from the worker's own company to the public sector body or agency/third party paying the company. These proposals are currently undergoing consultation and the government proposes the changes come into force from April 2017.

**Employment law reform:** A number of employment law reforms are in motion:

- the Business, Innovation and Skills Committee has launched an inquiry on corporate governance, focusing on executive pay, directors' duties and the composition of boardrooms, including worker representation and gender balance in executive positions;
- we are awaiting the outcome of a government Call for Evidence on post-termination restrictions in employment contracts; and
- the government has commissioned an independent inquiry into modern working practices. This review was announced in October 2016 and will take six months. It will address: security; pay and rights; training and progression; balance of rights and responsibilities for new business models; representation; under-represented groups; and new business models.

## In Focus: Enforcement

Employment laws are enforced in a number of ways, both through private action brought by affected individuals in courts and tribunals, and by regulators and other public bodies.

**Employment tribunals: access to justice**

Access to employment tribunals still remains a significant issue in the employment law arena. Since the introduction of employment tribunal fees in 2013, there have been increasing concerns that the fee regime has caused the number of claims made to employment tribunals to drop off, a conclusion reached by a Commons Select Committee in its recent report. The Committee recommended a substantial reduction in the overall quantum of fees; replacement of the binary Type A/Type B categorisation of claims according to complexity; an increase in disposable capital and monthly income thresholds for fee remission; and further special consideration of the position of women alleging maternity or pregnancy discrimination, for whom, at the least, the time limit of three months for bringing a claim should be reviewed.

We are still awaiting the outcome of the government's review of employment tribunal fees – a delay criticised by the Committee. Until that review is published, the Committee believes that its recommendations in relation to employment tribunal fees should be taken as indicating options for achieving the overall magnitude of change necessary to restore an acceptable level of access to justice to the employment tribunals system.

Aside from fees, the Ministry of Justice is currently consulting on wider reforms to the justice system. It is unclear at present how employment tribunals will sit within that new system. However, some of the proposals for the civil courts, such as an online court to deal with simpler claims, may well find their way into the tribunal system.

**National Minimum Wage Enforcement**

Back in September 2015, the Department for Business Innovation and Skills (now the Department of Business, Energy and Industrial Strategy) announced measures to increase compliance with the National Minimum Wage (NMW) and National Living Wage (NLW).

The measures included legislative reforms, doubling penalties for non-compliance and providing for the possibility of disqualification of those convicted from being a company director. New powers were also given to HMRC to 'name and shame' employers. Since the scheme was introduced in October 2013, 687 employers have been named and shamed. This August 2016 saw the government publish the largest list of employers, over 190, to be named and shamed for failing to pay their workers the NMW. Employers should take care to ensure that the NMW and NLW are paid within their organisation and, in particular, be alert to pay arrangements which may inadvertently push pay below these levels.

**Director of Labour Market Enforcement**

New powers, introduced under the Immigration Act 2016, now require the appointment of a new Director of Labour Market Enforcement, to provide strategic direction for those organisations policing and regulating the UK labour market – that is, the Gangmasters Labour Abuse Authority (GLAA) (formerly the Gangmasters Licensing Authority), the National Minimum Wage Unit and the Employment Agency Standards Inspectorate. The strategy will focus on labour market offences as well as breaches of licensing conditions, court orders and regulations plus any non-payment of financial penalties.

Many employers will have remained relatively untouched by the former Gangmasters Licensing Authority. However, since 1 October 2016, its powers have been significantly increased and could now potentially affect employers in all sectors. The GLAA's remit has also been expanded so that officers will be able to look into allegations of labour abuse in all aspects of UK businesses. In order to do this, a new role of Labour Abuse Prevention Officer has been created. These will be specialist investigators specifically required to carry out enquiries into labour market abuse offences. In order to support its expanded responsibilities, the GLAA has been given additional powers under the Police and Criminal Evidence Act 1984 and will be able to request assistance from other agencies, including a chief officer of the police, a Director General of the NCA, UK immigration officers or any other prescribed person.

## Dates for the diary

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| **1 October 2016** | The national minimum wage has increased to:<br>– £6.95 per hour for 21 to 24-year-olds;<br>– £5.55 per hour for 18 to 20-year-olds;<br>– £4 per hour for workers under 18 but above the compulsory school age; and<br>– £3.40 per hour for the apprenticeship rate. |
| **Early 2017** | The government will introduce a new tax-free childcare scheme covering 20% of annual childcare costs to a maximum of £2,000 per child, for families who earn less than £100,000 annually, and earn a minimum 16-hour weekly income at the national minimum wage. Both parents must be working and have one or more children under the age of 12. |
| **6 April 2017** | For those employers with a salary bill exceeding £3m a 0.5% apprenticeship levy will become payable in April 2017. |
| **April 2017** | Gender pay gap reporting regulations are expected to come into force. We are awaiting the outcome of the government's consultation on draft regulations introducing gender pay reporting for employers with 250+ employees (which it is understood will be defined under the Equality Act 2010 to include workers). The draft regulations will require employers to report by April 2018 on a gender pay snapshot taken on 30 April 2017. Separate reporting requirements are also in place for bonus awards and, on the current drafting of the regulations, would capture bonus awards made from April 2016. |
| **April 2017** | The government is looking to implement the following changes to the immigration rules:<br>– the introduction of a requirement that public authority employees in customer-facing roles be fluent in English;<br>– the ability of an immigration officer to close a place of work within 48 hours where they find or suspect illegal working, and the employer cannot provide evidence of complying with work check requirements; and<br>– an immigration skills charge which will be applied to employers who sponsor non-EEA nationals under a Tier 2 work visa. |
| **September 2017** | 30 hours' free childcare becomes available for 3 and 4-year-olds in working families living in England. |
| **2017** | The government has confirmed that it will proceed with additional limits to exit payments across the public sector, including a maximum of 15 months' salary to calculate redundancy payments, and a maximum salary of £80,000 to be used to calculate exit payments. The framework to limit public sector exit payments is being introduced alongside a £95,000 individual cap on public sector exit pay and a requirement that employees with annual earnings above £80,000 repay exit payments if they return to work in the public sector within one year. |

# Energy

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## Current Issues

**Capacity Market:** In its response to the consultation launched on the Capacity Market Rules in March 2016, the government confirmed that it would be holding a capacity auction during January 2017 for delivery one year ahead.

The government also noted in its response that the Capacity Market remains its principal security of supply tool. It confirmed that it will introduce a robust system of checks to ensure compliance with the Capacity Market Rules. Termination fees will be payable where a capacity provider abandons or otherwise fails to meet its agreement obligations, which will also disqualify it from two years of future capacity auctions.

The government has also indicated that the next auction will target significantly more capacity (perhaps over 3GW more), in line with its intention to manage risk by buying more capacity earlier.

The Capacity Market (Amendment) Rules 2016 reflect these changes and came into force on 21 July 2016.

**Renewables Obligation:** The Renewables Obligation (RO) closes to all new capacity on 31 March 2017, subject to grace periods which, when taken together and if all are successfully obtained, could provide certain developers with an extension until 31 January 2019.

The RO closed to small solar PV projects (being less than or equal to 5MW) on 31 March 2016. However, grace periods are available in limited circumstances which, if applicable to an eligible developer, would allow it a further 12 months to commission and accredit its solar project meaning that again, 31 March 2017 is the relevant cut-off date.

Developers should ensure that projects are commissioned and applications for accreditation and grace periods are made in line with the timescales above.

**Renewable Heat Incentive:** Stage 2 of the DECC's planned changes to the Renewable Heat Incentive (RHI) is to come into effect in April 2017. The key proposals for non-domestic projects are:

- the size of tariff reductions are to be proportionate to the need to control development, keep spend within budget and secure value for money;
- triggers for degressions are to be maintained;
- indicative deployment levels (by 2021) have been set, which indicate:
  - proportionately lower spend in Biomass; and
  - higher spend for heat pumps;
- from 1 April 2017, the number of triggers for Biomass will be reduced from four to just one per annum; and
- there will be tariff guarantees for deep geo-thermal, biomethane, large biomass, biomass CHP, large biogas and large ground and water source heat pumps.

**Smart meters:** The rollout of smart meters has commenced. The government aims to have installed 53 million smart meters, across all homes in the UK, by 2020. Energy suppliers are obliged to offer all their customers a smart meter.

Costs for the rollout are to be passed on to consumers.

**Embedded Benefits:** The government Capacity Market Consultation, carried out in March 2016, concluded that the current charging arrangements for embedded generators may over-reward embedded generation. Ofgem, in its open letter of 29 July 2016, raised concerns about the unfair market advantage that sub-100MW embedded generators, in particular controllable non-intermittent embedded generators, may be receiving. The letter focuses on the TNUoS Residual Demand embedded benefit. Ofgem is concerned that the size and increasing value of the TNUoS benefit may be distorting the market.

Ofgem believes that a minimum of two CUSC modification proposals will need to be considered. The two CUSC modifications currently being considered are:

- **CMP264:** this aims to prevent new embedded generators, connecting after 30 June 2017, from receiving the embedded TNUoS benefit; and
- **CMP265:** this is intended to remove the ability to obtain TNUoS demand residual payments from all embedded generators with Capacity Market contracts by April 2020.

**Contracts for Difference:** The government has consulted on extending the Contracts for Difference (CfD) Delivery Years to 31 March 2026. Delivery Years are the periods in which CfD projects need to commission to comply with their CfDs. Currently the CfD (Allocation) Regulations (2014) only give the government the power to run an Allocation Round and allocate budget for Delivery Years up to the period ending 31 March 2020. All respondents agreed with this proposed amendment.

The government has also announced that the next CfD auction has been delayed until 2017. The March 2016 Budget revealed that £730m had been set aside for the three CfD auctions scheduled for the current Parliament.

## In Focus: Enforcement

The Office of Gas and Electricity Markets (Ofgem) is the principal regulator in the energy sector. Ofgem's enforcement activity falls broadly into three categories, being the enforcement of:

- licence conditions, in relation to licensed entities in the gas and electricity sectors;
- competition law in the gas and electricity sectors; and
- consumer protection law.

As well as ongoing monitoring of licence conditions and adherence by energy companies to consumer protection laws, Ofgem carries out market reviews and, where appropriate, can refer investigations to the Competition and Markets Authority where it has general concerns about market practices. Where it has concerns about particular companies, Ofgem will carry out investigations and, if necessary, impose sanctions.

The sanctions that Ofgem can impose range from enforcement orders requiring companies to comply with their licence conditions, to fines of up to 10% of a company's worldwide turnover. Since a major review in 2014 of its enforcement activities, Ofgem has focused on ensuring that fines have a real deterrent effect, and the issuing of a fine of £26m in 2015 signalled its intent to do so.

However, for companies that engage early with the regulator, Ofgem can, in certain cases, accept binding undertakings to stop or not repeat offending conduct, rather than issuing punitive sanctions.

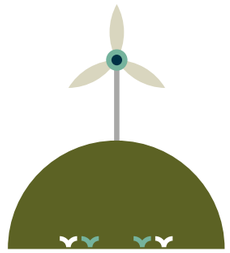
In June 2016, Ofgem set out its strategic enforcement priorities for 2016/17, which focused on taking action in the following three areas:

- where industry behaviour fails to meet obligations for customers in vulnerable circumstances;
- where there are serious shortcomings in a company's attitude and culture towards compliance; and
- where companies are failing to treat their domestic and microbusiness customers fairly through the Standards of Conduct.

**Price comparison websites in the retail sector**

One of the current areas of focus is price comparison websites.Initially Ofgem carried out an investigation into websites offering energy tariffs. Ofgem has since collaborated with other economic regulators as part of the UK Regulators Network (UKRN).

On 27 September 2016, UKRN published a report, highlighting a number of cross-sector themes and concerns relating to price comparison websites. This has subsequently been taken on by the CMA as part of its ongoing cross-sector market study into 'Digital Comparison Tools', such as price comparison websites and apps.



## In Focus: Enforcement (continued)

**Renewables Obligation (RO) and Feed-in Tariff Scheme (FIT)**

Ofgem routinely audits renewable energy generating stations to ensure compliance with renewables subsidy rules (including under the RO and FITs) and to protect against errors and fraud. It pays particular attention to sites that commission and apply for accreditation on or about the dates when subsidies degress or cease. Ofgem has the right to suspend or withdraw subsidy accreditation in a number of circumstances. In relation to RO schemes such circumstances include where:

- it believes there has been a material change in circumstances since accreditation;
- a condition of accreditation has not been complied with;
- it has reason to believe the decision to accredit was based on incorrect information; or
- there has been change in legislation which, had it taken place before accreditation, would have resulted in a refusal to accredit.

Generators also run the risk of having their application for accreditation under the RO refused if Ofgem deems that two of their generating stations are, in fact, one generating station. This hinges on how Ofgem defines 'generating station'. A similar principle also applies under the FIT scheme.

**Electricity supply licence: class exemptions**

The Electricity (Class Exemptions from the Requirement for a Licence) Order 2001 contains certain exceptions to the general rule that parties supplying, distributing or generating electricity must hold a licence. Those falling within an exemption can avoid various compliance and industry costs that apply to licensed companies.

However, certain sections of the Order, especially around the provision of power by generators to on-site or nearby customers, are complex and unclear. The risk of potential criminal sanctions for failure to comply with the Order's exemptions can pose a serious challenge for power generation projects that include private wire or local supply elements. As the opportunities for and popularity of such projects increases heightened regulatory scrutiny of this area might be expected to follow.

The Association for Decentralised Energy has recently published a report highlighting the issue and urging Ofgem review to explore whether issuing guidance would help to address some of the current uncertainties.

## Dates for the diary

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| **Q4 2016/2017** | Ofgem consulted on changes to relevant licence conditions to broaden the use of the Funding Return Mechanism (FRM). The FRM is the method by which Ofgem can direct money associated with an innovation project (funded under Low Carbon Networks Fund or Network Innovation Competition) to be returned to customers (for example, if a project is halted early). Results are expected in the next few months. |
| **January 2017** | A Capacity Market auction is to be held during January 2017 for delivery one year ahead. |
| **28 February 2017** | On 28 February 2017 the current system of CfD for Energy Intensive Industries (EIIs), pursuant to which EIIs receive compensation on CfD payments, will be replaced by an exemption for EIIs that fulfil specific criteria. |
| **31 March 2017** | The RO closes to all new capacity on 31 March 2017, subject to grace periods for certain projects. |
| **1 April 2017** | Stage 2 of the government's planned changes to the RHI scheme is intended to come into effect during April 2017. |
| **1 April 2017** | Business rates are to be re-valued from 1 April 2017 based on asset valuations as at April 2015. The Valuation Office Agency (VOA) published its new values on 30 September 2016, confirming renewables industry fears that the 2017 re-valuation would lead to significant increases in business rates liability for renewable projects. There are particular concerns that businesses' solar PV roof installations could see bills increase up to six-fold.<br>The VOA has announced that previously exempt installations of less than 50KW will now be separately valued and larger solar installations will no longer be valued at a fixed rate. |
| **2017** | The next CfD auction has been delayed until 2017. The government also intends to extend the CfD delivery years to 31 March 2026. |



# Environment

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## Current Issues

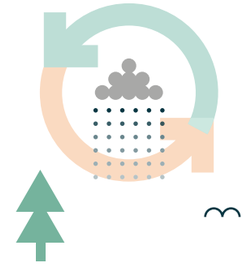
**Definition of environmental 'damage':** In July 2016 the Court of Appeal clarified the definition of 'damage' under the Environment Liability Directive for the first time. In *R v NRW*, the court upheld the first instance decision: environmental 'damage' should be restricted to environmental deterioration and should not include the deceleration of environmental progress (a drop in water quality and fish numbers in this case). The judgment provides clarity for those seeking to rely on the Directive, which should only be invoked where there has been actual adverse environmental damage.

**Brexit – environmental change on the horizon?:** The UK's Brexit vote has opened up the possibility of change to UK environmental law. With estimates that 80–90% of UK environmental legislation is derived from the EU, there is significant scope for reform in areas such as waste, chemicals, air and water pollution, where the EU is a major driver. Despite government plans for a 'Great Repeal Bill' and the transposition of all EU laws into domestic law, the UK is expected subsequently to 'cherry-pick' those EU laws it wishes to retain and be free to legislate in the remaining areas.

**UK to ratify Paris Agreement by end of 2016:** The UK Prime Minister, Theresa May, announced in September 2016 that the UK will continue to tackle climate change after leaving the EU, and pledged to ratify the Paris Agreement by the end of the year. Amidst concerns that Brexit may impact the UK's climate change commitments, the Prime Minister's recent speech to the UN evidenced the UK's dedication to a collaborative approach to tackling climate change.

**Government consultation – implementation of the Medium Combustion Plant Directive 2015:** On 5 February 2016, the European Commission published the final version of the Directive, which must be implemented into the national law of all Member States by 19 December 2017. The UK Government has announced it will publish a consultation on the implementation of the Directive, particularly following the UK's Brexit vote, in autumn this year. The Directive forms part of the EU's Clean Air Policy Package and is designed to help deliver a significant part of the Member States' emission reduction obligations.

**REACH – comprehensive updates to guidance on substances:** In December 2015, the European Chemicals Agency published updated guidance on REACH substances to reflect the ECJ's decision in *Case C-106/14*. The ECJ considered the definition of 'article' under REACH, deciding that producers and suppliers have certain obligations in relation to substances of very high concern in each component part of a complex product, rather than just the finished product. A comprehensive update to the December guidance is expected by the end of 2016.



## In Focus: Enforcement

Various public authorities, or regulators, are responsible for investigating and dealing with environmental issues throughout the UK – the most prominent of which is the Environment Agency. The relevant environmental legislation is enforced by regulators and the courts through a combination of civil and criminal sanctions, with proceedings being brought against both legal and natural persons. These sanctions typically take the form of monetary penalties, enforcement undertakings, remediation orders or imprisonment. Notably, the substantial body of UK and EU environmental law continues to emphasise remediation over punishment.

Traditionally, regulators have relied on the criminal law to protect the environment, with convictions generally leading to fines. In recent years, however, the Regulatory Enforcement and Sanctions Act 2008 has given the Environment Agency a range of new powers to impose civil sanctions, depending on the circumstances of the offence. The civil sanctions, such as enforcement undertakings, compliances and stop notices, enable regulators and the courts to deal with breaches of environmental law more flexibly than those available under the criminal law.

More recently, it has been recognised that fines imposed under the criminal law have not always reflected the offender's ability to pay, which could reduce the effect of fines as deterrents. In response to these concerns, the Sentencing Council published the new Definitive Guideline for the sentencing of environment offences in the Magistrates and Crown Court, effective from 1 July 2014.

**The Definitive Guideline**

The Definitive Guideline provides the courts with a framework when deciding sentences for environmental crimes, as well as 'starting points' for fines. This is based on the category of harm, the degree of the defendant's culpability and the size of the defendant organisation, which is calculated by reference to the defendant's annual turnover. While aggravating and mitigating factors are taken into account, the Guideline emphasises that fines be proportionate to the defendant's financial means. The Guideline also clearly states that fines should be '*sufficiently substantial to have a real economic impact to improve regulatory compliance*'.

The Guideline has generally been well received, with an assessment by the Sentencing Council indicating that the majority of cases have been sentenced within the appropriate category range. There have also been reports of a decrease in the number of environmental offences since the introduction of the Guideline.

As a result, several organisations and individuals have received significant fines. Noteworthy are Thames Water's fine of £1m in January 2016 and Yorkshire Water's fine of £1.1m in April 2016. The courts are clearly adopting a tough approach when applying the Guideline, which comes as a warning to all, but particularly large organisations and high net worth individuals, that the courts will act robustly in ensuring compliance with environmental regulations.

Increased fines are also attributable to changes in the law, which mean magistrates are now able to impose unlimited fines for offences committed on or after 12 March 2015. Nevertheless, the effect of these changes combined should be to encourage careful and informed decisions on environmental policies, procedures and systems needed to ensure compliance with relevant environmental legislation.

## Dates for the diary

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|---|---|
| **13 October 2016** | The Committee for Climate Change is due to publish a new analysis of the implications of the Paris Agreement for UK climate targets and strategy. The analysis will indicate whether the UK needs to change its current global warming targets in order to meet the new targets under the Agreement. |
| **Autumn 2016** | A government consultation is expected on the implementation of the Medium Combustion Plant Directive 2015. |
| **31 December 2016** | By the end of 2016, it is anticipated that the UK will begin its domestic procedure to enable ratification of the Paris Agreement. |
| **31 December 2016** | A comprehensive update to the European Chemicals Agency's guidance on REACH substances is expected by the end of 2016. |
| **1 April 2017** | Under the Finance Act 2016, the lower rate of landfill tax will be increased to £2.70 per tonne and the standard rate will increase to £86.10 per tonne. |
| **19 December 2017** | Deadline for the implementation of the Medium Combustion Plant Directive 2015. |
| **January 2019** | Legislation is expected to come into force which will set binding emission limit values on relevant air pollutants from diesel engines. The proposed legislation follows the Department of Environment and Climate Change's consultation on further reforms to the Capacity Market in March 2016. |



# Financial Services

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## Current Issues

**Brexit:** Although much of the UK's financial services regulation derives from EU legislation, the referendum vote has not had any immediate impact on the regulatory regime. The FCA has confirmed that such regulation *'will remain applicable until any changes are made, which will be a matter for Government and Parliament'*. From a practical standpoint, firms must *'continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect.'* Firms should therefore continue to prepare for directives such as MiFID II, the second Payment Services Directive and the Fourth Money Laundering Directive (4MLD), which will be implemented before Brexit takes place, likely to be March 2019 at the earliest.

**The Payment Accounts Directive (PAD):** The PAD was implemented in the UK through the Payment Accounts Regulations 2015. The Regulations expand access to bank accounts and make it easier for consumers to compare fees or switch bank accounts. Provisions on packaged accounts, switching and basic bank accounts came into effect on 18 September 2016. Provisions on transparency and fee information comparability will come into force at a later date, likely in 2018, dependent on the timing of a European Commission delegated act.

**Fourth Money Laundering Directive:** While 4MLD is not due to be implemented into national law until June 2017, the European Commission has called on Member States to bring this date forward to January 2017. Whether HM Treasury does this remains to be seen.

**MiFID II:** The FCA will publish rules in the first half of 2017 on conduct of business issues and materials not covered in the previous two consultation papers. This will include issues such as product governance and additional perimeter guidance.

**Capital Requirements Directive (CRD IV):** There are currently inconsistencies between remuneration codes in the FCA Handbook and the EBA's Guidelines on remuneration under CRD IV. The FCA is consulting on changes to the FCA Handbook to remove these inconsistencies and simplify FCA guidance on remuneration, in the Handbook, and general guidance on proportionality.

## In Focus: Enforcement

The Financial Conduct Authority which took over from the Financial Services Authority in April 2013, is responsible for regulating the conduct of more than 56,000 authorised financial services firms, as well as the retail and wholesale financial markets in the UK. The FCA also acts as the prudential regulator of more than 24,000 of these businesses that are not otherwise regulated by the Prudential Regulation Authority. The FCA's stated purpose is to protect both consumers and financial markets while promoting competition.

**Enforcement powers**

The Financial Services and Markets Act 2000 (FSMA) gives the FCA powers to obtain information and to conduct or order investigations, as well as to take enforcement action against firms. While these powers extend principally to authorised firms and the staff of authorised firms, the FCA may in certain cases exercise its powers against individuals who fall outside the regulated sector. For example, the FCA may investigate and take action against individuals for insider dealing and money laundering.

The FCA's enforcement powers include criminal, civil and regulatory powers. The FSMA envisions two principal enforcement powers for the FCA, public censure and financial penalties. The FCA is not, however, limited to these and in practice makes use of a wide range of tools when it chooses to take enforcement action, ranging from withdrawing a firm's authorisation to issuing private warnings. The FCA may also apply to the courts for civil orders or commence criminal prosecutions for certain types of offences. The FCA will also work with other authorities, such as the Serious Fraud Office in relation to financial crime (the SFO having taken the lead, for example, in the prosecution of individuals relating to alleged LIBOR manipulation).

Central to the FCA's approach to enforcement is its policy of credible deterrence, prioritising and targeting FCA activity where it can be most effective.

**Current priorities**

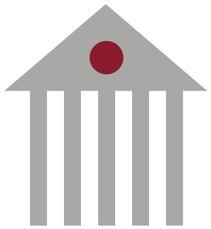
In keeping with the FCA's approach of deploying its resources where it thinks these will achieve the most good, the FCA's Business Plan for 2016/17 has identified seven priority themes for its work. These are: pensions; financial crime and anti-money laundering; wholesale financial markets; advice; innovation and technology; firms' culture and governance; and treatment of existing customers.

On the theme of firm culture and governance, the FCA is likely to increase its enforcement action against individuals. While FCA enforcement against individuals has been generally low in recent years, a recent uptake in the number of fines against individuals as well as the introduction of the Senior Managers Regime (SMR) and the Market Abuse Regulation (MAR) suggest that enforcement action against individuals is likely to increase.

The SMR focuses on individuals performing senior management functions, who may be held to account for misconduct falling within their area of responsibility. The SMR will also hold individuals in relevant firms to appropriate standards of conduct.

The FCA is also likely to be taking a hard look at market abuse offences and at firms' market abuse controls. In February 2016, for example, the FCA fined WH Ireland Limited £1.2m for failing to have systems and controls in place to prevent market abuse from occurring or being detected. The coming into effect of the MAR on 3 July 2016 has increased the obligations on individuals, and the FCA is likely to be bringing more enforcement cases in the future.

From the perspective of firms, the FCA is likely to be focusing on preventing financial crime, which it has highlighted as one of the key areas of focus. In November 2015, the FCA imposed a fine of £72.1m against Barclays Bank plc for failure to implement appropriate levels of client due diligence in a situation where the risk of financial crime was heightened. The FCA did not find that the clients or the transaction did, in fact, involve financial crime; rather, the FCA fined Barclays for failure to follow the procedures designed to safeguard against financial crime.



## Dates for the diary

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| **31 October 2016** | 31 October 2016 was the deadline for compliance with the Single Euro Payments Area Regulation by Payment Service Providers located in non-eurozone Member States. |
| **26 December 2016** | The Joint Committee of the European Supervisory Authorities will issue its first opinion on the money laundering/ terrorist risks affecting the EU financial sector and will submit draft Regulatory Technical Standards (RTS) on group-wide policies/procedures on 26 December 2016. |
| **Q4 2016** | The FCA is expected to issue rules and guidance on PPI complaints by the end of 2016, following a consultation. |
| **31 December 2016** | PRIIPs Regulation applies from 31 December 2016. This requires firms to provide a new key information document to retail consumers that are buying a range of investment products. |
| **January 2017** | The European Commission has proposed the early implementation by Member States of 4MLD and the Wire Transfer Regulation, which it is looking for by January 2017 (the original deadline for implementation being 26 June 2017). |
| **12 January 2017** | By 12 January 2017 the European Banking Authority (EBA) will issue a draft RTS on authentication and communication; and determining whether a central point of contact is appropriate. |
| **Q2 2017** | The FCA is expected to issue a policy statement in Q2 2017 on changes to FCA Handbook arising from MiFID II. |
| **2017** | The RTS and Implementing Technical Standards (ITS) relating to PAD will enter into force during 2017. |
| **March 2017** | The FCA conduct rules will apply from March 2017 to staff at relevant firms who are not senior managers or within the certification regime. |
| **13 July 2017** | Applications by Account Information Services and Payment Service Providers for authorisations or registrations can be made from 13 July 2017. |
| **13 July 2017** | By 13 July 2017 the EBA will issue:<br>– draft ITS on the information to be provided by the competent authorities to the EBA for compiling the EBA's register;<br>– guidelines on the information to be in the application for the authorisation of payment institutions; and<br>– guidelines on the establishment, implementation and monitoring of the security measures. |
| **3 January 2018** | MiFID II takes effect. |

# Gambling

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## Current Issues

**Fixed odds betting terminals:** These are more commonly referred to as FOBTs (or, in certain quarters of the British media, the 'crack cocaine of gambling') and are reported as being subject to a review by the Department of Culture, Media and Sport. The review is expected to be completed by the end of 2016.

**Daytime TV advertising:** According to recent reports the FOBT review is now set to be expanded to also cover advertising issues, with the industry facing a potential ban on daytime TV ads.

**Betting on eSports:** Betting on so-called eSports has grown in popularity, leading the Gambling Commission to consult on new guidance.

**Virtual currencies:** The Gambling Commission has also moved to issue guidance in relation to virtual currencies and in-game items that can be traded, sold or used as virtual currency. It also initiated criminal prosecutions of two YouTubers for offences involving gambling in relation to such in-game 'skins'.

## In Focus: Enforcement

The principal method of enforcement in the gambling sector is by the Gambling Commission, which has powers to prosecute for criminal offences or impose regulatory sanctions on licence-holders. Regulatory sanctions can include warnings, attachment of conditions to a licence, suspension or revocation of a licence, or the imposition of a financial penalty.

2016 has seen the Gambling Commission wrestling more seriously with new digital formats. Not only have we seen new draft guidance from the Commission on virtual currencies, eSports and social gaming; we have also had criminal prosecutions of YouTubers for offences involving betting on video games. As new formats evolve, whether in the areas of virtual reality, augmented reality or otherwise, and as we see artificial intelligence applications become more widely available to gambling operators and participants, the regulator is going to have its work cut out to keep up.

## Dates for the diary

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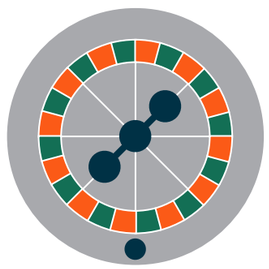
| **31 October 2016** | The new version of the Gambling Commission's Licence Conditions and Codes of Practice comes into effect. Changes include:<br>– new provisions to assist the prevention of gambling-associated crime;<br>– a new condition about responsible placement of digital ads;<br>– an extended requirement on non-remote lottery operators to assess and manage money laundering risk; and<br>– new controls on where gaming machines can be played in licensed gambling premises. |
| **Before end of 2016** | The Gambling Commission's finalised paper on virtual currencies, eSports and social gaming is expected to be published, following a consultation that ended on 30 September 2016. |
| **Before end of 2016** | The reported DCMS review into fixed odds betting terminals – now expected to be extended to cover daytime TV advertising of gambling generally – is expected to be completed by the end of 2016. |



# Health and Safety

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## Current Issues

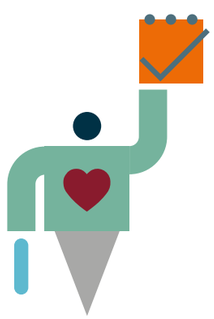
**Sentencing Guidelines for health and safety and corporate manslaughter cases:** We are seeing a very significant impact on businesses with turnovers exceeding £50m following the introduction of a tariff-based penalty system in February 2016.

In September 2016, Alton Towers received the largest ever fine, of £5m (reduced from £7.5m for an early guilty plea). We are yet to see the successful prosecution or penalty of a large business for a corporate manslaughter offence, where the guidelines allow for even greater fines.

**The impact of Brexit on health and safety legislation:** We do not expect Brexit to have a significant impact on legislation in the health and safety arena, although we await to see whether unpopular and prescriptive regulation brought in through European directives, including the Construction (Design and Management) Regulations 2015, change in any way as a result.

**A regulatory focus on health and wellbeing:** The Health and Safety Executive has put health on its business plan for 2016/2017 and plans to publish a work-related ill health strategy. Professional bodies such as the Institute of Occupational Safety and Health also have the issue on their agenda and the government is increasingly focusing on mental health as well as physical health challenges and looking to find solutions to problems (and cost) in the NHS.

**The UK exports its health and safety regulation model abroad:** The UK's Health and Safety Executive is successfully 'selling' its regulatory model and specialist experience, as a result of the positive impact on safety statistics, to other jurisdictions. Examples of this include Singapore, with other countries, such as the UAE and New Zealand, also looking closely at how health and safety is regulated in the UK.



## In Focus: Enforcement

A breach of health and safety legislation in the UK can lead to criminal enforcement action being taken against a corporate entity or an individual, by the Health and Safety Executive (HSE), local authorities, or (in the most serious fatality cases) the police and Crown Prosecution Service. Civil claims for personal injury can also be brought by private individuals.

In 2007, the UK introduced a new statutory corporate manslaughter offence to seek to overcome the challenges of the common law manslaughter provisions, where a 'controlling mind' of a company needed to be identified for a successful prosecution.

In addition to the 'worst case' scenario for a business (or individual) of a criminal prosecution, other potential enforcement action includes enforcement notices (improvement or prohibition) and advice or warning letters.

The HSE also has the power to recover its fees for investigating and advising a business when a 'material breach' of health and safety law has been found, under the Fee for Intervention scheme.

### New sentencing guidelines

Historically there has been very limited guidance for the courts to steer them on appropriate penalties in health and safety or corporate manslaughter cases. This resulted in inconsistency in fines being imposed and fines were generally felt to have limited impact on large businesses.

The introduction of new sentencing guidelines for the courts (applicable to all health and safety and corporate manslaughter cases) in February 2016 has dramatically changed the position. Cases heard since February have led to fines which fit consistently into the brackets set out in this new tariff-style guidance, resulting in multi-million pound fines for companies fitting into the 'large' (in excess of £50m turnover) category.

As a result of increasing enforcement in the health and safety arena, and the impact of the new sentencing guidelines, we are seeing businesses' boards and investors increasingly focusing on whether good health and safety management systems are in place and stress-testing them.

Additional concerns about individual prosecutions under health and safety legislation (we have seen 19 this year) mean that company directors are identifying greater accountability and risk in this arena and seeking specialist support.

# Life Sciences and Healthcare

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## Current Issues

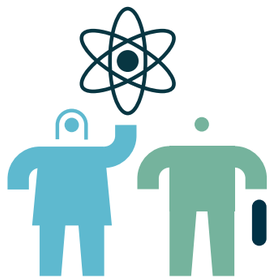
**Brexit and access to healthcare:** Aside from the question of how much money the NHS will receive once Brexit occurs, the key questions are: will UK citizens still be entitled to a European Health Insurance Card and access to state-provided healthcare when visiting an EEA country? And what will happen to EEA visitors to the UK?

**Brexit and staffing – freedom of movement:** A significant number of EU citizens work for the NHS and social care providers. At a time when recruitment of permanent staff is difficult in this sector, if Brexit affects the flow of these workers to the UK (and/or the recognition of their qualifications), then the UK may face a catastrophic skills shortage.

**Apprenticeship levy:** Many are looking at the 2017 apprenticeship levy as a way to solve the sector's staffing crisis and not merely as a matter of statutory compliance. Whether employers become an employer-provider (who develop and deliver their own training) or look to external providers/programmes, apprenticeship training in the sector is likely to improve career prospects and the quality of care.

**The National Living Wage (NLW):** Six months on from the introduction of the NLW for the over 25s, the social care sector is still getting to grips with the increase in its cost base. Despite fears that providers' financial viability would be jeopardised (with low profit margins already being squeezed) and workers' hours would be cut, these challenges appear to have been balanced by uplifts in local authority fees. Reports suggest a positive effect from NLW, particularly in the under 25s, whose pay has also increased.

**Regulatory costs:** Providers are focusing more than ever on regulatory compliance and the offences and costs attached to the same. As well as the newly introduced Care Quality Commission (CQC) fees for registration, the market is facing increased potential financial liabilities for non-compliance. Since April 2015, CQC's powers have changed and it has updated its enforcement policy – in certain circumstances, the maximum limit on fines has been removed. More recently, the changes to sentencing guidelines for (general) health and safety offences means fines are now influenced by a provider's turnover in addition to the level of harm and culpability.



## In Focus: Enforcement

Enforcement is a key role of the CQC, which is the independent regulator of health and social care in England. CQC is responsible for the safety and quality of treatment and care involving patients and service users in receipt of a health or adult social care service from a provider registered with CQC.

In broad terms, CQC registration is required for any of the following:

- treatment, care and support provided by hospitals, GPs, dentists, ambulances and mental health services;
- treatment, care and support services for adults in care homes and in people's own homes (both personal and nursing care); and
- services for people whose rights are restricted under the Mental Health Act.

CQC's core functions are: to register providers (subject to payment of fees); to monitor, inspect and publicly rate them; and to enforce breaches of the regulations. CQC adheres to an enforcement policy and 'decision tree': it will only take action that it judges to be proportionate and, generally, will only intervene if people are at an unacceptable risk of harm or providers are repeatedly or seriously failing to comply with their legal obligations.

There is a memorandum of understanding between the CQC, the Health and Safety Executive (HSE) and local authorities to cover the overlap of their inspection and enforcement functions. The latter entities are responsible for health and safety matters involving: (a) patients and service users who are in receipt of a health or care service from providers not registered with CQC; and (b) workers, visitors and contractors, irrespective of registration.

NHS Improvement (NHSI) provides another layer of oversight of foundation trusts, NHS trusts and (independent) providers of NHS-funded care. NHSI is an amalgam of previous entities, but its emphasis has changed to prioritise support to providers and local health systems to help them improve. It still regulates competition in the health sector and has a memorandum of understanding with the Competition and Markets Authority for the investigation and enforcement of such matters in the sector under competition law.

CQC's approach to enforcement is viewed as being more 'softly-softly', when compared to other regulators, such as the HSE. It has also been challenged in the courts recently in terms of the application of CQC's own quality ratings review, and in particular a number of CQC's pre- and post-publication processes. CQC is implementing the recommendations from the judgment in respect of its factual accuracy process, but the judgment may give further confidence to other providers to challenge inspection reports and ratings.

## Dates for the diary

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| **October 2016 onwards** | Implementation of Sustainability and Transformation Plans within relevant STP footprints in England. Health and care organisations within defined areas have been obliged to develop plans to *'drive genuine and sustainable transformation in patient experience and health outcomes of the longer-term'.* |
| **6 April 2017** | Introduction of the apprenticeship levy. Providers in the health and social care market will need to budget for the levy and review its existing training programmes and internal systems and processes. |
| **1 August 2017** | All new pre-registration nursing, midwifery and allied health professional students will receive their funding and financial support through the Student Loans Company rather than through the current NHS bursary scheme and HEE funded tuition. |

# Product Regulation

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## Current Issues

**Civil drones (small unmanned aircraft): Concerted efforts to allow for wider commercial and consumer usage:** This year has seen significant steps taken towards updating regulations for civil drone usage, which may help businesses realise commercial value in this area.

In the UK, the Civil Aviation Authority has granted Amazon permission to test drone delivery. The UK Government has been vocal about wishing to be seen as an international leader in this area.

The European Aviation Safety Agency (EASA) has published a draft regulation which is being considered by the European Commission.

**Driverless cars: Innovation continues at speed, UK Government tries to update regulation to keep pace:** Regulation is struggling to keep pace with technology in this area; companies wanting to take advantage of semi and fully autonomous vehicle technology need to ensure that what they are doing is compliant with current regulation.

In the UK, the regulatory environment makes testing of autonomous and semi-autonomous technologies relatively easy, but everyday usage not so. However, the UK Government has announced that it intends to bring through legislation by summer 2017 to accommodate the commercial roll-out of driverless.

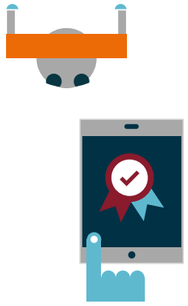
**Launch of new Central Product Recall Database for electrical products:** The UK Retail Ombudsman has launched a new Central Product Recall Database for electrical products. Consumers can register their contact details together with information about electrical products they have purchased.

This may be useful to manufacturers when complying with obligations to warn consumers of safety issues. However, it is dependent on a high degree of consumer engagement and it is unclear how interaction with manufacturers will work.

**Predicting the impact of Brexit on CE-marking:** The practical effect of the recently announced Great Repeal Bill for product regulation will be that CE-marking is here to stay, for at least the next few years. Thereafter, whilst we have no certainty, it would make practical sense for the UK to maintain the scheme, as it would still allow UK manufacturers to sell throughout the EU.

**The Product Safety and Market Surveillance Package rumbles slowly on:** The long-awaited new package of legislative measures aimed at improving EU consumer product safety and strengthening market surveillance of products is still not yet in force and there is no clear date set for this.

From a practical perspective, it would be preferable to have it in place prior to the Brexit conversion of all EU law into UK law, so that manufacturers who sell in the UK and EU only have one set of rules to comply with for the foreseeable future.



## In Focus: Enforcement

Where non-compliance with product regulations has taken place, regulators will commonly encourage and promote voluntary action first. Only when that fails will regulators use their enforcement powers. These are a range of powers which can force remedial measures to be taken to remove the risk the non-compliant product presents, such as suspending sales of the product whilst further tests are done, or requiring that products are marked or provided with warnings, or recalled. There is also the option for prosecution which could result in a fine or imprisonment for an individual.

We do see discrepancies in how different regulators deal with unsafe products, with some regulators being more active than others, resulting in some categories of products being perceived as more highly regulated than others. For example, the Food Standards Agency, DVSA and MHRA are typically more active, Trading Standards less so.

Given that Trading Standards is responsible for enforcing a large swathe of consumer product legislation, particularly around consumer electrical items and toys, there is a perception that enforcement is therefore relatively light in this area.

This light touch has been subject to increasing criticism within the UK – the specific criticism being that it is allowing cheap dangerous products, particularly imported products, onto the market and not enough is being done to recall unsafe products.

**The current UK consumer product recall system**
The current UK consumer product recall system was the subject of an independent review, which was published in February 2016.

The report considered that the current process needed major change and made several recommendations, including: the creation of a national product safety agency/ centre of excellence; increased funding and training for the regulating authorities; better and clearer guidance; increased consumer engagement; and better data sharing. There was also a call for reestablishment of the national injury database.

In the government's formal response, there was little appetite for a new safety agency, and suggestion of increased funding was deferred pending a review of Trading Standards. Reestablishment of the national injury database was not considered helpful. However, there was acceptance that better guidance and data sharing would be beneficial. The government has since established a steering group who will monitor the government's response to the review.

We are also seeing a focus on enforcement at EU level. Echoing the views in the UK, the European Commission recognises that non-compliant products are passing unnoticed into the Single Market and posing risks to consumers. To address this, the Commission has launched a public consultation on current market surveillance measures.

In the short term, these deep dive explorations of how product regulation is enforced are likely to have little impact. They are non-binding in nature and, particularly in the UK, absent any major reform. Trading Standards lacks the funding and resources to address product regulation non-compliance. However, looking further forward, and regardless of Brexit, we foresee both the EU and UK being more active in securing voluntary compliance with product regulation.

## Dates for the diary

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|---|---|
| **December 2016** | Update anticipated on the progress of the Product Safety and Market Surveillance Package. |
| **January 2017** | Update anticipated from the European Commission on how it intends to reflect proposals in EASA's prototype regulation for civil drones. |
| **July 2017** | Revised UK legislation anticipated to accommodate legal use of semi and fully autonomous vehicles on UK roads. |

# Regulated Procurement

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## Current Issues

**Post-Brexit access to markets:** Suppliers to the public and regulated utilities sectors will be waiting to see what form of trade agreements are eventually put in place with the EU and other countries, as these will impact on how procurement is regulated in a post-Brexit world. If a UK-EU agreement is based on the framework the EU has with other trading partners, under the World Trade Organisation Government Procurement Agreement, standard public sector procurement will remain regulated as it is today, but with reduced regulation in the utilities and defence sectors and for concession contracts.

**Early market engagement:** Contracting authorities and central purchasing bodes (for example the Crown Commercial Service (CCS)) appear to be following government guidance and spending more time engaging with suppliers before commencing procurements. Central government is encouraged to make greater use of Prior Information Notices (PINs) if they relate to a specific procurement or industry sector-specific market engagement activity, to promote early market engagement. Suppliers should set alerts for relevant PINs in the Official Journal (OJEU).

**Exclusion for poor past performance:** The selection stage (Pre-Qualification Questionnaire (PQQ)) of regulated procurements allows purchasers to exclude suppliers for breaches of previous public contracts and poor references in relation to contractual performance on other public contracts. Suppliers should avoid situations which lead to early termination of contracts, damages or other comparable sanctions, which would have to be declared in subsequent PQQ responses.

**Limitation periods for challenges:** Suppliers have 30 days to challenge a breach of the procurement regulations from the date it knew or ought to have known about the breach. This is leading to claims being issued during tender periods as a result of breaches within tender documents which public bodies refuse to correct via the clarification question process. Suppliers need to ensure that all tender documents are scrutinised very carefully on receipt or risk prejudice later in the process which they will be time barred from challenging.

**Centralised procurement:** Central government has moved to a system which buys common goods and services once on behalf of the whole of government, and not individual departments. Suppliers need to be alive to the frameworks being set up to supply across central government or risk being shut out of that market for up to four years (which is the typical length of a CCS framework).

## In Focus: Enforcement

The primary method of enforcing procurement regulations is through private claims in the High Court. The applicable regulations, such as the Public Procurement Regulations 2015, impose various obligations on authorities when it comes to running tender exercises, in addition to general European law principles of transparency, fairness and equal treatment. Contractors can take action during the course of a tender exercise to enforce those obligations with an order of the court.

Once an authority has notified bidders of the outcome of the exercise, there will be a 10-day statutory 'standstill' period before the contract can be signed, which is extended if any of the unsuccessful bidders issues a claim before signature. If that challenge is successful, the authority may be ordered to annul its decision and re-run the exercise.

Traditionally, procurement challenges have focused on this remedy: preventing the contract from being entered into and seeking the annulment of an award, rewind of the process, or for it to be abandoned and re-run. If the authority can persuade the court to lift that automatic suspension, claims have often fallen away. However, the recent case of *Energy Solutions v Nuclear Decommissioning Authority* was the first high-profile case for over a decade in which damages were awarded in a claim brought after the end of the standstill period, when the contract had already been entered into.

Following *Energy Solutions*, we anticipate more suppliers will be prepared to bring claims seeking damages for the losses they believe they have incurred as a result of alleged breaches of procurement regulations.

There are other routes for unsuccessful bidders to make complaints about poor procurement procedures, but none that provide for a financial remedy other than a claim in the High Court. These other routes are:

**Complaint to the EU Commission**
Although an EU complaint is a relatively cheap option, it suffers from a number of material disadvantages:

- the Commission may not consider that the case is worthy of investigation, at the EU level;
- there is no effective mechanism for injunctive relief (interim measures at the EU level are very difficult to obtain);
- there is no fixed timescale for the procedure, and generally the process will be slow and certainly outside the control of the complainant; and
- the complainant will have no control and limited visibility over the conduct of the case.

**Mystery Shopper**
The Mystery Shopper Service sits within the CCS and allows government suppliers and potential government suppliers to raise concerns anonymously about potentially poor public sector procurement practice. Following receipt of a complaint, CCS will investigate. If it considers that there has been a failure in best practice, it will make recommendations to the public body. The case is then published on CCS's website.

**Complaint to NHS Improvement under NHS Procurement, Patient Choice and Competition Regulations 2013 (NHS PPC Regulations)**
Under the NHS PPC Regulations, NHS bodies must refrain from 'anti-competitive behaviour' when procuring healthcare services, unless to do so is in patients' interests. If a supplier considers that there has been a procurement failure it can make a formal complaint to NHS Improvement, which has power to investigate and ultimately order that the procurement (or any resulting contract) be stopped. NHS Improvement will not necessarily investigate; it has a prioritisation framework to help it select suitable cases.

## Dates for the diary

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| **November 2016** | New PQQ: The old standard PQQ needed updating in order to fit together with the requirements of the European Single Procurement Document (ESPD). There has been an obligation on contracting authorities to accept ESPDs since January 2015 and a mismatch has arisen between the standard form ESPD and the CCS's PQQ. The ESPD allows suppliers to simply self-certify that they meet the requirements, with the contracting authority seeking evidence of this only from the winning bidder at the end of the process. The new 'Selection Questionnaire' document is aligned with the ESPD. |
| **16 November 2016** | The European Commission has launched a public consultation on the Single Digital Gateway, an online tool providing information for businesses and individuals to move or do business in another EU country. The Gateway will focus on addressing the current information gap and fragmentation by integrating, completing and improving relevant EU and national-level online information, assistance services and procedures in a user-friendly way. The consultation was open until 16 November 2016. |
| **31 December 2016** | A report on whether, and if so to what extent, the Defence and Security Procurement Directive 2009 has achieved its objectives, should be put before the European Parliament and Council by the end of the year. The UK Government will undoubtedly be considering this in developing its approach to how any regulation of defence procurement should be amended in the post-Brexit world. |
| **Early 2017** | The Supreme Court will hear the final appeal in one aspect of the *Energy Solutions v Nuclear Decommissioning Authority* case. The NDA is appealing the Court of Appeal decision that it is not necessary for a claim to be issued in the 10-day standstill period, as long as it is issued within the 30-day limitation period from date of knowledge of a breach of the procurement regulations. The judgment currently leaves contracting authorities with a risk of a claim for damages being brought after it has signed a contract with the purported winning bidder, as happened in this case. The damages claim was successful (although NDA is seeking leave to appeal), leaving NDA liable for around a £200m damages pay-out – as well as paying profit on the ongoing contract. |

# Telecoms


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## Current Issues

**European telecommunications framework reform:** The European Commission published a proposal to reform the 2009 European telecoms package. The proposal takes the form of a European Electronic Communications Code. This telecoms reform will impact communications providers that fall within the current regime; they also create a new class of service provider for OTT platforms that do not use the national phone numbering system. In the current proposals OTT platforms only have limited obligations (security and access to emergency services); however, this may change as the proposal progresses through the legislative process.

**Digital communications review:** In February 2016 Ofcom announced its proposal following its strategic review in 2015. The review focuses on five key areas for which we expect to see regulatory change over the next few years: the guarantee of sufficiently fast universal broadband availability; support for investment in new broadband networks; improving quality of service; increased independence of Openreach from BT; and consumer empowerment so that people can understand the array of choices available to them. Some of these reforms form part of the Digital Economy Bill.

**Automatic compensation:** Following the digital communications review and a call for inputs in summer 2016, Ofcom will launch a full consultation by the end of 2016 on its proposals for automatic compensation for performance failures. The proposed automatic compensation will apply to consumers and small businesses (up to 10 people) from the retail communications provider. A number of practical and commercial considerations still need to be fully explored by Ofcom and the consultation will be the opportunity for communications service providers (both retail and wholesale) as well as customers to input on these issues.

**Review of the General Conditions of Entitlement:** Ofcom issued a consultation in August 2016 to review the UK telecoms framework by amending the general conditions to simplify and clarify regulation thus reducing the cost of compliance and removing redundant rules. The consultation looked at the rules around network functioning, public pay phones, directory information and numbering conditions. Ofcom will issue revised conditions in spring 2017.

**Wholesale roaming charges:** Following the abolition of retail roaming charges which will be effective from June 2017, the European Commission has adopted a proposal to set maximum regulated wholesale roaming charges for mobile operators at EUR0.04/min, EUR0.01/SMS and EUR0.085/MB in the EU. This proposal still needs to be adopted by the European Parliament and Council.

**Net neutrality:** Following the implementation of the European regulation on net neutrality on 30 April 2016, BEREC issued non-binding guidance on the interpretation of the regulation on 30 August 2016. The guidance clarifies a number of areas such as the permissibility of zero-rating practice and it will be the responsibility of national regulatory authorities to monitor and enforce the rules. It will be interesting to see if there is variation in the approach taken by each Member State and Ofcom's approach over the coming months.

## In Focus: Enforcement

Ofcom is the independent regulator of the communications sector in the UK, as well as the competition authority. In carrying out its role, Ofcom has two over-arching duties:

- to further the interests of citizens in relation to communications matters; and
- further the interests of consumers in relevant markets, where appropriate, by promoting competition.

Whilst Ofcom operates independently, it can co-ordinate with other regulators on issues where there is a crossover. For example, in relation to its own-initiative investigation into nuisance calls on which it has co-ordinated with the Information Commissioners Office (the data protection regulator).

Ofcom has the power to impose fines of up to £2m or 10% relevant turnover, and Ofcom policy is to set fines at a level which are a deterrent and set an example to other providers of the implications of breaching the regulations. It also has the power to request information from companies and impose specific conditions, for example where a provider has significant market power. Any request for information by Ofcom should be considered carefully and we recommend taking legal advice as to the scope of the request and information disclosed. Whilst significant fines are not regularly handed down, Ofcom will use its powers where it is in the interests of furthering its over-arching duties.

Whilst Ofcom initiates its own investigations and actively monitors compliance of companies, for example by conducting mystery shopping exercises, it also resolves complaints between operators and services providers based on claims/breaches in relation to the Competition Act 1998 and the Communications Act 2003.

Where appropriate Ofcom may handle a dispute/complaint on an informal basis. Where this is not appropriate it will conduct an enquiry, followed by an investigation.

Current focus areas for Ofcom enforcement are:

- silent and abandoned calls;
- emergency calls;
- complaints handling (which includes rules related to dispute resolution);
- wholesale mobile call termination rates;
- annual geographic number charges;
- cancellation and termination arrangements; and
- services offered to end-users with disabilities.

## Dates for the diary

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|---|---|
| **31 December 2016** | Investigatory Powers Bill expected to receive Royal Assent. |
| **Late 2016** | Ofcom consultation on the automatic compensation proposals for communications providers. |
| **Spring 2017** | General conditions review – Ofcom to publish final statement and revised conditions. |
| **End of spring 2017** | Digital Economy Bill expected to receive Royal Assent. |
| **15 June 2017** | Roaming charges for consumers within Europe will come to an end, subject to fair usage rules. A cap on wholesale roaming charges may also be adopted. |



# Transport

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## Current Issues

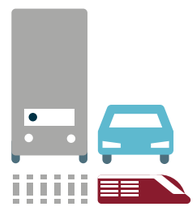
**Applying the Consumer Rights Act 2015 to the rail, aviation and maritime sectors:** The transport sector initially benefited from an exemption from the consumer compensation provisions of the Consumer Rights Act 2015 (CRA) to allow time to establish compensation schemes. The UK Government has now decided to withdraw the exemption on the grounds that consumers should not be denied any of their rights or protections, even for a temporary period. The CRA therefore applies in full to all transport services, including mainline passenger rail services, from 1 October 2016.

**New Buses Bill:** The Bill aims to significantly reform local bus travel in the UK. Operators will be required to make travel data accessible enabling developers to create better products for planning journeys. Local authorities will be given stronger powers to impose minimum service standards as part of their partnerships with operators. Controversially, the Bill will also enable councils to implement TfL-style bus service franchising. The Bill is expected to receive Royal Assent in mid-2017. For more information, please see our latest update here.

**4th Railway Package:** The package is intended to remove barriers to the creation of a single European railway. The proposed reforms will ensure a more competitive rail sector, with better connections between EU countries. It is aimed at cutting administrative costs for rail companies and opening up domestic passenger railways to new entrants by December 2020. Ultimately, the effect of this package on the UK will not be clear until the form that Brexit will take has been agreed. For more information, please see our latest update here.

**Drones:** Amazon is testing the viability of delivering small packages by drones. The Civil Aviation Authority has provided Amazon with special permissions to explore three key areas that would typically bind drone pilots: operation beyond the line of sight, obstacle avoidance and flights where one person operates multiple autonomous drones. The CAA believes that the tests will help it shape its future approach and drone policy.

**Driverless cars:** The government has used £20m of its £100m fund on eight new projects with the aim of positioning the UK at the forefront of the intelligent mobility market. The Centre for Connected and Autonomous Vehicles was also inviting businesses to apply for innovation project funding of up to £35 million to develop new autonomous vehicle technologies. DfT is currently analysing feedback on a consultation on autonomous vehicles that closed in September 2016. This may help shape the Modern Transport Bill, first announced in the Queen's Speech in May 2016 and likely to be published early in 2017. It is intended to encourage investment in driverless and electric cars, and ensure insurance is available to users of driverless vehicles.



## In Focus: Enforcement

Transport regulation is enforced principally through sector-specific regulators such as the Office of Rail and Road (ORR) and the Civil Aviation Authority (CAA).

### ORR

The ORR is the independent safety and economic regulator for Britain's railways and monitor of Highways England. It is mainly responsible for ensuring that railway operators comply with health and safety law and also has powers to enforce competition law in the rail industry.

There is widespread consensus that the ORR is succeeding from a health and safety point of view, with statistics showing fewer accidents on UK railways when compared to similar countries across Europe. This is a view supported by HM Chief Inspector of Railways and we expect the ORR to continue to monitor and enforce health and safety matters at the same levels. The Competition and Markets Authority has expressed a general concern that regulators across various sectors are not sufficiently using their concurrent powers of enforcement in relation to competition laws. Whilst other regulators already lag behind the ORR on this, we may see an increase in competition investigations and enforcement by the ORR.

The ORR ran consultations on the rail retail market in 2015 and issued its final report on these consultations in October 2016. The report's conclusions indicate that the ORR is seeking to drive competition and create a more consumer-focused rail retail industry by trying to improve the position of third-party retailers of tickets in their dealing with Train Operating Companies (TOCs). The changes that are expected over the coming year include TOCs (via the Rail Delivery Group) introducing more transparency in their decision making processes, a role for third party retailers in discussions on industry developments and enhanced dispute resolution mechanisms for third-party retailers for their dealings with TOCs. It is envisaged that these changes will come about through TOCs accepting some of the ORRs recommendations, rather than via the exercise of any enforcement powers by the ORR.

### CAA

The CAA is responsible for the regulation of all aspects of civil aviation in the UK. The CAA has civil powers to take enforcement action in relation to a range of passenger rights legislation and general consumer law and is also tasked by the DfT to investigate and prosecute breaches of aviation safety rules. Prosecution is one means by which the CAA ensures that the aviation rules for which it is responsible are properly observed and appropriately enforced.

With the number of drones in use continuing to rise, the number of incidents involving drones at airports has quadrupled this year. The CAA has recently launched a new drone awareness initiative which seeks to target the increasing number of recreational drone users in the UK, to ensure that their drones are being operated safely and within the scope of its drone code at all times.

The CAA 'drone code' states that drones should not be flown above 400 feet and kept away from helicopters, planes, airports and airfields. Those with cameras fitted should also be kept 50m from people, vehicles and buildings.

Following reports of a drone hitting a British Airways Airbus A320 plane as it came in to land at Heathrow Airport, the DfT has confirmed it is talking to manufacturers about introducing 'geo-fencing' technologies in drones. This technology would prohibit drones from being flown into geographical pre-programmed areas, such as airports. It could also set a limit on how high a device can fly, which would eliminate the issue of people flying their drones above the legal limit. Regulators appear to be seeking to solve drone issues by preventing regulatory breaches rather than limiting them via the deterrence of enforcement action.

## Dates for the diary

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|---|---|
| **1 October 2016** | From 1 October 2016, the Consumer Rights Act 2015 will apply in full to all transport services, including mainline passenger rail services. |
| **9 November 2016** | The Centre for Connected and Autonomous Vehicles was inviting businesses to apply for innovation project funding of up to £35m to develop new connected and autonomous vehicle technologies. This includes how these vehicles will work as part of a wider transport system. The deadline for applications was 9 November 2016. |
| **Autumn 2016** | A provisional agreement on the more controversial Market pillar of the 4th Railway Package was reached in April 2016 between the Commission, Parliament and Council. Formal ratification of this agreement is expected in autumn 2016. |
| **Early 2017** | The Transport Secretary, Chris Grayling, has announced that the Modern Transport Bill will be published early next year to help Britain become a world-leader in autonomous driving technology. |
| **2017** | The first phase of HS2 (construction of the London to Birmingham route) is due to begin in 2017. |
| **2017** | Driverless cars are expected to be trialled on UK roads. |
| **Summer 2017** | The Bus Services Bill is expected to receive Royal Assent. |