

Regulatory Outlook

January 2018



Contents

A message from Catherine Wolfenden



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This edition of the UK Regulatory Outlook once again shows that businesses have a huge task to keep up to date with business regulation and the risks of non-compliance. Even without the uncertainty of Brexit (on which see more below), regulatory changes continue to have an impact on the operation of business. Assessing which regulations need to be complied with, and how, is a significant business function. Monitoring that compliance effectively, often across disparate jurisdictions and business units, is complex and presents a risk to many businesses.

Osborne Clarke's regulatory lawyers, working with our in-house specialist technology team, OC Solutions, support clients with audit and compliance projects across multi-jurisdictions to help them understand business regulatory risk. We provide bespoke technology solutions that develop legal and compliance functions to manage this information in clear and easy-to-use formats. These projects can be useful in planning the investment that needs to be made in: compliance; recruitment; IT infrastructure; legal support; product development; and training. The outputs are also used to determine strategy for growth into new jurisdictions.

The impact of Brexit on the regulation of UK business cannot be overstated. Regulatory barriers could present one of the most significant challenges for UK businesses post-Brexit. A transition period that preserves the status quo would allow some time to prepare, but what businesses will be preparing for will only become clear as the negotiations progress. The longer term effect on the economy and businesses if regulatory regimes diverge and the UK's influence on regulatory standards (such as data, product standards and payments) diminishes, is even less clear.

There are 34 decentralised agencies of the EU that have a unique role in pooling expertise from across the EU and developing, influencing, interpreting and enforcing regulation. National authorities, including public bodies and industry groups, are members of these agencies and contribute to shaping the regulations within the agencies' remit. UK companies and their supply chains will continue to have to meet EU standards and regulations in order to trade in the EU. It is important for UK industry that the UK is involved as far as possible in the policy-making, monitoring and enforcement of regulations that affect it. EU agencies provide a crucial route for this influence to take place.

Data is an excellent example of the economic need for the UK to remain a global leader in business regulation. Every company in every sector uses data. Digitally enabled trade contributed to over £145 bn in the UK economy in 2015¹. The UK's Information Commissioner's Office was a significant player in shaping how that data should be regulated, in the form of the General Data Protection Regulation, through the Article 29 Working Party (soon to be the European Data Protection Board).

The GDPR comes into force across the EU – including the UK – on 25 May 2018, harmonising data protection rules across EU Member States. The territorial scope of the GDPR means that to continue to trade in the EU and process EU citizens' data, UK businesses would need to comply with the GDPR in some form after Brexit, regardless of what UK data protection law looks like. In order to ensure that data can continue to flow freely across borders, though, the UK needs to go further, ensuring that its data protection laws remain similar to those in the EU.

¹ CBI report, "The Room Where it Happens", December 2017

The EDPB will therefore play an important role in shaping the how data regulation will affect UK businesses in the future. The UK's continued membership of the EDPB post-Brexit, even as an 'observer', is important in order to retain a key role in influencing policy on data on a global scale.

The position is similar in many other areas of regulation, where there will be an interest in avoiding significant regulatory divergence. As part of the EU, UK regulators have often been an important voice in shaping regulatory standards that lead the world. Whether the final agreement reached between the UK and the EU27 allows that voice to continue to be heard will make a substantial difference to the regulatory landscape in the UK, and the EU, after Brexit.

How can we help?

This Regulatory Outlook draws on the expertise of over 40 regulatory lawyers in Osborne Clarke's UK Regulatory Group. Whether you are interested in a specific development covered in this Regulatory Outlook, or would welcome a wider discussion about regulatory compliance or how you can prepare for Brexit, please do get in touch with me, the relevant expert for the area you are interested in, or your usual Osborne Clarke contact.



Advertising and Marketing

01

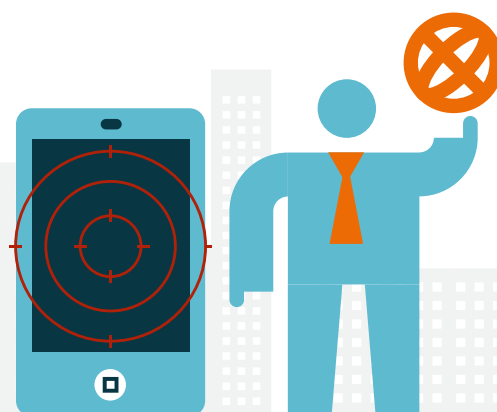


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Current issues

Gender stereotyping in advertising:

The Advertising Standards Authority has published its report on gender stereotypes in advertising. The report concludes that new rules should be brought in to address the use of harmful gender stereotypes. The intention is not to preclude all stereotypes from advertising. Rather, advertisers will be asked to avoid certain particularly problematic stereotypes. For example, suggesting that certain activities are inappropriate for one gender or that certain roles within a household are the sole responsibility of one gender. The ASA also intends to clarify its existing position on adverts that objectify or inappropriately sexualise women and girls – particularly those that suggest it is acceptable for young women to be unhealthily thin.

Health claims for e-cigarettes consultation:

The ASA has consulted on whether it should change the rules to allow health claims to be made in advertising for e-cigarettes. If the current prohibition on health claims is removed, advertisers will be able to make claims about the relative health benefits of e-cigarettes in comparison to tobacco.

Data Protection Bill:

The Data Protection Bill had its first reading in the House of Lords on 13 September 2017 and is currently proceeding through Parliament. The Bill will replace the existing (1998) Data Protection Act. The draft provisions set out the UK's derogations from the incoming EU data protection regime (GDPR). The most significant of these for businesses are:

- that, for most purposes, parental consent is not needed to process data online once a child is 13; and
- the creation of a new offence of knowingly or recklessly re-identifying de-identified personal data.

The Bill is intended to enable the UK to easily establish that its data protection regime meets EU standards upon Brexit; which should help to facilitate a smooth transition and the continuation of frictionless data transfers across borders.

Clarification on the rules in relation to sponsored vlogging:

It has been well established for some time that a sponsored vlog may be advertising if the sponsor has paid the vlogger and exercises editorial control over the content of the vlog. The ASA has recently published an important ruling which considers what constitutes “editorial control” in this context. It found that contractual provisions allowing the sponsor advance input (but not exclusive control) over the content and commitments by the vlogger to include a competition and use the sponsor's goods amounted to editorial control. As this approach evolves, we expect there to be further developments in this area.

ePrivacy Regulation:

The European Parliament has begun negotiations with Member States regarding the draft Regulation. As currently drafted, the Regulation would introduce significant changes in relation to cookies and direct marketing. For more information on the e-Privacy Regulation and how this may impact advertising, please see [here](#).

Advertising broadband speeds:

The rules regarding how broadband speeds can be advertised are due to change from 23 May 2018. Under the new rules, it will no longer be possible to advertise broadband speeds on an “up

to” basis. Rather, advertisers will only be allowed to advertise the speed achieved by at least half of customers at peak times. This will have to be expressed as an “average speed”. Suppliers are also being asked to promote speed checking services.

Dates for the diary

January 2018

Announcement expected from the Advertising Standards Authority regarding progress on the new rules regarding gender stereotyping in advertising.

23 May 2018

New rules on advertising broadband speeds come into force.

25 May 2018

GDPR becomes directly effective across all EU Member States.

The European Commission also aims (although this may be ambitious given that the Regulation is currently in draft form) to have the ePrivacy Regulation come into force from this date.



Anti-bribery, Corruption and Financial Crime

02



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Current issues

New look SFO:

A new Director will be in place in April 2018, replacing David Green CB QC, and the agency will now be subject to “direction” from a newly created National Economic Crime Command Centre within the National Crime Agency. What that might mean in practice is uncertain, but both developments will be keenly watched to determine the future direction of travel for the SFO. We anticipate that the SFO, in conjunction with other agencies, will seek to enhance its enforcement capabilities in the corporate world.

Headline charging decisions:

A likely barometer in this regard may well be seen in the pending decisions to be taken by the SFO in relation to a number of high profile corporate crime cases, including: Airbus, GlaxoSmithKline, Rolls-Royce and Serco/G4S. These may prove indicative of more aggressive enforcement against corporates and senior executives, which we expect will be a trend in 2018.

Tax evasion:

Consistent with this approach, we believe that HM Revenue & Customs will also be keen to bring the first prosecutions utilising the failure to prevent the facilitation of tax evasion offences, which have now been in force since 30 September 2017. HMRC often adopts a policy of high profile prosecutions in particular sectors, to “incentivise” compliance from other companies; this approach may be adopted here.

FCA enforcement:

The FCA has not, to date, focussed on the new failure to prevent facilitation of tax evasion offence. It is mooted that this will change in 2018 and that the FCA will conduct a tax evasion thematic review, although the impact of any such review may not be apparent until later in the year, or beyond. We also believe that we may see a continued up-tick in FCA insider dealing investigations over the course of the year.

New offences

Consideration is being given by legislators to the possibility of introducing a broad corporate offence of failing to prevent economic crime, including fraud and money laundering. This has been discussed previously and although then discounted by the government, following lobbying from relevant parties, and in particular the SFO, the issue is once again under consideration. An alternative is also being considered, which whilst more limited, may prove to be more realistic. This would see a further corporate offence being enacted but limited to the failure to prevent money laundering. In either event, it will be a further strict liability offence (mirroring the Bribery Act), aimed at making it easier to prosecute companies.

Legal privilege:

The controversial decision in *SFO v ENRC*, which on its face greatly reduced the likelihood of being able to rely on litigation privilege in the context of internal investigations, is listed for appeal in April 2018. The Law Society is intervening and this will undoubtedly be one of the most significant cases of the year.

Companies will need to consider the ruling from the Court of Appeal (which we anticipate is likely to be further appealed to the Supreme Court) with great care when deciding how best to conduct internal investigations.

Dates for the diary

Mid 2018

Pivotal Court of Appeal decision expected in *SFO v ENRC*. We anticipate that this decision will be further appealed to the Supreme Court.

April 2018

New Director of SFO expected to be in place.



Competition

03



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Current issues

Lawfulness of restricting resellers from selling luxury and technical products on online market places:

The long awaited *Coty* decision was handed down on 6 December 2017. The decision confirmed that restricting sales on third-party marketplaces such as Amazon and eBay, where the supplier itself does not sell on these platforms, can be permissible, although an absolute prohibition on online sales remains unjustifiable. In 2018, attention will turn to the way in which this decision is interpreted by the competition authorities. With the German Competition Authority already indicating that it interprets the decision as being limited to luxury brands, the position that the CMA takes will be one to watch.

Greater scope for dominant companies to offer rebates:

In the years following the imposition of the €1.06bn fine on Intel in 2009, the journey of the subsequent appeals through the court system has put to the test the extent to which dominant companies can lawfully offer rebates to their customers. The CJEU's ruling on Intel's appeal (September 2017) is to be welcomed by companies with strong market positions. Moving away from a line of cases where certain rebates were deemed automatically unlawful (an easy win and a worrying enforcement risk profile for companies with strong market positions), the CJEU held that regulators must consider whether these rebates actually have harmful effects on competition – placing a higher evidential burden on regulators and reducing the enforcement risk for businesses.

Implications of Brexit for competition law compliance:

Businesses involved in mergers, acquisition, joint ventures and other changes of control are likely to face increased merger control scrutiny, in some cases being required to seek clearance from the Competition and Markets Authority (CMA) in addition to the European Commission. Brexit will undoubtedly have profound implications for the application of State aid rules, which govern the extent to which the UK government can subsidise industries, support UK businesses and challenge support provided by other governments. Whilst anti-protectionist rules will be required if the UK is to enter into trade deals (with the EU or any other country or trading bloc), the form of, and body selected to regulate, those rules remains a live and contentious issue.

Crackdown on “geoblocking” of digital content and the sale of goods online:

By the end of next year, new legislation will be introduced prohibiting the blocking of access to websites, online content and the re-routing of customers to national websites. Charging additional fees to customers from different member states will also be prohibited. The new law will affect online retailers of physical goods as well as suppliers of online digital content and services. As things stand, copyright is excluded from the scope of the legislation, meaning that IP protection could lend itself as an effective tool for some businesses, for whom geo-blocking forms a central part of their distribution model.

Excessive pricing cases in the pharma industry.

A clutch of recent cases demonstrate an intense interest on the part of competition regulators into the high price of pharmaceutical products. Businesses with strong market positions in other (particularly consumer-facing) sectors should also take stock and consider the extent to which their pricing might be challenged for being “excessive”. To illustrate, less than a year after fining Pfizer and Flynn Pharma a total of c.£90 million for excessive pricing of anti-epilepsy drugs, the UK regulator issued a statement of objections to Actavis for excessive pricing for hydrocortisone and announced a similar investigation into the pricing of Liothyronine tablets by Cincordia. The UK regulator is not alone; the European Commission is currently investigating the pricing practices of Aspen Pharma, which also faced an investigation by the Italian Competition Authority’s last year.

CMA's report on the digital comparison tool (DCT) market study:

DCTs and businesses whose products or services feature on DCTs’ platforms ought to be conscious of the findings of a report, published by the CMA in September 2017, setting out its findings (and recommendations) from its market study into the supply of DCTs in the UK. The market study was triggered by concerns in relation to consumer trust in, and the transparency of information provided by, DCTs. While the report generally takes a positive view of DCTs, regarding them as facilitative of competition, it does express concerns about a number of practices commonly employed by DCTs, including: wide price parity clauses, non-brand bidding, negative matching and non-resolicitation agreements.

Dates for the diary

January 2018

CMA due to make provisional findings in the on-going Phase 2 investigation into the anticipated 21st Century Fox/ Sky merger, with the final report due to be given to the Secretary of State by 6 March 2018. The CMA is investigating the proposed acquisition on the grounds of media plurality and a genuine commitment to broadcasting standards.

May 2018

Competition Appeals Tribunal to hear the appeal by Ping Europe against the company’s £1.45 million fine imposed for its operation of an online sales band, with a judgment potentially to follow by the end of 2018.

July 2018

CMA aims to publish its provisional decision in its investigation into the supply and acquisition of investment consultancy and financial services to and by institutional investors and employers in the UK.

December 2018

Anti-geoblocking legislation is expected to come into force that will limit the extent to which:

- retailers can restrict cross-border sales over the internet (e.g. through redirecting customers to national websites, or limiting the geographic regions in which delivery is offered); and
- digital content and providers can technically block access to that content across borders (e.g. by blocking access to downloads when the consumer travels to another EU country).



Consumer Finance

04

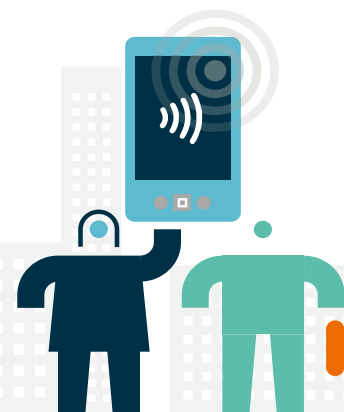


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Current issues

Brexit:

The FCA plans to look at whether there is a need to introduce a new “duty of care” for all regulated firms. In other words, it will look at whether its rules (which have the force of law) should impose an obligation on firms to exercise reasonable skill and care in the provision of services to consumers. There also appears to be an acceptance on the part of the FCA that many of the mandatory consumer disclosure requirements that are derived from EU law actually hinder effective communication, have a negative impact on consumers and should be reviewed.

Overdrafts:

The FCA plans to consult in spring 2018 on proposals to change the regulatory regime applying to overdrafts. It is concerned about the long-term use of arranged overdrafts at levels which can be persistent and unsustainable and has broader concerns about unarranged overdrafts – that their use is often inadvertent, and charges appear high and complex. It has even gone so far as to say that there is a case for considering the fundamental reform of unarranged overdrafts and whether they should have a place in any modern banking market at all. This may open up opportunities for alternative lenders to innovate and increase competition in this space.

Exploratory work on the motor finance industry:

The FCA is currently looking at the motor finance sector, which has grown significantly in recent years. It is considering whether firms are taking the right steps to ensure that they lend responsibly; whether information about hire purchase and hire products is sufficiently clear and transparent; whether there

are conflicts of interest arising from commission arrangements between lenders and dealers, and whether risk is being adequately priced. Following its review, the FCA will assess whether and how to intervene in the market. It plans to publish an update in the first quarter of 2018.

Open banking initiative:

Open banking is tasked with delivering Application Programme Interfaces (or APIs), data structures and security architectures that will make it easy and safe for customers to share their financial records, by the end of January 2018. This date is aligned to the implementation of the Payment Services Regulations 2017, which will allow authorised third parties to be given consent by the account holder to access their bank accounts to extract statement information and to initiate payments, without having to use their bank's online services. It is envisaged that this capability will then lead to far-reaching innovative services being created by new entrants and technology companies.

Extension of the Senior Managers and Certification Regime (SMCR):

The SMCR replaced the approved persons regime for individuals in banks, PRA investment firms and some insurers in March 2016. This is to extend to all other regulated firms from 2018. The FCA has proposed to take a proportionate and flexible approach; splitting SMCR requirements into ‘limited’, ‘core’ and ‘enhanced’ categories. The applicable category will depend on a firm's size, complexity and on the potential impact on consumers.

Review of retained provisions of the Consumer Credit Act 1974 (CCA):

The FCA is required by law to review the remaining CCA provisions and report to HM Treasury by 1 April 2019 on whether their repeal (in whole or in part) would adversely affect consumer protection. The FCA has not yet published a summary of the input received from industry stakeholders, nor has it outlined the

scope for the review and the approximate timelines through to 1 April 2019. A contributing factor to the delay could be Brexit, as some of the CCA provisions implement the European Consumer Credit Directive. We do, however, anticipate further regulatory activity in this space over the course of 2018.

Dates for the diary

January 2018

Payment Services Regulations 2017 in force and APIs, data structures and security architectures for open banking in place.

Early 2018

FCA due to publish update on motor finance exploratory work.

Spring 2018

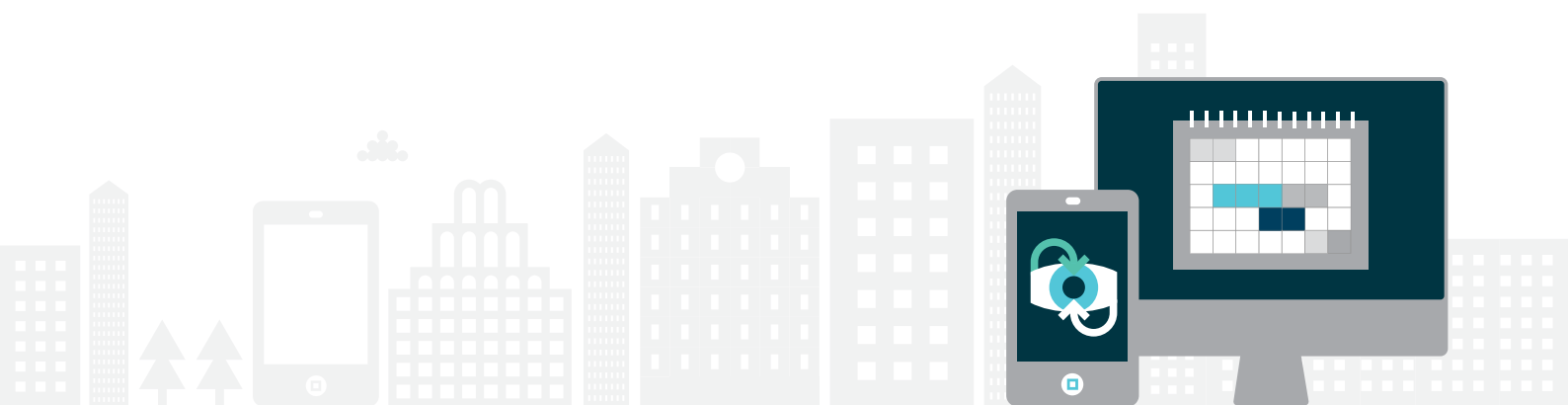
FCA due to publish proposals on overdrafts and other forms of high-cost credit.

May 2018

GDPR in force.

Summer 2018

Extension of SMCR to all FCA-regulated firms.



Consumer Protection

05



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Current issues

Ban on surcharging for card payments:

Applying surcharges to consumers for paying by particular payment methods (most commonly for payments by credit or debit card), is now against the law, as from 13 January 2018. Previously, retailers were allowed to charge additional amounts to customers for particular payment methods, provided they only passed on the direct costs borne by the business. This change will affect a wide range of businesses including some airlines, theatre and concert booking sites, take-away food apps and local councils.

EU negotiators agree to “end” unjustified geo-blocking:

Political agreement across the EU has been reached to end unjustified geo-blocking between Member States for consumers wishing to buy products or obtain services online within the EU. Before the Regulation comes into force, online sellers will need to make sure that their online services do not discriminate against customers on the basis of their nationality or place of residence where it cannot be objectively justified. Examples of such discrimination include: re-routing customers to a different website according to their IP address, without consent; blocking customers with certain IP addresses; charging additional fees to customers from different Member States; providing a different service to customers from different Member States; and providing different terms and conditions to customers from different Member States.

CMA investigations:

The Competition and Markets Authority has been particularly active in consumer enforcement. In 2017, we saw market investigations into online gambling, hotel booking sites, secondary ticketing sites and care homes. We expect this level of investigation and enforcement to carry on throughout 2018.

Digital Single Market:

The EU's Digital Single Market strategy will continue to be implemented throughout 2018, with consumer protection measures forming a central part of the initiative. On the horizon are measures relating to consumers' rights in respect of digital content and online sales of goods. Businesses operating in this area need to keep track of developments during 2018.

Dates for the diary

13 January 2018

Ban on surcharging for card payments in force.

20 March 2018

Regulation (EU) 2017/1128 on cross-border portability of online content services comes into force.

By the end of 2018

Geo-blocking Regulation comes into effect.



Cyber Security

06



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Current issues

General Data Protection Regulation (GDPR):

The GDPR, which will take effect across the EU from 25 May 2018, remains the most significant legislative and regulatory change to impact on cyber security for some time. The GDPR requires data controllers and processors to take appropriate technical and organisational measures to guard against personal data breaches. This core requirement is accompanied by higher maximum fines for non-compliance (up to the higher of €20million or 4% of global turnover) and more stringent reporting requirements (including a 72 hour time limit for reporting notifiable breaches).

NIS Directive:

The EU Network and Information Security Directive requires certain providers of 'critical infrastructure', and certain digital services providers, to take appropriate technical and organisational measures to ensure the security of their networks and information systems – the Directive, unlike the GDPR, is not aimed at personal data but rather network security more generally – and to notify the relevant authority of any significant breaches that take place.

Under the UK's proposed implementation, maximum fines will be up to €20million or 4% of global turnover, mirroring those under the GDPR. Regulatory enforcement powers would be given to industry-specific regulators.

Although not aimed at protecting personal data, the NIS Directive's requirements contain some overlap with the GDPR, meaning that certain conduct could potentially breach both (with the risk of 'double' fines).

Security flaws in third party software and hardware:

Malicious actors are searching for vulnerabilities and flaws in both software and hardware, with the new vulnerabilities such as "Meltdown" and "Spectre" seen as having the potential to cause significant issues.

In order to comply with the GDPR and (where applicable) the NIS Directive, companies will be expected to monitor such developments and implement appropriate security measures to mitigate their effect.

New cyber crime court?

Cyber security continues to be high on the legislative and regulatory agenda, with an announcement in 2017 that London may gain a new court specialising in fraud, economic crime and cyber crime. There are no details yet, save that feasibility studies will be carried out in early 2018.

Dates for the diary

December 2017 (overdue)

UK government due to publish results of consultation on NIS Directive implementation.

9 May 2018

Deadline for compliance with the high-level principles of the NIS Directive.

25 May 2018

GDPR comes into effect.

November 2018

NIS Directive: detailed guidance due from sector-specific regulators



Data Protection and Privacy

07



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Current issues

General Data Protection Regulation (GDPR):

The GDPR will take effect across the EU from 25 May 2018. The GDPR introduces some significant changes that have the potential to have a profound impact on many businesses that collect and use information about individuals.

In December 2017, the Article 29 Working Party published its new draft guidelines on transparency and consent. We can expect the Article 29 Working Party to publish its final version of these guidelines over the next few months, along with:

- revised versions of its guidelines on breach notification and automated decision-making and profiling; and
- guidelines on data transfers to third countries.

We are also expecting guidance from the Information Commissioner's Office (ICO) in the form of its 'Guide to the GDPR'. The ICO also intends to publish detailed guidance on consent and on the other lawful bases for processing (including legitimate interests).

You can find out more about the GDPR on Osborne Clarke's dedicated [GDPR feature page](#).

Data Protection Bill:

In September 2017, the Data Protection Bill was introduced into Parliament. The Bill is principally designed to:

- implement and supplement key standards under the GDPR;
- outline where UK law will deviate from certain GDPR provisions; and

- update and strengthen UK law to make the shift to the GDPR (and the UK's transition out of the EEA) as simple and as smooth as possible for businesses.

The Bill is currently making its way through the legislative process (you can keep up-to-date on its progress [here](#)). Irrespective of the progress of the Data Protection Bill, businesses should continue with GDPR projects as planned, while weaving core themes and likely changes under the Bill into those activities. For example, employers currently mapping data or assessing the legal bases on which they process special categories of personal data and criminal convictions data will need to also consider preparing, as part of their remedial measures, an appropriate policy document to ensure their obligations in respect of those types of data are fully satisfied (this is one of the current requirements of the Data Protection Bill).

Data transfers outside the EEA:

In a much-anticipated judgment, the Irish High Court decided to ask the Court of Justice of the European Union (CJEU) to rule on the case of [Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems](#) as to the validity of the standard contractual clauses for legitimising transfers of personal data outside the EEA (otherwise known as the "Model Clauses"). The intended referral to the CJEU does not mean that the Model Clauses are now invalid. It is likely to take some time for the CJEU to pass judgment on the Model Clauses, so until we hear anything different (from the CJEU or from regulators), the Model Clauses should continue to be used where appropriate.

e-Privacy Regulation:

On 8 September 2017, the European Commission published its first proposed revision to the draft Regulation on Privacy and Electronic Communications (e-Privacy Regulation). This will replace the existing e-Privacy Directive (implemented in the UK by the Privacy and Electronic Communications Regulations 2003). The e-Privacy Regulation aims to reinforce trust and security in digital services in the EU, by ensuring a high level of protection for privacy and confidentiality in the electronic communications sector, as well as seeking to ensure the free flow of movement of personal data and electronic communications equipment and services in the EU.

- The draft e-Privacy Regulation introduces significant reforms (summarised [here](#)), including in relation to the (much broader) scope and territorial application of the rules, the processing of “electronic communications data”, and the so-called “cookies” rules (which cover a much wider range of technologies and activities than simply posting and accessing cookies).
- The original ambition of the European Commission was for the e-Privacy Regulation to come into effect on 25 May 2018 – the same date as the GDPR. However, this seems optimistic, especially as there has been no proposed transition period for businesses needing to comply with it.

Dates for the diary

Early 2018

ICO's Guide to the GDPR due to be published.

Early 2018

ICO's guidance on the other lawful bases for processing, including legitimate interests, due to be published.

Early 2018

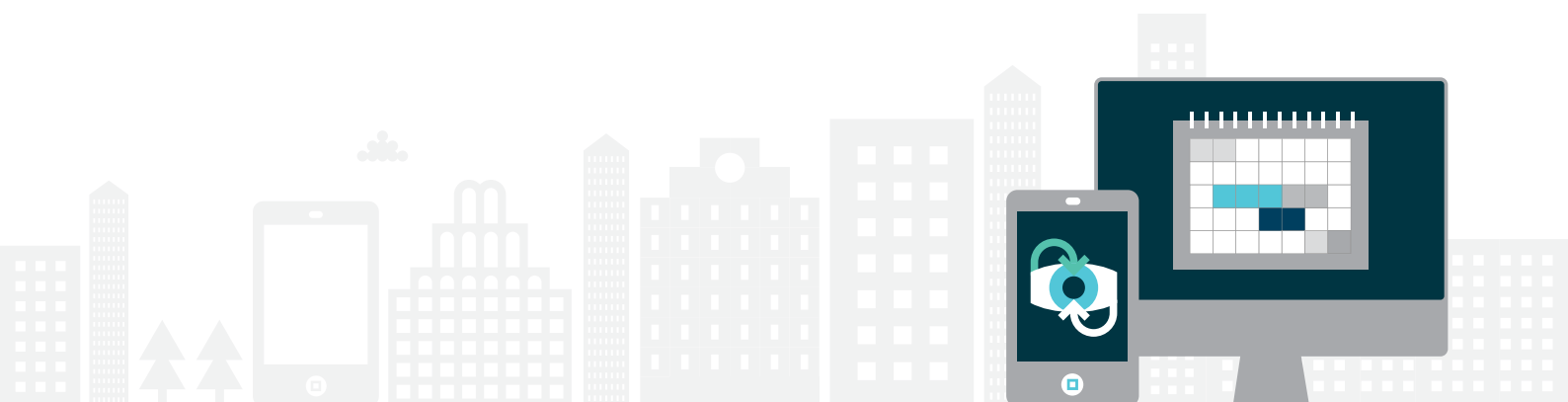
Further guidance from the Article 29 Working Party expected.

25 May 2018

e-Privacy Regulation (once finalised) intended to come into effect.

25 May 2018

The GDPR comes into effect.



Employment and Contingent Workforce

08



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Current issues

Gender pay reporting:

The new gender pay reporting requirements require employers with 250 or more employees to publish prescribed gender pay gap data based on a snapshot taken on 5 April 2017. This data must be published by 4 April 2018 and companies should now start considering when they will upload their data and whether/what additional information will be provided in a voluntary narrative to support or provide context to their report.

Gig economy:

The government-commissioned review on Modern Working Practices was published in July 2017 and better clarification of employment status and greater protection for gig economy workers were key recommendations. This was echoed in the gig economy report 'A Framework for Modern Employment' and draft Bill, published jointly by the Work and Pensions and Business, Energy and Industrial Strategy select committees in November 2017. The government has delayed the new legislation on the gig economy that would reform employment practices, amid growing concern that reforms to boost workers' rights could face parliamentary opposition from certain parts of the Conservative party. Putting into practice clear tests for employment status will be challenging and, in the meantime, businesses must keep a watchful eye on emerging case law to understand the rights and liabilities of their workers.

The General Data Protection Regulation (GDPR):

The GDPR, which comes into effect in all EU Member States from 25 May 2018, has particular implications in the context

of employment. Employers must start preparing now as the new regime has stricter requirements for consent (which must be 'freely given') and provides new and enhanced rights for individual data subjects to access and erase their personal data. These changes should be reflected in policies and procedures and training provided.

Mental health in the workplace:

The government has published an independent report containing 40 recommendations, including: 'mental health core standards'; legislative reform to enhance protections; and the creation of online portals to provide support. This report follows recently published ACAS guidance on work-related stress and promoting positive mental health in the workplace. Employers should ensure their policies underpin a workplace culture that supports mental health.

Failure to prevent the facilitation of tax evasion: implications for users of contingent workers:

The new offence, which came into force on 30 September 2017, concerns the failure to prevent the crimes of those who act for or on behalf of a corporation. The offence widens the scope of those who can be held to account under criminal law. This can be quite a risky area for users of contingent workers and staffing companies, as they can commit this offence if their supply chain is held to be evading tax and if they have not put in place adequate procedures to prevent the facilitation of the tax evasion.

Enabling tax evasion offence:

The government has introduced sanctions (in force from 16 November 2017) that apply to 'enablers' where a taxpayer has entered into an abusive tax arrangement that HMRC has defeated. Each person in the supply chain who has enabled the use of the arrangement is potentially liable to a penalty and naming. The measure can apply even if the taxpayer who entered into the defeated abusive tax arrangement does not incur a penalty.

Reforms to IR35 in the private sector:

The government reformed the off-payroll working rules (known as IR35) for engagements in the public sector in April 2017. There had been indications that this could potentially be extended to the private sector in April 2018. Instead, however, the government announced in the 2017 Autumn Budget that it will consult on how to tackle non-compliance in the private sector, drawing on the experience of the public sector reforms throughout 2018, with any new legislation likely to be introduced in 2019.

Dates for the diary

Early 2018

The Information Commissioner's Office UK guidance on consent under the GDPR is expected.

20 & 21 February 2018

The Supreme Court will hear the appeal in the *Pimlico Plumbers* case against the Court of Appeal decision that the plumbers were workers and therefore entitled to minimum employment rights afforded to workers.

4 April 2018

Deadline for employers of 250 plus employees to make their first publication of their gender pay gap data.

6 April 2018

Changes to the taxation of termination payments to be introduced, so that all PILONs will be treated as earnings (subject to tax and class 1 NICs).

25 May 2018

GDPR comes into effect in all EU Member States.

June 2018

Quoted companies must report annually on the ratio of CEO pay to the average pay of their UK workforce (along with a narrative explaining changes to the ratio from year to year and how pay relates to conditions across the wider workforce).

9 June 2018

European Trade Secrets Directive must be brought into force in all EU Member States. Employers should start considering now the steps they will need to take within their businesses.

6 April 2019

Department for Business, Energy and Industrial Strategy (BEIS) due to have reviewed the UK's early conciliation regime.

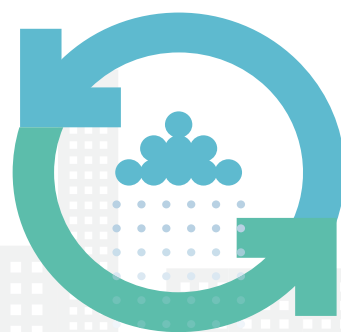
30 April 2019

BEIS due to have evaluated the right of carers to request flexible working.



Environment

09



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Current issues

Government releases 25 Year Environment Plan:

On 11 January 2018, the government detailed its long-awaited [plans](#) for the UK's natural environment over the next 25 years. Key aspects of the plan include achieving zero avoidable plastic waste by 2042 (which comes just days after the UK's microbead ban), curbing emissions from combustion plants and generators (which also comes a few days after the government's implementation plan to phase out UK coal generation), tackling air pollution in a proposed new Clean Air Strategy and consulting on plans to set up a world-leading environmental watchdog. Initial responses from industry are that the government's plans sound promising but will need to be backed up by strong legislation and adequate funding in order to make any real difference.

Brexit: consultation on new, independent, statutory environmental standards body:

On 13 November 2017, the Environment Secretary, Michael Gove, announced that the government proposed to establish a new independent body to hold the government and potentially other statutory bodies to account in relation to environmental standards once the UK has left the EU. The proposed new environmental watchdog will prevent a 'governance gap' following Brexit, by taking over the European Commission's role of monitoring environmental targets and protection. The announcement follows concerns that the UK's departure from the EU may weaken levels of environmental protection where the Commission has previously applied considerable pressure. The Environment Secretary has pledged a consultation to follow on

the functions, remit and powers of the new watchdog, which was echoed in the government's 25 Year Environmental Plan, published on 11 January 2018.

Air quality: further challenge from ClientEarth, coal phase-out across UK and impact of air quality on planning permission:

On 7 November 2017, ClientEarth commenced its third judicial review challenge against the government over its continued failure to deal with illegal air pollution across the UK through its air quality plan. The latest challenge follows two successful judicial review challenges by ClientEarth against the government, in April 2015 and November 2016.

On 5 January the Department of Business, Energy and Industrial Strategy (BEIS) outlined its implementation plan for phasing out coal power generation in the UK. From 1 October 2025, new emissions limits will apply to coal-powered generators, which will force them to reduce their coal emissions or face being closed down. Air quality continues to dominate headlines – including news that the UK is the first EU member to ratify the Kigali Amendment to reduce hydrofluorocarbons (HFCs) under the Montreal Protocol. The importance of air quality issues in certain planning decisions, particularly in relation to residential developments, has recently been highlighted in a case where planning permission was refused on air quality grounds. In [Gladman Developments Ltd v Secretary of State for Communities and Local Government and others](#), a planning inspector's conclusion that a developer's mitigation measures would not result in a satisfactory level of air quality were upheld.

Industry fears cost increases from Environment Agency charging review:

The Environment Agency (EA) has been criticised for 'creating a lot of confusion' by proposing to replace its current system of regulatory charges. This would impact a number of its charging schemes, including: the environmental permitting regime, the marine licensing regime, the waste electrical and electronic equipment (WEEE) regime, the control of major accidental hazards regime and the EU Emissions Trading Scheme. The most radical change is the proposed removal of the operational risk appraisal regime, which is used in rating the environmental risk of installations based on their emissions, location, compliance rating, operator performance and complexity. It is thought that the proposed move to a less intricate 'performance based regulation' will see over 100,000 permitted operations being affected, including: environmental permits, abstractions licences and WEEE producers. Industry responses have highlighted concerns over the fairness of the proposed new regime as well as the limited preparation time for regulated business, as it is anticipated that the changes will be effective from April 2018.

A formal consultation on the EA's proposals was published on 30 November and closes on 26 January 2018.

Waste Electrical and Electronic Equipment: DEFRA publishes amendment proposals:

In October 2017, DEFRA published a consultation on proposed changes to the WEEE Regulations 2013. The consultation sets out how certain aspects of the EU WEEE Directive 2012 might look once transposed into UK law. The changes required will bring all electrical and electronic equipment (EEE) within the scope of the 2013 Regulations in a move referred to as 'open scope' which must be implemented by all Member States by 15 August 2018. The 'open-scope' changes also introduce a requirement to categorise and report EEE and WEEE in six revised categories, which is a change from the current 14 categories in the UK. As a result of the move to 'open scope', the consultation anticipates an increase in costs to regulators, producers and treatment facilities who will need to amend their existing reporting system.

Environment Agency proposes revised enforcement and sanctions policy:

On 28 November 2017, the EA launched a consultation on proposals to update its current Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance so that they are combined into a single document – the 'Enforcement and Sanctions Policy' (ESP). Both the Statement and Guidance are currently used by the EA during enforcement of environmental legislation in England. In an effort to increase usage of enforcement undertakings, the draft ESP provides guidance on the form of undertaking which is capable of being accepted by the EA. Amongst other items which need to be included in an undertaking, offenders must specify action which will secure 'equivalent benefit or improvement to the environment', where restoration of the harm caused is not possible. The EA points out in its consultation that quantifying the cost of such harm to the water environment is particularly difficult. In response, the EA is proposing a simplified natural capital methodology to assess the long-term harm to the water environment caused by pollution. This system of assessment is one way in which the value of services provided by an ecosystem which supports the economy can be identified and valued.

The consultation closes on 29 January 2018.

Dates for the diary

11 January 2018

DEFRA's '25 Year Plan for the Environment' published.

January 2018

Market supplies of HFCs will be reduced by an estimated 48% across the EU, significantly affecting producers and retailers of HFC-using products.

26 January 2018

Environment Agency's consultation on charging review closes.

29 January 2018

Environment Agency's consultation on its enforcement and sanctions policy closes.

23 February 2018

Proposed deadline for High Court hearing in ClientEarth's third judicial review challenge against the government.

28 February 2018

Transport for London consultation on changes to Ultra Low Emission Zone closes.

1 April 2018

Introduction of prohibition on the letting of non-domestic properties with an EPC rating below Band E under MEES Regulations.

7 June 2018

Criteria for determining endocrine-disruptors in biocides to apply.

15 August 2018

Deadline for implementation by Member States of EU WEEE Directive 2012.

January 2019

Legislation expected to come into force that 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.

September 2020

Ultra Low Emission Zone to be introduced for central London.



Export Control and Sanctions

10



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Current issues

Modernisation of the European dual-use export control regime:

In September 2016, the European Commission published a proposal to amend the legislation underpinning the current European dual-use export control regime: the EU Dual Use Regulation. The proposed changes aim to harmonise and simplify the rules, and introduce a new “human security” dimension to the existing European dual-use export control regime. The proposal was approved by the International Trade Committee in the European Parliament at the end of November 2017 and will now be voted on by all MEPs in a European Parliament plenary session (scheduled for January 2018). The impact of this re-cast Regulation on the UK depends on how long it takes to go through the EU legislative process, and what is agreed between the UK and the EU in relation to Brexit.

Legality of UK strategic military licensing regime:

On 10 July 2017, the High Court ruled that the government had acted lawfully in continuing to authorise transfers and sales of strategic military items to Saudi Arabia, despite concerns about how those items were being used in the on-going conflict in Yemen. The Campaign Against Arms Trade, which brought the judicial review, plans to appeal the ruling. Nonetheless, at least in the short term, the ruling provides certainty for defence businesses exporting from the UK that extant export licenses will remain valid and the governmental decision-making process for future licensing decisions will remain unchanged.

Sanctions and Anti-Money Laundering Bill:

The Sanctions and Anti-Money Laundering Bill was introduced in the House of Lords on 18 October 2017 and is currently passing through the Committee Stage. It will then pass through the House of Commons and is expected to gain Royal Assent during 2018. The Bill will make provision for sanctions to be imposed where appropriate for the purposes of compliance with United Nations obligations or other international obligations or for the purposes of furthering the prevention of terrorism. The current draft of the Bill gives wide delegated powers to Ministers to make sanctions regulations that are “appropriate” in certain defined circumstances, and to designate individuals and entities.

Dates for the diary

16 January 2018

Plenary session for first reading of recast EU Dual Use Regulation.

July 2018

UK government due to publish UK Strategic Export Controls Annual Report 2017. This report will cover the UK's export control policy and practice during the period January 2017 to December 2017.

Throughout 2018

If CAAT is granted the right to appeal, the Court of Appeal hearing is expected to hear appeal of judicial review decision on transfers of strategic military items to Saudi Arabia.

Throughout 2018

The Sanctions and Anti-Money Laundering Bill continues to pass through the legislative process.



Food Law



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Current issues

European Commission requests feedback on implementing regulation for country of origin labelling of primary ingredients:

The draft regulation requires products where country of origin is indicated or implied to identify on the label when the primary ingredient is from a different country. The primary ingredient is one that represents more than 50% of the food or is associated with the name of the food by the consumer.

Champagne sorbet:

The CJEU has [ruled](#) against France's champagne industry lobbying group (CIVIC) and concluded that Aldi could use the name "champagne" for its sorbet, providing it had "as one of its essential characteristics, a taste attributable primarily to champagne". The sorbet contained 12% champagne but the CJEU ruled that while the quantity of champagne was significant, it was not of itself a determinative factor. The CIVIC had argued that Aldi was benefiting from the quality and prestige attached to the name and had infringed its Protected Designation of Origin.

The Acrylamide Regulation:

From April 2018, all food businesses that produce or place on the market certain foods, including: french fries, potato crisps, bread, breakfast cereals, biscuits and crackers, coffee, and some baby foods, will need to take the steps specified in the Regulation to mitigate acrylamide formation. This follows a scientific assessment that acrylamide in food potentially increases the risk of developing cancer for consumers in all age groups.

Glyphosate renewed:

In November 2017, Member States voted in favour of a European Commission proposal to renew the controversial pesticide glyphosate for a further five years, following a scientific assessment that concluded that there was no causal link with cancer in humans. In response to a European Citizens' Initiative on the subject, the Commission has agreed to put forward a legislative proposal in spring 2018 to ensure greater transparency of scientific assessments (in particular that scientific studies are publicly available) and to review the governance of EFSA.

National Food Crime Unit:

The Food Standards Agency is keen to secure funding to expand the remit of the National Food Crime Unit to include investigative powers as envisaged in the Elliott and Kenworthy reviews. The Ministerial Group on Food Crime is due to share its views on this in January 2018.

Food hygiene rating scheme:

Professor Poppy published his report in December 2017 identifying the benefits and improved hygiene standards since the introduction of the food hygiene rating scheme. This is particularly so in Wales and Northern Ireland, where it is mandatory to display ratings, and the FSA intends to make the scheme mandatory in England as well.

Updated guide to protecting and defending food and drink from deliberate attack:

The [Publicly-Available Specification](#) provides guidance on the avoidance and mitigation of threats to food and food supply through a risk management methodology known as TACCP

(Threat Assessment Critical Control Points). The updated standard looks in particular at the threat from the misuse of digital techniques. H3 Subhead Blue

Dates for the diary

1 January 2018

Regulation (EU) 2015/2283 on novel foods is in effect.

January 2018

Report due to be published by the European Commission on the Fitness Check of General Food Law, to review the legislation currently in place. A consultation will also be launched to feed into the preparation of a proposal to be submitted in spring 2018.

1 February 2018

Feedback period closes on draft regulation regarding country of origin labelling for primary ingredient of a food.

April 2018

EU Acrylamide Regulation (Reg 2017/2158) takes effect. UK guidance for the catering and food service industry expected in early 2018.



Health and Safety

12



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Current issues

HSE introduces new dispute process for Fee for Intervention scheme:

Following a public consultation that ended in June 2017, the HSE has revised its dispute process under the Fee for Intervention scheme. Following a judicial review brought by OCS Limited, which challenged the fairness of a dispute process overseen by the HSE, the new process introduces an independent panel to make decisions at dispute stage, and an entitlement to disclosure. The panel will be chaired by a lawyer and include two members that have practical experience in the management of health and safety. The HSE has also stated that further information will be provided to businesses in order to allow for appropriate representations to be made to the panel.

Gross negligence manslaughter sentencing guidelines:

On 10 October 2017, the ten-week consultation, relating to new guidelines for the sentencing of gross negligence manslaughter offences, closed. This review is predicted to result in new guidelines being introduced for the sentencing of individuals, which will significantly increase the length of custodial sentences imposed. The changes come in response to the Sentencing Council's assertion that gross negligence manslaughter sentences are considerably lower than those for other manslaughter offences. The consultation document outlines that the median sentence to date has been four years, with a quarter of individuals prosecuted for gross negligence manslaughter receiving suspended sentences. The new guidelines will also target several other forms of manslaughter, although it will omit corporate manslaughter, on which separate guidelines were specified in February 2016.

Grenfell Inquiry:

In the wake of the Grenfell tragedy in June 2017, the disconnect between the Regulatory Reform (Fire Safety) Order 2005, the Building Regulations 2010, and associated guidance will come under increased scrutiny. The government asked Dame Judith Hackett (previously head of the HSE) to undertake an independent review of building and fire safety regulations, with a particular focus on high-rise residential buildings. This review is to run alongside the Public Inquiry being chaired by Sir Martin Moore-Bick. An interim report was published on 18 November 2017. The key finding in this report was that the current regulatory system for ensuring safety in high-rise and complex buildings is 'not fit for purpose'. The review will now undertake targeted work in six broad areas – regulation and guidance; roles and responsibilities; competence; process, compliance and enforcement; resident's voice and raising concerns; and quality assurance and products – in partnership with the construction industry and other stakeholders, before publishing its final report and recommendations in spring 2018.

HSE report & statistics released:

In December 2017, the HSE released its annual report detailing summary statistics for Great Britain in 2017. Key statistics include the following: 1.3 million workers suffered from work-related ill health during the relevant period, 0.5 million workers suffered from work-related stress, and 137 suffered fatal injuries in the workplace. 2016-2017 saw a significant increase in fines for businesses breaching health and safety legislation under the new court sentencing guidelines – 21 companies receiving £30.7m of the total £69.9m fines imposed. Total fines increased significantly from the £38.8m the year before. Nevertheless,

there was a fall in the number of cases prosecuted, following an upward trend for several years. Whilst many of the other figures stayed similar to the year before, the proportion of people who reported experiencing work-related stress, depression or anxiety

has risen again, increasing by 16% since 2014-2015. The report, though, once again highlights the UK's "consistently low standardised rates of fatal injury" in comparison to that of the rest of the EU.

Dates for the diary

2 February 2018

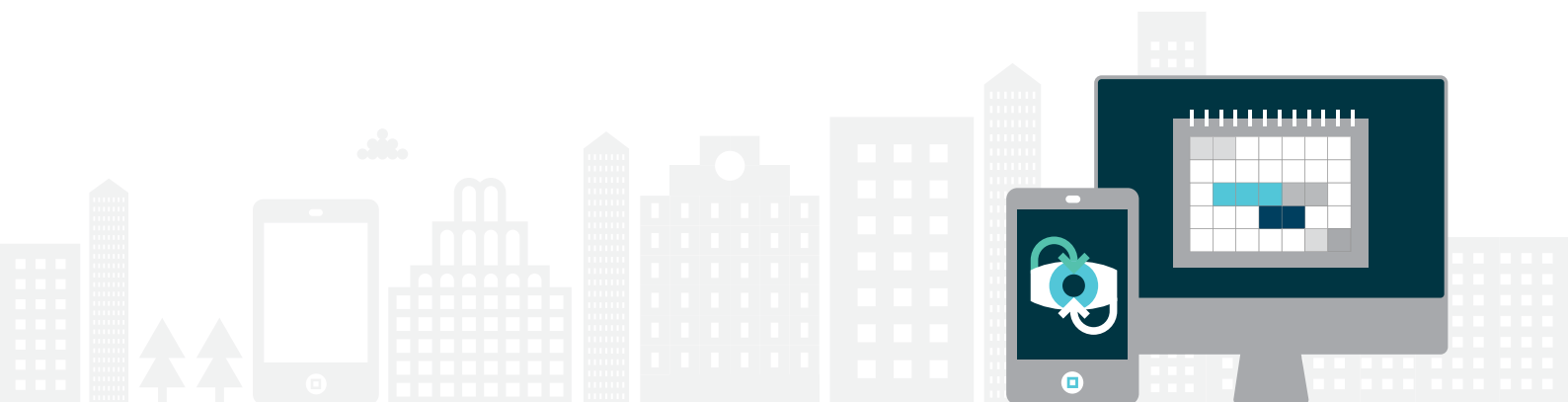
Consultation ends on implementing new and revised Workplace Exposure Limit. This will look at revising indicative Occupational Exposure Limits for 31 chemical substances to help protect workers from the ill-health effects of exposure to hazardous substances.

February 2018

The delayed international standard on occupational health and safety management systems (ISO 45001) due to be published.

Spring 2018

Full reports from the Grenfell Tower Inquiry expected.



Product regulation

13



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Current issues

New UK legislation proposed for civil drones (small unmanned aircraft):

Draft legislation is set to be published in spring 2018 setting out new rules for civil use of drones. We anticipate users of drones weighing over 250g will have to register their drones and sit safety awareness tests. They could also be banned from flying near airports, or above 400 feet. Police will also be given new powers to seize and ground drones that may have been used in criminal activity. The EU is also debating drone legislation, but this is unlikely to take effect until after Brexit.

UK driverless cars legislation:

The Law Commission has recently announced that it will be starting work on developing laws to promote safe use of driverless cars, to support the UK's aims to be a leader in autonomous technology, with legislation to be ready as early as 2021. The work is anticipated to consider the issue of liability for accidents involving driverless vehicles.

Consumer products: new EU regulation on gas appliances takes effect:

The new Gas Appliances Regulation takes effect on 21 April 2018. Additional categories of products such as gas fittings will need to be CE marked; risk assessments which take account of foreseeable misuse will be mandatory; there are a number of changes to the essential requirements; and certificates of conformity will need to have a maximum validity period of 10 years. Certification under the new Regulation will be required as of 21 April 2018 for any products not already in the supply chain as at that date.

EU legislative proposals to ensure safe products in the Single Market:

The European Commission has tabled two legislative proposals to make it easier for companies to sell products across the Single Market, and strengthen controls by national authorities and customs officers to prevent unsafe products from being sold to consumers. The draft regulations will now be sent to the European Parliament and Council for adoption. It remains to be seen whether these will be in force prior to the UK's departure from the EU and therefore whether the UK will adopt them. The proposals also include "soft law" measures such as awareness-raising campaigns on mutual recognition and a mutual recognition rulebook.

Dates for the diary

Spring 2018

Draft drone bill due to be published, alongside proposed amendments to the Air Navigation Order on powers necessary for registration and leisure pilot testing.

21 April 2018

Gas Appliances Regulation (EU) 2016/426 takes effect.

May 2018

REACH registration deadline: applies to companies that manufacture or import substances in low volumes (between 1-100 tonnes a year) and have not yet registered them. This also applies if you manufacture or import a product; it may contain substances that need to be registered individually.

Summer 2018

EU legislative proposals to ensure safe products in the EU Single Market: We should know by the summer when these will be anticipated to come into force so we can understand the Brexit implications on this particular area of legislation and also understand if the “soft law” proposals are on track.



Regulated Procurement

14



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Current issues

Brexit: changes to procurement regulations:

The European Union (Withdrawal) Bill, when enacted, will incorporate the existing corpus (or *acquis*) of EU law into the UK statute books, including the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, and the Concessions Contracts Regulations 2016. Changes to these regulations will be needed, for example, to remove references to EU institutions and OJEU, but it is unlikely that policy changes will be effected in the short term.

UK to join Government Procurement Agreement in its own right:

Following Brexit, the UK will join in its own right the WTO Government Procurement Agreement, which aims to ensure open government procurement between its members. Currently, the UK is a member by virtue of its membership of the EU. UK government public procurement policy changes in years to come will therefore need to be made in line with the GPA rules.

Recommendations for improvement to running of public procurement procedures:

The inquiry into the Nuclear Decommissioning Agency's failed procurement for a contract to decommission 17 nuclear power plants has published its interim report. The interim report makes a number of recommendations, including that the NDA should run simpler, more transparent competitions, and should improve record keeping. The final report will likely contain far more numerous and wide-ranging recommendations, which may well influence future procurement policy and guidance more widely.

Claimants should be prepared to issue on the facts available:

The High Court has refused an application to extend time, from the statutory seven day period following issue of a claim form, to serve particulars of claim for a procurement challenge. The court narrowed the grounds on which such applications will succeed; stating that there needs to be a "very good reason" to extend time. The decision makes it less likely that defendants will agree to grant an extension of time, given the likelihood of the court denying such an extension. Claimants will now have to issue claims and be prepared to plead particulars within seven days, on the facts available, and reserve rights to amend pleadings following disclosure if necessary.

Rules on confidentiality rings clarified:

A claimant applied to have an employee and its experts included in a confidentiality ring to examine disclosed documents. The claimant argued that its legal team would not be able to understand the documents, but the application was denied. This might be the start of a more consistent approach by the courts, allowing external lawyer-only confidentiality rings in the first instance, with non-lawyers allowed to see confidential documents only if lawyers cannot understand them and advise without client or expert assistance.

Changes to healthcare procurement:

Following Lord Carter's 2015 review into NHS productivity, the Department of Health has announced wholesale changes to the procurement of goods by the NHS in England. Under the new rules, medical products will be divided into 11 categories,

and each category will be procured centrally by private sector partners. The new structure represents a step towards centralised procurement in order to bring about significant savings. The changes will be implemented in September 2018.

New public procurement thresholds:

The European Commission has increased the thresholds that apply to new procurement procedures commencing on or after 1 January 2018 under the PCR 2016, the UCR 2016 and the

CCR 2016. This is a scheduled increase that occurs every two years. The next threshold increase is expected at the beginning of 2020, although this might not be relevant to UK public contracts, depending on what changes are made to public procurement law as a result of Brexit. The previous thresholds will continue to apply to any procurements that commenced (i.e. the contract notice or prior information notice was published on OJEU) before 1 January 2018. For details of the new thresholds see [here](#).

Dates for the diary

Early 2018

Decision anticipated in *Commission v Austria*. The case concerns the purchase of services to manufacture biometric passports by the Austrian state. The contract was directly awarded to an Austrian company, with no procurement process, on the grounds of national security. Austrian law requires that a contract to produce any “official” documents is always awarded to one particular Austrian company. The case should clarify the extent to which, and in what circumstances, a government can choose whether to take national security into account when deciding to run a procurement process.

June 2018

Appeal in *R (Faraday Development Limited) v West Berkshire Council* due to be heard. The original judicial review, which concerned whether a development agreement entered into by West Berkshire Council should have been subject to a public procurement procedure, was unsuccessful.

Spring 2018

Final report of inquiry into failed NDA procurement due to be published.

September 2018

Changes to NHS procurement rules to be implemented.



