# Regulatory Outlook

## Brexit special edition

July 2018

# Contents

# Foreword


**Catherine Wolfenden**
Partner and Head of Osborne Clarke's Regulatory Group
T: +44 117 917 3600
E: catherine.wolfenden@osborneclarke.com

**Ashley Morgan**
Senior Knowledge Lawyer, UK
T: +44 117 917 4378
E: ashley.morgan@osborneclarke.com


Welcome to the latest edition of Osborne Clarke's Regulatory Outlook.

With less than a year until the UK formally leaves the EU, Brexit continues to dominate the political and news agendas. Yet the shape of the future trading relationship between the UK and EU is still far from clear and even the UK-EU Withdrawal Agreement, which would provide a much-needed 'status quo' transition period, is dependent on the resolution of significant sticking points.

This edition of the Regulatory Outlook attempts to answer two of the questions that we are asked most frequently by clients: how will Brexit impact on the regulatory environment that our business operates in? What does that mean for our cross-border trade?

In looking at these two issues across 16 areas of business regulation, a few common themes emerge:

– **We are not expecting a 'bonfire of regulations' in the UK post-Brexit**, whatever the future trade deal looks like. This is in part because maintaining common regulatory standards assists businesses trading across borders and in part because the UK government has committed to upholding current levels of protection for the environment, workers' rights and product standards. But it is also a reflection of the fact that the UK, and the UK's many regulators, have been influential in shaping business regulation in the EU in recent years and are likely to keep following the same path, at least initially.

– **There are a number of important EU regulatory reforms in progress**; the speed of the legislative process will determine which of those reforms will be automatically ported into UK law post-Brexit. This is because under the (draft) Withdrawal Agreement, the UK would be required to implement any new EU law brought in during the proposed transition period, from 29 March 2019 to 31 December 2020. This would only apply to EU law that is both 'in force' and 'in effect' by 31 December 2020. As a result, any EU Regulation subject to an implementation period that extends beyond that date, or EU Directive that requires implementation in national law but has not been implemented in the UK by that date, would not become part of UK law.

– **In many areas, businesses may need to comply with parallel regulatory regimes**, even if the standards are equivalent under each. There are very few existing mechanisms for the EU to recognise 'equivalent' or 'adequate' regimes of non-EU states (which of course the UK will become – a 'Third Country' in EU parlance). Those that do exist (such as for data protection and certain aspects of financial services) are typically operated unilaterally by EU bodies, rather than being reciprocal arrangements.

For businesses, the good news is that the substantive regulatory and compliance picture is likely to remain relatively stable as the UK leaves the EU. In most cases, businesses will be dealing with the same regulators in the UK, although some, like the Competition and Markets Authority, will be given expanded remits and powers. Businesses may need to also deal with regulators in other EU Member States, if the UK loses access to 'one-stop-shop' arrangements, such as in data protection or competition regulation. Businesses may also need to get used to using new systems and processes, such as in regulated procurement, where public contracts will be published in the UK's Contracts Finder rather than the Official Journal of the EU, but the regulations will remain essentially as they are now.

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

The real change is likely to come further down the line. The UK has traditionally been a strong pro-business voice in the shaping of EU regulations. The absence of that voice could have an effect on the direction of future EU regulation, which those trading in the UK may still need to follow – either to ensure that their products or services can be sold into EU markets, or because the UK decides to or is required to maintain alignment with that area of regulation.

For now, there is much that businesses can be doing to ensure they are prepared for both the risks and the opportunities that Brexit could bring. This may include risk-assessing supply chains, auditing key contracts or putting in place contingency plans. For many, it will also mean the need to keep track of legislative (and political) developments and understand what they might mean for business. This will include the stream of 'correcting' Statuatory Instruments that are being introduced under the European Union (withdrawal) Act 2018, some of which make technical changes that businesses may need to take into account. At Osborne Clarke, our regulatory experts are helping businesses to understand both the risks and opportunities that Brexit may present for them, and ensure they are best prepared and remain up-to-date.

Catherine Wolfenden

Ashley Morgan

# What will Brexit mean for business regulation in the UK?

Click on the relevant answer to find out more.

| | Any new EU law expected to come into force and effect before end of proposed transition period? | New regulator needed, or new powers for existing regulator? | 'Equivalence' or 'recognition' regime for recognising Third Country regulatory regimes | Changes to UK regulation expected post-Brexit? | What should businesses be doing now? |
|---|---|---|---|---|---|
| Advertising & Marketing | ✓ | ✗ | ✗ | ✓ | ⓘ |
| Anti-corruption, Bribery & Financial Crime | ✓ | ✗ | ✗ | ✗ | ⓘ |
| Competition | ✓ | ✓ | ✗ | ✗ | ⓘ |
| Consumer Finance | ✓ | ✗ | ✗ | ✗ | ⓘ |
| Consumer Protection | ✓ | ✗ | ✗ | ✗ | ⓘ |
| Cyber Security | ✗ | ✗ | ✗ | ✗ | ⓘ |
| Data Protection | ✓ | ✗ | ✓ | ✗ | ⓘ |
| Digital Media & Entertainment | ✓ | ✗ | ✗ | Unclear | ⓘ |
| Environment | ✓ | ✗ | ✗ | Unclear | ⓘ |
| Employment & contingent workforce | ✗ | ✗ | ✗ | ✗ | ⓘ |
| Export control and Sanctions | ✗ | ✗ | ✗ | ✗ | ⓘ |
| Food law | ✓ | ✗ | ✓ | Unclear | ⓘ |
| Health & safety | ✓ | ✗ | ✗ | Unclear | ⓘ |
| Payments | ✓ | ✗ | ✓ | ✗ | ⓘ |
| Product Regulation | ✓ | ✓ | ✗ | ✗ | ⓘ |
| Regulated Procurement | ✗ | ✗ | ✓ | Unclear | ⓘ |

# Advertising and Marketing

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**Nick Johnson**
Partner
T: +44 20 7105 7080
E: nick.johnson@osborneclarke.com


## Current issues

### ASA consults on restricting use of gender stereotyping in advertising:

As a result of extensive research and consultation on the issue, the Advertising Standards Agency (ASA) is **consulting** on a proposal to add the following rule to both the broadcast and nonbroadcast advertising codes:

*"Advertisements must not include gender stereotypes that are likely to cause harm, or serious or widespread offence".*

The ASA has also published draft guidance on how this rule should be interpreted and applied in practice.

### IAP Europe launches transparency and consent framework to address GDPR compliance issues:

The **Transparency and Consent Framework** is designed to help AdTech suppliers comply with GDPR and the (current) E-Privacy Directive when processing personal data and setting/accessing cookies for digital advertising.

### Communicating broadband speed claims:

On 25 May 2018, new guidance on how to communicate residential broadband speeds in advertising came into effect. As a result, any numerical speed communicated in an advert for broadband must be available to at least half of consumers at peak times. In addition, this speed must be described as 'average' rather than 'up to'. Advertisers are also encouraged to recommend speed checking facilities wherever possible.

Advertisers using 'up to' claims in other contexts may need to consider whether the old 'up to' rule of thumb remains reliable.

### CAP GDPR consultation:

The Committee of Advertising Practice (CAP) has **consulted** on how advertisers' obligations under the GDPR should be reflected in the non-broadcast advertising code. In particular CAP asked for feedback on how the GDPR should be reflected in the rules on the use of databases and online behavioural advertising.

CAP will now consider the responses and the outcome of the consultation will be published in due course.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the proposed transition period?

We are expecting a new EU E-Privacy Regulation, which is likely to significantly impact the rules on cookies, device fingerprinting, direct marketing and targeted advertising. The original intention was that this regulation would be brought into law at the same time as GDPR. This project has been delayed and the Council of Ministers has still not agreed a negotiating position.

The EU's New Deal for Consumers package of legislation would have some limited impact on advertising and marketing, especially in relation to online platforms.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

The ASA is principally responsible for enforcing advertising law in the UK. This is not expected to change as a result of Brexit.

Trading Standards and the Competition Markets Authority also have a role in Advertising enforcement. We anticipate no changes to this situation as a result of Brexit.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

There is no equivalence regime or mechanism whereby decisions by UK regulators on advertising law are recognised in third countries.

The ASA is part of the European Advertising Standards Alliance (EASA) which promotes responsible advertising and is the European voice of self-regulation of advertising. The EASA also coordinates and administers a cross-border complaint system which is designed to encourage different countries to take a consistent approach to an individual complaint.

Since the EASA is not an EU body we do not anticipate any changes to this arrangement. The loss of any applicable equivalence or recognition scheme for specific sectors such as financial services or pharmaceuticals may impact on advertising in those sectors.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

Current UK policy is driving a stricter approach to advertising so-called 'junk food' and gambling. This trend for stricter regulation in sensitive areas has been on-going for many years and all indications are that this will continue.

It is possible that if the UK decides to align food regulatory standards with the US (rather than the EU) post-Brexit, part of this arrangement will involve the deregulation of food advertising. However, there is little political or consumer appetite for this result so we judge it unlikely.

There does appear to be some political appetite for deregulating the advertising of e-cigarettes. For example the ASA has recently consulted on permitting limited use of health claims in advertising. This process could be hastened as a result of leaving the EU.

### What should businesses be doing now to prepare for Brexit?

We do not expect major immediate impacts on advertising law, outside of particular regulated sectors. However, businesses involved in data driven online advertising and marketing will need to consider how cross-border data transfers should be handled.

Those businesses which advertise sensitive products such as children's foods, gambling and e-cigarettes should keep abreast of legal and political changes in these areas as the law in these areas may potentially evolve faster in the UK than in the EU post-Brexit.

# Dates for the diary

## July 2018

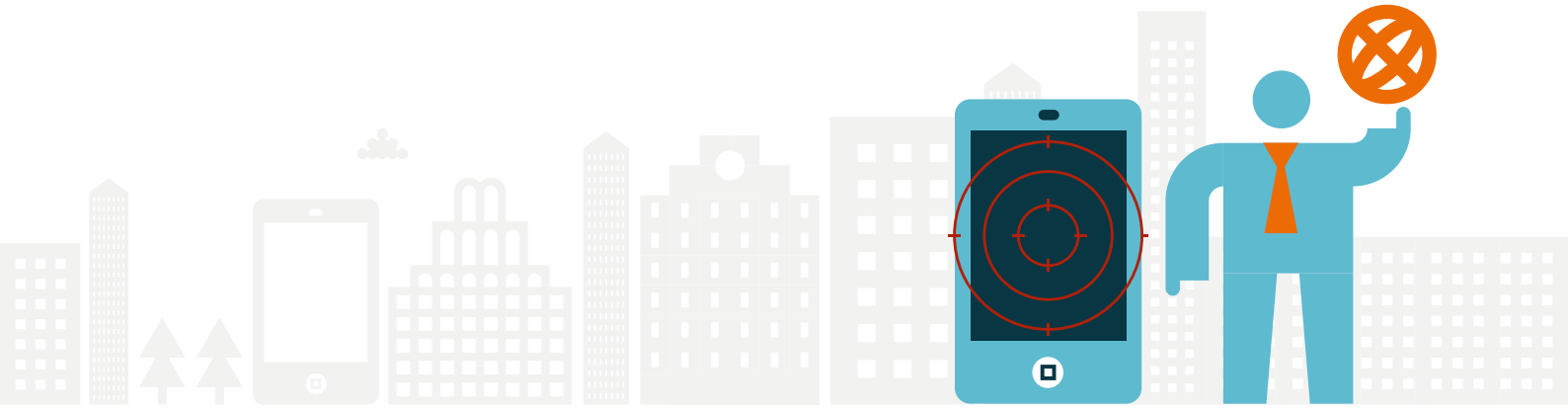
CMA aims to publish its provisional decision in its investigation into the supply and acquisition of investment consultancy and financial services to and by institutional investors and employers in the UK.

## 26 July 2018

Consultation on gender stereotyping closes.

## Summer 2018

Outcome of CAP consultation on GDPR expected to be published.



# Anti-corruption, Bribery and Financial Crime

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**Tom Ellis**
Partner
T: +44 20 7105 7418
E: tom.ellis@osborneclarke.com



**Jeremy Summers**
Partner
T: +44 20 7105 7394
E: jeremy.summers@osborneclarke.com


## Current issues

### Appeal in ENRC privilege litigation:

The Court of Appeal decision in the appeal from the High Court decision in *SFO* v *ENRC* on the scope of litigation privilege is eagerly awaited. The decision (arising in the context of a significant on-going SFO overseas corruption investigation) may confirm a restrictive approach to litigation privilege and impact on the planning and conduct of internal investigations.

### New Director of the SFO:

Lisa Osofsky will take over the Directorship of the Serious Fraud Office in September 2018. Ms Osofsky is originally from the US, where she was a former Deputy General Counsel at the FBI. She has since worked at Goldman Sachs, Control Risks and Exiger. Ms Osofsky has indicated that she is committed to ensuring the SFO's independent future, although it remains to be seen how much of the agency's work is 'tasked' by or through the National Crime Agency. We may in any event anticipate a more US-style approach to the SFO's work, including increased corporate Deferred Prosecution Agreements alongside the prosecution of senior individuals.

### National Economic Crime Centre:

Part of the Home Office's Anti-Corruption Strategy 2017-20 is the creation a multi-agency National Economic Crime Centre, to act as the national authority for the UK's operational response to economic crime. The NECC will be based in the National Crime Agency and include staff from across government and the private sector. The NECC's aims are to: improve the intelligence picture on economic crime; task and coordinate the overall law enforcement response; and increase the UK's ability to investigate high-end economic crime.

### UK Treasury Committee economic crime inquiry:

The Treasury Committee inquiry, launched in March 2018, has two aspects:

– the anti-money laundering and sanctions regime in the UK; and

– how economic crime affects consumers.

As part of this, the inquiry will be looking at the effectiveness of financial institutions in combatting economic crime.

The Committee will examine the scale of money laundering, terrorist financing and sanctions violations in the UK in addition to fraud, in particular through the medium of online banking.

### 5th Money Laundering Directive

The 5th Money Laundering Directive (MLD5) entered into force on 9 July 2018. EU Member States must bring into force the laws, regulations and administrative provisions necessary to comply with MLD5 by 10 January 2020. Amongst the key changes from MLD4 will be the inclusion of virtual currency exchange platforms and custodian wallet providers within the scope of regulation.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the proposed transition period?

The European Commission has issued a proposal for a Directive on countering money laundering by criminal law.

MLD5 is expected to come into force and effect by the end of 2019, so is likely to become part of UK law.

The European Commission has also proposed rules aimed at boosting transparency in order to tackle aggressive cross-border corporate tax avoidance.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

Dependent on what security/law enforcement cooperation provisions remain in force post-withdrawal, relevant UK agencies may need new powers to address any loss of European assistance.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

While laws are set and enforced at a national level, in many cases enforcement will involve cooperation and mutual assistance between authorities in different states. The EU regime on security cooperation facilitates this within the EU.

The position in relation to mutual assistance post-Brexit remains unclear.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

After Brexit, it is unlikely that the UK will choose to lighten regulation, since the UK has been a leader in enacting financial crime regulation.

### What should businesses be doing now to prepare for Brexit?

– Now is a good time to review your policies and procedures and consider where revisions may be necessary to comply with existing law.

– Consider MLD5 and whether it may impose additional obligations on your business.

– Keep the position under review, including the progress of proposed EU legislation that may or may not apply in the UK, depending on when it comes into force and effect.

# Dates for the diary

## Autumn 2018

The FCA is consulting on proposals to add a chapter on insider dealing and market manipulation to the Financial Crime Guide and also to update the guide to reflect a number of recent regulatory changes.

## November 2018

The US withdrew from the Iranian Joint Comprehensive Plan of Action (JCOPA) in May 2018 and announced the re-imposition of Iranian sanctions.

## March 2019

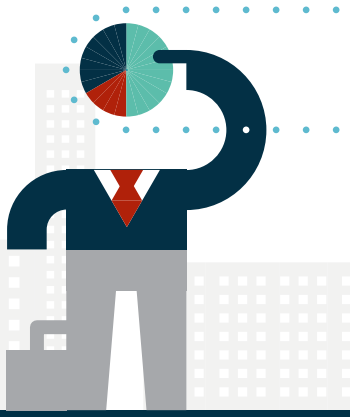
The House of Lords Select Committee has been appointed to review Bribery Act 2010.

The report will focus on: the extent to which the Bribery Act has led to stricter prosecutions of corrupt conduct, a higher conviction rate and/or a reduction in such conduct; and the impact the Act has had upon business and in particular small and medium enterprises.

## 2019

The new SFO Director will need to make decisions on a number of long running high profile investigations, including: ENRC, GSK, GPT and Rolls Royce. How these are dealt with may well indicate the likely direction of travel for the SFO going forwards.

# Competition



03


**Simon Neill**
Partner
T: +44 20 7105 7028
E: simon.neil@osborneclarke.com

**Marc Shrimpling**
Partner
T: +44 11 7917 3490
E: marc.shrimpling@osborneclarke.com


## Current issues

### Post-Brexit regulation of State aid rules:

The UK government has now **confirmed** that during the expected Brexit transition period, the existing structure of the EU rules and regulations around State aid will be maintained in full. This will mean that, during the transition period, the European Commission will continue to remain responsible for approving and monitoring UK State aid. Thereafter, the Competition and Markets Authority (CMA) will be responsible for enforcing a State aid regime that is likely to remain close to that of the EU.

### New UK merger thresholds designed to protect national security:

On 15 March 2018, the Department for Business, Energy and Industrial Strategy **published** the UK government's decision to amend the UK merger control jurisdictional thresholds, extending the powers of the Secretary of State to intervene in mergers that might raise national security concerns in specific areas of the economy. The new thresholds took effect from 11 June 2018.

### Geo-blocking Regulation:

In December 2018, The EU **Geo-blocking** Regulation comes into force, prohibiting the 'unjustified' blocking of access to websites or online content and the re-routing of customers to national websites. The new law will affect online retailers of physical goods as well as suppliers of online digital content and services.

For now, copyright-protected content (such as books, music or films) is excluded from the scope of the legislation – although much of this content will fall within the new Portability Regulation.

### Vertical mergers in the technology sector:

The digital sector remains an area of focus for competition authorities. The European Commission has shown a tendency towards asserting jurisdiction over proposed mergers in the digital sphere in the light of the parties' internal documentary evidence – particularly regarding the underlying rationale behind each deal – rather than relying exclusively on turnover as previously.

A more value-based merger assessment **has already been introduced** in Germany and Austria; it remains to be seen whether other EU Member States or the Commission itself elect to introduce similar measures.

### Merger control: receiving clearance before implementing transactions:

All transactions falling within the remit of the EU Merger Regulation must be notified to the Commission and cleared before implementation.

European competition authorities are particularly vigilant in enforcing such cases. A **recent fine** imposed on Netherlands-based Altice Group for taking steps to effectively implement a proposed acquisition prior to the transaction receiving official Commission approval is another important reminder of the risks (financial and reputational) of taking any action towards a target entity prior to approval.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the proposed transition period?

The Geoblocking Regulation takes effect from 3 December 2018. The Regulation addresses 'unjustified' geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

At present, the Competition and Markets Authority has responsibility for enforcing competition law in the UK. This will continue after Brexit, but the CMA will also take on other responsibilities. In March 2018, the UK government announced that the CMA would become the regulator for State aid in the UK, and the CMA has had a budget increase of £20m per year to cover this.

For multi-jurisdictional, non-State aid competition-law issues, the position is currently less clear.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

EU competition law does not have an equivalence regime, but the UK may need to (and has said it intends to) keep its competition and State aid regime close to the EU regimes as part of a future deal.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

The UK government has made it clear on several occasions in recent months that it does not intend to make any substantive changes to UK competition law. It recognises the value in keeping UK competition law closely aligned to EU law.

In terms of enforcement in the UK, following the end of any transition period (if one is agreed), the CMA will become the primary enforcement agency in the UK. The European Commission will no longer have a direct role. This will be the case not only for competition law enforcement, but also for the State aid (anti-subsidy) rules.

### What should businesses be doing now to prepare for Brexit?

– If you are subject to any on-going investigations or enquiries at EU level, find out how these will be managed if they continue post-Brexit.

– If you are a recipient of State aid (such as government grant funding), verify what the position is for post-Brexit auditing and/or clawback.

– Continue to prioritise competition law compliance within your business – the CMA has indicated that it will be launching more enforcement action and investigations in the UK post-Brexit.

# Dates for the diary

### 3 December 2018

The Geo-blocking Regulation comes into force.

# Consumer Finance

04

**Nikki Worden**
Partner
T: +44 20 7105 7290
E: nikki.worden@osborneclarke.com

## Current issues

### FCA high-cost credit review:

The FCA has published two consultation papers following its review into the potential for consumer harm in the high-cost short term credit market.

In **CP18/12**, the FCA has proposed new rules and guidance aimed at the rent-to-own, home-collected credit, catalogue credit and store cards sectors, seeking to increase customer transparency and fairness in relation to the way these products operate. The FCA also explains its plans for further work assessing potential rules to introduce a price cap on rent-to-own goods, and the level and structure of a possible cap.

**CP18/13** sets out prospective new rules to: improve the visibility and content of key information provided to customers; introduce tools to enable customers to calculate the cost of using an overdraft; and send consumers overdraft alerts to address unexpected overdraft use.

The FCA also sets out for discussion proposed measures to:

– simplify overdraft pricing structures;

– provide for a potential backstop price cap for overdraft charges;

– provide guidance around exactly which costs firms should consider when ensuring refused payment fees reasonably reflect the actual costs; and

– address the repeat use of overdrafts by customers.

### Fairness of variation terms in financial services consumer contracts:

The FCA is consulting on new **guidance** outlining the factors financial services firms should consider under the Consumer Rights Act 2015 when drafting and reviewing variation terms in their consumer contracts.

The draft guidance outlines a number of factors firms should consider in order to achieve transparency and fairness when drafting and reviewing variation terms, including:

– the scope and effect of the variation clause and whether the reason for varying the term is based on a valid reason;

– the transparency of the variation clause;

– provision for notice in the variation term to enable the consumer to reflect on the change and take appropriate action; and

– the ability for the consumer to terminate the agreement if they do not wish to accept the variation.

The FCA plans to publish feedback on the guidance in December 2018. Once the guidance is finalised, it should be read in conjunction with the material on unfair terms available on the FCA's website, together with the Competition and Markets Authority's **unfair contract terms guidance**.

### Senior Manager and Certification Regime:

The senior managers and certification regime (SMCR), which came into force for deposit-taking firms in March 2016 and is due to come into force for dual-regulated insurers from 10 December 2018, will be extended to all firms that are solo-regulated by the FCA, from mid-to-late 2019.

The SMCR will replace the current approved persons regime, with the aim of reducing harm to consumers by increasing individual accountability for those in senior management positions. Those acting as senior managers will be required to be approved by the FCA before they start their role and have a statement of responsibilities. This will need to be provided to the FCA. Senior managers will also have a 'duty of responsibility', which means that, where something goes wrong, they will need to demonstrate to the FCA that they took reasonable steps to prevent harm from occurring.

The certification regime will apply to employees who are not in senior management roles, but whose position means they could cause harm to customers, the firm and/or market integrity. Firms will be required to 'certify' that these individuals have the relevant competency to fulfil their roles at least once a year.

The FCA is also proposing to introduce new conduct rules, which will apply to most employees who work in the financial services sector

### FCA Policy Statement on creditworthiness and affordability:

During 2017, the FCA consulted on new rules relating to assessing creditworthiness and affordability.

However, the industry raised concerns that the proposed rules went further than improving transparency, and that they sought to significantly change the existing regime. For example, under the proposed rules, firms would not be able to take household income into account, which could lead to some customers experiencing financial exclusion.

Following industry feedback, the FCA has indicated that it will publish a Policy Statement in summer 2018, setting out its new rules on assessing creditworthiness in consumer credit.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

The consumer finance industry as a whole has experienced a great deal of change over the last 10 years, particularly as a result of the implementation of new EU legislation. This includes the Consumer Credit Directive (CCD) in 2011, the Consumer Rights Directive, which was implemented over a number of years between 2013 and 2015, the Mortgage Credit Directive (MCD) in 2016 and, most recently, the second Payment Services Directive from 13 January 2018.

When it comes to lending to consumers, we now have equivalent regimes across the EU Member States in terms of the requirement to provide consumers with certain information before entering into a loan agreement or mortgage.

As a result, we are not currently envisaging any new EU legislation being implemented before the end of the proposed transition period that specifically impacts the consumer finance industry.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

No. The FCA will continue to regulate firms that provide loans and mortgages to individuals for non-business purposes post-Brexit.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

As we say above, the regulatory regimes for consumer credit and mortgage lending have been harmonised across the EU, with all member states being required to implement the CCD and MCD, as maximum harmonisation directives, into their own jurisdiction.

At present, there is no existing regime for recognising other countries' regulatory regimes.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?:

We do not anticipate the UK government making any material changes to the existing consumer credit or regulated mortgage regime immediately following Brexit, given the number of recent changes to legislation in this area.

However, given that a great deal of existing UK consumer finance law is based on the implementation of EU Directives such as the CCD and MCD, Brexit presents the opportunity for the industry to lobby the government and the FCA with its suggestions for simplifying the current consumer credit and mortgages regime in certain areas.

The government is more likely to be receptive to moving away from a single market approach in these areas, given that, ordinarily, borrowers look to obtain a loan or a mortgage in their home country, rather than shopping around abroad.

We anticipate that the FCA is likely to take a 'wait and see' approach in relation to suggesting any changes to the existing rules and legislation in view of Brexit, to avoid requiring firms to make multiple changes to their systems, processes and documentation which could not only be costly but create confusion for borrowers.

### What should businesses be doing now to prepare for Brexit?:

From a UK law perspective, firms that are established in the UK and who only lend to UK-based customers, will not need to take any specific action to prepare for Brexit.

However, firms that currently rely on passporting rights under the Banking Consolidation Directive or the MCD to offer consumer finance from another Member State into the UK, or vice versa; will need to consider whether they wish to continue to provide these products in the relevant jurisdiction(s) post-Brexit.

If so, and in the absence of any agreement being reached between the UK and the EU in relation to an equivalence regime, firms will need to decide whether they should set up a branch or a subsidiary in the relevant jurisdiction, and what that might involve in terms of obtaining necessary regulatory permissions or licenses.

# Dates for the diary

### 15 August 2018

Providers of personal current accounts and business current accounts will be required to start publishing standard information on service availability, helplines and numbers of operational and security incidents that will help customers compare the service they could receive from different providers. They will also have to publish a link to complaints data.

### 1 September 2018

Firms will be required to comply with the new requirements in CONC 6.7 in relation to a credit card customer who is in persistent debt.

### 1 October 2018

The new rules and guidance on staff remuneration and incentives in consumer credit come into effect.

### 15 February 2019

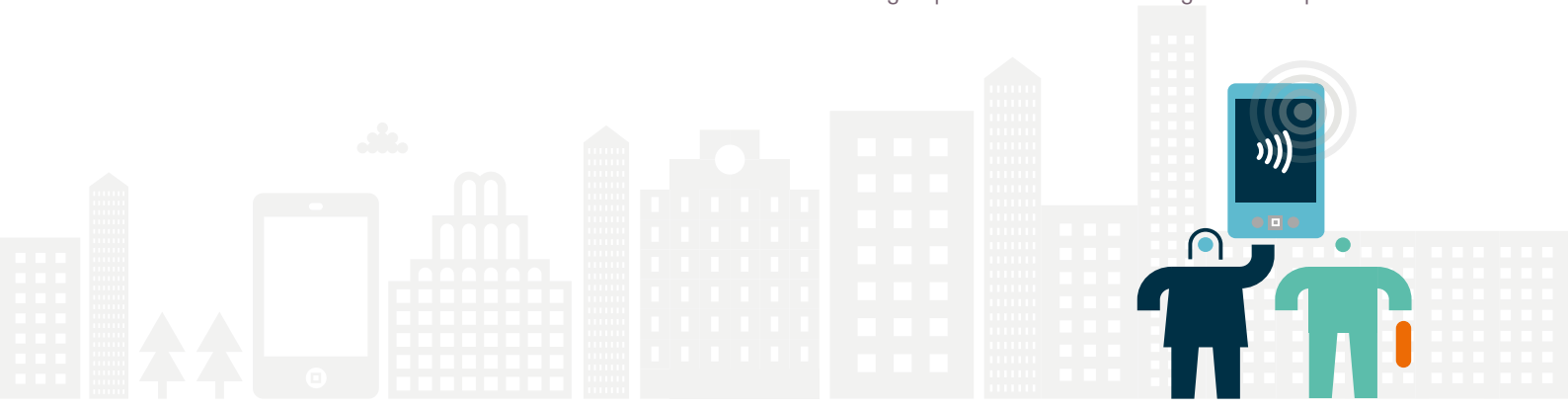
Firms will be required to start publishing account opening and debit card replacement metrics.

### 1 April 2019

The FCA is required to report to Treasury on the retained provisions of the Consumer Credit Act 1974, with its recommendations as to whether the current requirements should be repealed either in whole or in part, or transposed into rules and guidance in CONC.

### 1 April 2019

The FCA takes over the regulation of claims management companies from the Ministry of Justice. The Financial Ombudsman Service will also become responsible for resolving disputes about claims management companies.



# Consumer Protection

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**Tom Harding**
Partner
T: +44 11 7917 3060
E: tom.harding@osborneclarke.com

**John Davidson-Kelly**
Partner
T: +44 20 7105 7024
E: john.davidson-kelly@osborneclarke.com


## Current issues

### Geo-blocking Regulation:

After considerable negotiation and consultation, the Geo-blocking Regulation has been **passed** and will stop most companies from preventing access to national versions of their websites within the EU.

The Regulation takes effect from 3 December 2018 and addresses 'unjustified' geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment.

Underlying all the requirements of the Regulation is the principle of non-discrimination; meaning that, where a customer wishes to access and buy services from a national website, they should be treated in the same way as customers physically based in that Member State.

### New Deal for Consumers: substantial reforms to consumer law, including GDPR level fines:

Following a major evaluation of the EU consumer law directives, the EU **announced** its long-awaited 'New Deal for Consumers', which proposed the following key changes:

– GDPR-level fines of at least 4% of turnover in the Member State(s) concerned;

– measures to enable group actions for breaches of consumer law;

– new consumer rights for contracts for free digital services;

– harmonized remedies for unfair commercial practices;

– rules for dual quality products;

– more transparency for consumers in online marketplaces; and

– the deletion of certain consumer rights.

The Commission is looking for these legislative proposals to be put in place by May 2019, though there is likely to be an implementation period that extends for some time after that.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

The Geo-blocking Regulation takes effect from 3 December 2018.

The EU's 'New Deal for Consumers' proposals would require a new Directive and amendments to a number of existing Directives. The Commission is looking for these legislative proposals to be put in place by May 2019. However, even if that timetable can be achieved, there is likely to be an implementation period for the legislation that goes beyond the end of the transition period. If so, these significant changes in consumer protection would not automatically apply to UK businesses in relation to consumers that are based in the UK.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

No. The Competition and Markets Authority will continue to have the main regulatory responsibility for consumer law.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

No.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

It is hard to say. Although not solely focused on consumer law, Prime Minister Theresa May did call out 'digital' in particular during her Mansion House speech in March 2018 referencing that it *'is a fast evolving, innovative sector…so it will be particularly important to have domestic flexibility, to ensure the regulatory environment can always respond nimbly and ambitiously to new developments.'* However, whether this potential divergence will play out in reality is unknown, as is any related impact on 'non-digital' consumer law.

### What should businesses be doing now to prepare for Brexit?

Where businesses are supplying goods, services or digital content to consumers in the EU, these arrangements will still be caught by much of the EU's consumer protection legislation. UK businesses that deal with EU consumers will therefore still need to ensure that they comply with relevant new EU consumer protection law.

For businesses supplying UK consumers, without knowing what, if any, differences are going to arise between UK and EU27 consumer laws, at the moment they should proceed as normal.

It will be particularly interesting to see what stance the UK takes on the New Deal for Consumers, which may be indicative of the future direction of travel for consumer law in the UK. Will the UK seek to implement the new rules regardless of the fact that the Directive will not be automatically binding in the UK? Or will the UK decide that this is the point in time that the regimes will diverge?

# Dates for the diary

### 3 December 2018

Geo-blocking Regulation takes effect.

### End May 2019

Target date for implementing legislation for the 'New Deal for Consumers' to be put in place.

# Cyber Security

06


**Charlie Wedin**
Partner
T: +44 11 7917 4290
E: charlie.wedin@osborneclarke.com



**Ashley Hurst**
Partner
T: +44 20 7105 7302
E: ashley.hurst@osborneclarke.com


## Current issues

### Effect of GDPR on ICO approach to cyber security:

The GDPR, which came into effect on 25 May 2018, is the most important change to the regulation of cyber security for some time.

The practical effects of GDPR on the UK regulatory enforcement landscape remain uncertain. The Information Commissioner's Office (ICO), the UK's data protection regulatory authority, has yet to publish details of any enforcement action taken under the new regime.

However, the GDPR has led to a sharp increase in issues notified to the ICO. The ICO recently confirmed that it had received 1,106 data protection complaints or concerns for the period from 25 May 2018 to 18 June 2018.

### NIS Directive:

The Networks and Information Systems (NIS) Directive, which applies to operators of essential services and relevant digital service providers, was implemented into UK law on 10 May 2018 (through the NIS Regulations).

For organisations affected by the NIS Regulations, compliance should be carefully analysed – not least because there is the potential for 'double jeopardy' as between the fines that can be levied under the NIS Regulations and under the GDPR.

### Proposals for EU Cybersecurity Act:

In September 2017, the European Commission **published** a legislative proposal for a Cybersecurity Act. The consultation period for the proposals finished in December 2017 and it is likely that the proposals will be analysed by MEPs later this year.

Under the current proposals, the Cybersecurity Act would make two significant changes to the current landscape.

First, it would introduce an EU cybersecurity certification framework, in an effort to harmonise the numerous different security certification schemes in existence in the EU.

Second, it would increase significantly the scope and powers of European Union Agency for Network and Information Security (ENISA). Among other things, ENISA would be given a permanent mandate to assist Member States in responding to cyber-attacks (as well as responsibility for putting in place and implementing the proposed certification framework).

# In Focus: Brexit

## Is any new EU legislation expected to come into force and effect before the end of the transition period?

Certain key EU legislation has already come into force and effect, namely:

– the GDPR, which came into force on 25 May 2018 and has been supplemented in the UK through the Data Protection Act 2018; and

– the NIS Directive, which applies to operators of essential services and competent authorities and which was implemented in the UK through the NIS Regulations 2018 on 10 May 2018.

The E-Privacy Regulations, which replace the Privacy and Electronic Communications Regulations (PECR), have not yet come into force and effect. However, it is anticipated that the Regulations will be passed in late 2018 or early 2019, with a one year implementation period. On that basis, it is possible that the E-Privacy Regulations will come into force and effect during the transition period.

As we say above, the European Commission has also proposed a new 'Cybersecurity Act', along with legislation that would increase the scope and powers of ENISA. It is unlikely that these proposals will come into force and effect before the end of the transition period.

## Is a new regulator needed, or do additional powers to be given to an existing regulator?

No new regulators will be required.

Under the GDPR (and the Data Protection Act 2018) and PECR, the ICO is the relevant regulator.

The NIS Regulations 2018 establish a number of 'Competent Authorities' that have regulatory responsibilities for each relevant sector. The National Cyber Security Centre will be the 'Single Point of Contact', which is not a regulatory role but which will entail acting as the contact point for engagement with EU partners.

## Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

There is no such regime for cyber security, but there is an existing 'recognition' regime in relation to data privacy issues.

The European Commission can issue an 'adequacy decision' in relation to a third country's data protection regime. To date, the European Commission has issued 'adequacy decisions' to 12 countries.

The UK is seeking a bespoke arrangement with the EU that goes beyond the adequacy regime, but so far the EU has resisted anything other than the existing mechanism.

## Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

The government intends to preserve the GDPR, and has already made provision for doing so by bringing into force and effect the Data Protection Act 2018.

Whilst the NIS Directive has been implemented into law, some aspects of the NIS Regulations require cross-EU cooperation (such as the participation in a Computer Security Incident Response Team network), which will depend on any future deal between the UK and EU.

## What should businesses be doing now?

– Ensure compliance with all current EU legislation that is in effect and in force and understand the effect and implications of the E-Privacy Regulations once these come into force and effect.

– Monitor the proposals for the EU's Cybersecurity Act, to ensure you understand how any legislation might affect you (bear in mind that EU legislation in this space may continue to be relevant, whether or not the UK implements that legislation post-Brexit).

– If your business processes data in relation to EU citizens but does not have an establishment elsewhere in the EU, consider how you would comply with your GDPR notification responsibilities in the event of a data breach.

# Dates for the diary

## 11 September 2018

Proposals for a draft Cybersecurity Act are currently being analysed by various EU committees. It is anticipated that there will be an analysis of the proposals by MEPs on 11 September 2018

## H1 2019

The current draft E-Privacy Regulations are currently awaiting EU Parliamentary reading. It is expected that the E-Privacy Regulations will be approved by the first half of 2019.

# Data Protection

07

**Mark Taylor**
Partner
T: +44 20 7105 7640
E: mark.taylor@osborneclarke.com

## Current issues

### EU-UK data transfers post-Brexit:

The UK and the EU have not yet reached agreement on an arrangement that would preserve cross-border data flows post-Brexit. The EU's chief negotiator, Michel Barnier, has previously **rejected** a proposal put forward by the UK.

The **proposed arrangement** sought to continue the uninterrupted and secure EU-UK personal data flows, which the UK argued was 'vital for all partners', including having the Information Commissioner's Office remain on the European Data Protection Board ('EDPB', formerly the Article 29 Working Party).

Mr Barnier emphasised that the only option for the UK would be an adequacy decision, which could be a lengthy process and not without challenges. This would mean standard contractual clauses may be needed for the immediate future post-Brexit (from 1 January 2021, assuming the draft agreement on the proposed transition period is ratified) to legitimise EU-UK personal data transfers.

### Revised E-Privacy Regulation:

The EDPB has supported the swift adoption of the E-Privacy Regulation, which will replace the existing E-Privacy Directive and will govern processing of personal data by electronic communications services (including email and sms marketing, telemarketing and cookies/tracking technologies).

Critically, the EDPB confirmed that GDPR-grade consent needs to be obtained before processing electronic communications data or before using the storage or processing capabilities of a user's terminal equipment. Organisations will not be able to rely on broad 'legitimate interests' that go beyond what is necessary to provide the electronic communications service. This will apply to cookies and similar tracking technologies.

If enacted in its current form, this will have a significant impact on all website operators, particularly those that conduct online behavioural advertising, which relies heavily on the use of cookies to target individuals. Website operators will need to obtain GDPR-grade consent, which can be obtained through privacy settings on a website browser or app privacy settings.

### New fees regime for funding the Information Commissioner's Office:

The UK's Data Protection (Charges and Information) Regulations 2018 **came into force** on 25 May 2018 and introduced the requirement (subject to limited exemptions) for data controllers to pay a data protection fee to the ICO, which is tiered depending on turnover and number of staff and ranges from £40 to £2,900.

The Regulations apply to organisations that are based in the UK, but also those who are not based in the UK but process personal data relating to data subjects who are in the UK when the processing takes place, where the processing relates to either: (a) the offering of goods or services to data subjects in the UK; or (b) the monitoring of data subjects' behaviour in the UK.

Organisations that hold a valid ICO registration prior to 25 May 2018 do not need to do anything until their current registration expires, but where an organisation's registration has lapsed, or an organisation has become a data controller after 25 May, they should complete the ICO's self-assessment tool to confirm which fee applies to them. Failure to pay the fee could result in a fine from the ICO.

### CJEU broadens the concept of data controllership:

The recent ruling by the Court of Justice of the EU in **Case C-210/16 Wirtschaftsakademie** found that Wirtschaftsakademie (a company offering educational services) was a joint controller alongside Facebook in respect of personal data processed about visitors to its Facebook fan page.

Despite the fact that Wirtschaftsakademie did not have access to the data processed, other than in anonymised form for statistical purposes, the fact that it helped set the 'parameters' by which the personal data was processed was enough to have influence over Facebook's processing and therefore made it a data controller.

The judgment means that an organisation can be a joint controller without even having access to the personal data, if it establishes the purposes of the processing and facilitates the means of the processing. This interpretation significantly broadens the concept of data controllership, and could have far reaching consequences on how organisations engage with platform services, moving from a controller-to-processor basis to a controller-to-controller basis.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

The E-Privacy Regulation, which is currently in draft form, is expected to be in final form and published in the Official Journal by end of 2018 or the first half of 2019. The current draft has a one year implementation period, meaning that it would apply in the UK provided it is passed before the end of 2019.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

No. The ICO will continue to be the UK data protection supervisory authority post-Brexit. However, the relationship between the ICO and other EU supervisory authorities and the EDPB is currently unclear. We expect more clarity as all parties get to grips with the GDPR and their new roles.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

The EU data protection regime includes a mechanism by which the European Commission can recognise a third country's regulatory regime as being 'adequate', which allows personal data to be transferred from the EU to that country.

The UK is seeking a bespoke arrangement on data transfers. However, the current position – per the statement issued by Michel Barnier (discussed above), is that the UK must apply for an adequacy decision post-Brexit. If/until adequacy is granted (or a bespoke agreement is concluded), standard contractual clauses will be needed to legitimise any transfers of personal data outside of and into the UK.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

This is unlikely, given that the UK is looking for an arrangement (or, failing that, an adequacy decision) that recognises the UK's regulatory regime as affording broadly similar protection for personal data. However, this could potentially change depending on the outcome of the UK's adequacy application post-Brexit.

### What should businesses be doing now to prepare for Brexit?

- Update agreements to ensure that the data protection provisions allow for the transfer and processing of personal data to the UK as a matter of contract (typical data protection clauses will impose restrictions on the transfer of data outside the EEA).
- Continue with GDPR projects through to completion, as an organisation which is compliant pre-Brexit is likely to be compliant post-Brexit.
- Continue to monitor the position concerning EU-UK data transfers post-Brexit and consider updating agreements to include standard contractual clauses to legitimise data transfers (as a matter of regulatory law) until such time that the UK is granted adequacy.

# Dates for the diary

## H1 2019

The e-Privacy Regulation, which will replace the existing ePrivacy Directive and will govern the processing of personal data in connection with electronic communications services (including email and sms marketing, telemarketing and cookies/tracking technologies) is expected to be passed into EU law.

# Digital Media and Entertainement

08


John Davidson-Kelly
Partner
T: +44 20 7105 7024
E: john.davidson-kelly@osborneclarke.com


## Current issues

### Portability of digital content services:

The **EU Portability Regulation** requires providers of paid for (and in some cases, free) online content services, including online TV, videogames and music services, to allow subscribers to access their service whilst temporarily in another EU Member State.

The Regulation came into force on 1 April 2018.

However, the Regulation relies on the principle of 'reciprocity', so upon Brexit the UK will fall outside its scope, meaning that EU subscribers may not be able to watch their services in the UK and UK subscribers will not be able to view their services in the EU.

### Proposed reform to Audiovisual Media Services Directive:

The **proposed changes** (amongst other things) extend the scope of broadcast law to online video services.

On 13 June 2018, EU ambassadors confirmed that an agreement had been reached on the final text. The Directive will be put to a full vote by the European Parliament.

The new Directive will come into force 20 days after publication into the Official Journal of the EU and Member States will then have 21 months to transpose it into national legislation. This means it could potentially come into force in March 2020 (before the end of the Brexit transition period, if that is agreed).

### Digital Content Directive:

The **Digital Content Directive** will imply specific rights and remedies into consumer contracts for digital content for the first time, even where there is no payment for the content.

The Directive is still being discussed in negotiations between the European Commission, Parliament and Council. Whether the Directive comes into force in the UK will depend on when negotiations conclude and the length of any implementation period.

### Platform to Business Regulations

On the 26 April 2018, the Commission published a draft regulation intended to set new standards on transparency and fairness for businesses that contract with online intermediaries.

The **P2B Regulations** mark the first piece of horizontal 'platform specific' legislation by the European Commission.

The P2B Regulations are aimed at creating a fair and predictable environment for businesses that use big online platforms, although in practice the Regulations go beyond this and impose some potentially very onerous obligations on platforms.

# In Focus: Brexit

## Is any new EU legislation expected to come into force and effect before the end of the transition period?

The new Audiovisual Media Services Directive will come into force 20 days after publication into the Official Journal of the EU and Member States will then have 21 months to transpose it into national legislation. This means it could potentially come into force in March 2020.

As a result the AVMSD may become law in the UK during the transition period, and therefore be retained afterwards.

The Platform to Business Regulations have been published in draft by the European Commission and now need to be agreed with the European Parliament and Council. Given that the current draft has an implementation period of just six months, these Regulations are likely to be in force and effect by the end of the transition period.

## Is a new regulator needed, or do additional powers to be given to an existing regulator?

No.

## Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

The AVMSD relies on the 'country of origin principle', meaning that broadcasters only need to be licensed in one territory, and comply with that territory's set of rules, in order to broadcast across the entire EU.

However, on Brexit the country of origin principle will cease to apply to the UK, which is problematic because a large number of international broadcasters have chosen to base themselves in the UK and broadcast across the EU. There is no such EU regime for recognising licenses granted by third countries.

Therefore unless agreement is reached with the EU, these international broadcasters will need to relocate their broadcasting operations elsewhere in the EU and obtain a licence there. They may also need to retain their licence in the UK if they are broadcasting to UK audiences.

## Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

The UK will have scope to make changes to broadcast regulations post-Brexit, which could potentially be more favourable to those broadcasting within the UK. However, to the extent that lighter regulation could be aimed at making the UK more attractive for overseas businesses, this will be greatly outweighed by the country of origin principle ceasing to apply to the UK.

## What should businesses be doing now to prepare for Brexit?

- Understand whether you are licensed in the UK and broadcast into the EU.
- If so, identify the territories which would provide the most favourable regulatory regime for your service(s).
- Plan to relocate your broadcasting operations if needed, which could take potentially between 6-9 months. To deliver certainty to their operations, broadcasters need their relocation plans greenlit by the end of summer 2018 to provide for a move before 29 March 2019, if that is needed. The alternative is to assume that there will be a transition period and work to a relocation date at the end of 2020 but this does not deliver certainty until the transition period is agreed.

# Environment

09


**Matthew Germain**
Partner
T: +44 11 7917 3662
E: matthew.germain@osborneclarke.com


## Current issues

### Brexit consultation on new Environmental Principles and Governance Bill:

On 10 May 2018, the UK government **launched** its consultation on the development of the Environmental Principles and Governance Bill. The consultation addresses key issues and questions around how environmental principles should be embedded into law, public policy-making and delivery, particularly following the UK's departure from the EU. The consultation also considers what functions and powers the new independent environmental watchdog should have. The 'green watchdog' is intended to:

- provide independent scrutiny on existing/future environmental law and policy;
- respond to complaints about the government's delivery of environmental law; and
- hold the government accountable for the delivery of environmental law by exercising enforcement powers where necessary.

The consultation closes on 2 August 2018.

### New Clean Air Strategy:

On 22 May 2018, the government **published** a new **Clean Air Strategy**, which aims to cut air pollution through primary legislation as part of its 25 Year Environment Plan. The announcement came just five days after the UK government was referred to the Court of Justice of the European Union for its continued failure to tackle illegal levels of air pollution and five days after the EU Commission published a draft regulation aimed at controlling carbon dioxide emissions for new heavy-duty vehicles.

### WEEE Directive: open scope:

The Waste Electrical and Electronic Equipment Directive sets collection, recycling and recovery targets for electrical goods. From 15 August 2018, the EU's 'open scope' or 'catch all' approach will take effect, such that all EEE will be classed within the scope of the Directive unless an exemption applies.

WEEE is equipment that is dependent on electric currents or electromagnetic fields in order to function – as well as equipment for the generation, transfer and measurement of such currents and fields – which is designed for use with a voltage rating not exceeding 1,000 volts AC or 1,5000 volts DC.

### Mayor of London announces Ultra Low Emission Zones:

On 8 June 2018, the Mayor of London **announced** that from 25 October 2021, the Ultra Low Emission Zone (ULEZ) for light vehicles in London will be extended to include the North and South Circular roads. In addition, from 2020, heavy vehicles (including buses, coaches and HGVs) will be required to meet tighter emission standards in the Low Emission Zone.

As currently planned, the ULEZ will require vehicles entering the Congestion Charging Zone to meet certain emission standards. Failure to do so will result in a penalty charge. The ULEZ will be introduced in central London on 8 April 2019 following a consultation by Transport for London in November 2017.

### Changes to Renewables Obligation:

The Renewables Obligation (Amendment) Order 2018, which was laid before Parliament on 4 June 2018, will amend the Renewables Obligation in England and Wales to:

– control the costs of RO support for biomass conversion and co-firing former fossil fuel generation stations;

– require a declaration to be provided by certain stations when claiming support for combined head and power generation; and

– clarify the greenhouse gas emission trajectories with which certain CHP stations must comply.

The Order follows a consultation in September 2017 and the government response in January 2018.

### Combatting waste crime

On 8 March 2018, the Waste Enforcement (England and Wales) Regulations 2018 came into force. The Regulations aim to strengthen the powers of environmental regulators to address waste crime in England and Wales. Such powers include the ability to:

– remove from a property waste which is being illegally stored, kept or disposed of;

– take steps to eliminate or reduce consequences of unlawful keeping or disposal of waste; and

– prohibit access to and the importation of waste into a site for up to 72 hours (by serving a restriction notice) or 6 months (where the court issues a restriction order) if there is a risk of serious pollution to the environment or harm to human health.

Non-compliance with the Regulations is a criminal offence.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

The European Commission published a draft regulation on carbon dioxide (CO2) emissions for heavy duty vehicles on 17 May 2018. This will impose CO2 emission standards for new heavy-duty vehicles for the first time, with reduction targets set for 2025 and 2030. It is not clear when the proposed Regulation will be finalised and come into effect. The reduction targets are set for after the transition period and may be less relevant to the UK as a result.

The European Commission, Parliament and Council reached a political agreement to set a binding renewable energy target for the EU for 2030 of 32%, with a clause for an upwards revision by 2023. This is in conjunction with the Commission's proposal for a revised Renewable Energy Directive which will replace the Renewable Energy Directive 2009 (Directive 2009/28/EC). It is not clear when this will come into force.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

The European Union (Withdrawal) Act 2018 contains a provision (section 16) to secure environmental protections after Brexit and introduce an environmental watchdog.

The provision gives DEFRA until 26 December 2018 to publish an Environmental Principles and Governance Bill. This will include a set of environmental principles, a policy statement, and provisions to establish an independent environmental watchdog with legal enforcement powers to keep the government in check.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

There is no EU equivalence or recognition regime for environmental law.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

There is speculation amongst some that existing EU legislation transposed into UK domestic law will not be properly updated or subject to proper governance once the UK leaves the EU. In particular, in areas where the UK has struggled to meet certain EU environmental standards, such as air quality, nature protection and treatment of urban waste water, there is a concern that the government may use Brexit as an opportunity to lower these standards.

However, some environmental regimes originated in the UK and it seems likely that the UK will keep the substance of these regimes, such as the regulation of emissions from industrial installations. The current UK government has also committed itself to a 25 Year Environment Plan which sets out detailed targets by which the government will monitor progress towards a better environment, with an emphasis on delivering a 'green Brexit.'

Additionally, the EU and the UK are both signatories to areas of law governed by international treaties, which means the UK will remain subject to these international regimes, even it if is no longer bound by EU law (for example, transfrontier shipment of waste and use of HFC refrigerant gas).

### What should businesses be doing now to prepare for Brexit?

- Review your compliance strategies to ensure that even if EU environmental standards are lowered in the UK, you continue to comply with certain standards for Europe-bound substances and products.
- If you are entering into contracts which have the potential to be affected by Brexit (that is, contracts that will continue after the transition period ends) you should evaluate the impact of Brexit on those contracts and consider adding provisions that expressly provide for situations in which your ability to perform the contract is affected by Brexit. This exercise should include an evaluation of the impact Brexit might have on your supply chains. Utility businesses in particular should keep track of the key EU environmental law which materially impacts their long-term strategy in the UK, including Emission Trading, Environmental Permitting, and Greenhouse Gas Emissions targets to ensure their business plans account for any significant changes going forward.

# Dates for the diary

### 15 August 2018

The EU's 'open scope' or 'catch all' approach takes effect such that all EEE will be classed within the scope of the Directive unless an exemption applies.

### 1 January 2019

The Kigali amendment to the Montreal Protocol (which brings the future production and consumption of hydrofluorocarbons (HFCs) under the control of the protocol) enters into force.

### April 2019

The main rates of climate change levy increase from April 2019 to recover revenue lost from abolishing the Carbon Reduction Commitment Energy Efficiency Scheme (CRC Scheme).

### October 2019

As part of the 2016 Budget, the government confirmed that it will abolish the CRC Scheme from the end of the 2018-2019 compliance year, with businesses required to surrender allowances for the final time in October 2019.

### 1 April 2023

After 1 April 2023, under the MEES Regulations, landlords must not continue to let any buildings which have an EPC rating of less than 'E', unless an exemption applies.

# Employment and contingent workforce

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**Julian Hemming**
Partner
T: +44 11 7917 3582
E: julian.hemming@osborneclarke.com

**Kevin Barrow**
Partner
T: +44 20 7105 7030
E: kevin.barrow@osborneclarke.com


## Current issues

### Gender pay:

The next gender pay reporting deadline falls on 4 April 2019. Gender pay reporting requirements require employers with 250 or more employees to publish prescribed gender pay gap data on 4 April each year based on a snapshot taken on 5 April in the preceding year.

Whilst employers may now have their process in place following on from reporting this year, employers must ensure that they are now following up on any initiatives; it will be easy to make a direct comparison between this year's and next year's report to see what progress has been made against diversity commitments.

### CEO pay ratios:

The UK government has **published** draft legislation, expected to come into force in January 2019 (applying to company annual reports from January 2020), which includes:

– a requirement for a listed company which has 250+ employees to publish the pay ratio between its chief executive and its 25th, 50th (median) and 75th percentile UK employee; and

– a new disclosure obligation on all companies with 250+ employees to report in their annual report on the action that has been taken to engage with employees.

### Government response to Taylor review:

In February 2018, the government **published** its response to the Taylor Review into modern working practices. As part of its response it issued four consultations, on:

– **employment status;**

– **increasing transparency in the labour market;**

– **agency workers; and**

– **enforcement of employment rights.**

These have now all closed and we await the outcome and any legislative proposals resulting. Holiday pay remains a thorny issue for employers and the consultation looks at proposals to provide a 12 month reference period for calculating holiday pay.

Legislative changes anticipated, or in the pipeline, specifically affecting the use of contingent workers include:

– new rights for agency workers and gig workers, including the right to request a permanent job after working a specific period at one end-user, a day one statement of rights and a detailed payslip setting out all deductions. Workers may also be given a right to be involved in consultations with all staff and a right to training; and

– joint and several liability for end-users for breaches by staffing companies/platforms of certain employment law obligations, such as holiday pay and national minimum wage rights.

### IR35 consultation:

HMRC has issued a consultation (closing 10 August 2018) looking at reforming IR35 rules in the private sector. This follows on from last year's reforms in the public sector.

The IR35 rules ensure that those working through a personal service company (a limited company of which the individual contract worker or consultant is the only shareholder) who would have been an employee if engaged directly, pay income tax and national insurance contributions as if they were employed. At present, if the courts decide the individual is really a worker/

employee of the end-user client, it is the personal service company (not the end-user) that is liable.

Subject to the outcome of the consultation, most commentators believe that will change in April 2019 and the UK staffing market will operate more akin to the German/US markets. Users of personal service companies will need to take more care regarding their employment status or face major liabilities.

### Increased risk of Employment Tribunal claims:

Since the abolition of Employment Tribunal fees just under a year ago, the number of single tribunal claims has steadily been rising. The latest tribunal statistics (published 14 June 2018) show single claims received at the Employment Tribunal following the abolition of fees have risen by 118% compared to the same period the previous year.

Businesses should note in particular the increase in employment status claims being brought by contingent workers, including temporary/contract workers and gig workers, following **recent case law** finding in favour of worker status. There is an increased likelihood that UK courts will find employment or worker status exists where a platform or end-user exercises control over a 'self-employed' worker by disciplining them or issuing financial penalties for a failure to attend.

### 'Regulation 80' determinations:

HMRC is likely to send thousands of tax claims (so-called 'Regulation 80 determinations') in March 2019 to users of contingent workers where those contingent workers avoid tax by:

– being paid via an offshore arrangement; or

– being paid via sole trade arrangements.

Users will often be unaware that this is how their contingent workers are paid due to supply chains being elongated and the fact that users do not always know what entities exist in the chain between them and the worker.

Users should carry out spot checks on how and where their contingent workers are paid. Indemnities in contracts are unlikely to cover the relevant liabilities because intermediaries who give such indemnities will rarely have the balance sheet strength to pay a large tax claim.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

No. We are not expecting any new EU legislation concerning or contingent workforce before the end of the transition period.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

No. Enforcement of employment and contingent workforce regulation is carried out at a national level (for example, by HMRC in relation to tax matters), so will not change following Brexit.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

No. There is no equivalence or recognition mechanism for employment law or the regulation of contingent workers.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

We do not anticipate material changes to regulation or enforcement impacting on employers or staffing companies/ platforms as a direct consequence of Brexit. The UK government seems likely to leave any EU-derived laws unchanged – at least in the short term. The Prime Minister has indicated that she does not have any intention of reducing worker's rights. Whilst we may see some changes to legislation as a result of the consultations coming out of the Taylor review into modern working practices, for example to the Agency Worker Regulations and the Working Time Regulations, these are not anticipated to be material.

In relation to immigration, there are current plans for how applications must be made post-Brexit that have been laid before parliament. These set out what applications can be made, when they can be made and who they will affect.

### What should businesses be doing now to prepare for Brexit?

– Identify how many EU workers you have in your workforce and make sure that you understand their rights and status. Watch out for exchange rate fluctuations where you are paying workers in a different currency to that which you are paid in. This has always been a risk area, but the risk of fluctuations is increasing.

– Understand what applications will need to be made by your EU workforce, when and how – there could be right-to-work implications after December 2020.

– Identify the potential for labour shortages and the impact of increased labour costs:

- make sure your business is able to look outside the UK and EU for skilled workers, for example, by obtaining a sponsor licence; and
- if you are using UK contractors and agency workers in roles across Europe, and vice versa, they may cease to have the right to work if they are not employed and you may need to consider employing them. This may add to the growing trend of staffing companies moving closer (for various reasons, including tax efficiency) towards an outsourcing/consultancy model in which an element of responsibility is taken for the output of the workers.

# Dates for the diary

### 10 August 2018

Consultation closes on IR35.

### 1 October 2018

Childcare voucher schemes close to new entrants.

### 1 January 2019

Regulations on executive pay reporting are introduced.

### 1 April 2019

National Minimum and National Living Wage 2019/20 rates apply.

### 4 April 2019

Deadline for employers of 250+ employees to publish a snapshot of their gender pay gap data taken on 5 April 2018.

### 6 April 2019

Employers liable to pay employer's national insurance contributions on termination payments above £30,000.

### 6 April 2019

Requirement for payslips to state hours worked where pay varies.

# Export Control and Sanctions

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**Alex Vakil**
Senior Associate
T: +44 20 7105 7542
E: alex.vakil@osborneclarke.com

**Jon Round**
Senior Associate
T: +44 11 7917 3400
E: jon.round@osborneclarke.com


## Current issues

### Sanctions and Anti-Money Laundering Act:

The Sanctions and Anti-Money Laundering Act received royal assent in May 2018 and represents the first substantive piece of sanctions-related legislation covering Brexit. With the UK leaving the EU, the EU sanctions regime will no longer apply to the UK, thus requiring the UK to create its own powers.

A key issue for the UK post-Brexit was how it would continue to play a central role in foreign and security policy, of which sanctions is a key tool. Whilst the UK previously had powers to implement its own sanctions regimes, such as under the Terrorist Asset Freezing Act 2010 (now repealed), they were seldom used. Instead the UK implemented secondary legislation in the form of statutory instruments that established the offence and set out the penalties for breaching EU sanctions regulations.

Businesses' sanctions compliance policies are unlikely to have to change significantly as a result of the Act coming into force. It seems likely that the UK will continue to be aligned with the EU sanctions regime going forward. However, by not being restricted to a single common foreign and security position, the UK may determine that stronger sanctions are required in some cases than would be the case under the EU regime. Businesses will therefore have to ensure that they comply with the potentially more stringent UK sanctions regime going forward.

### UK Export Control Unit: control list classification advisory service:

This service is for the assessment of goods and technology against the UK strategic control export control list. The service was temporarily suspended in 2014 for operational reasons. Its return will be good news for exporters that have recently had to attempt to self-classify their goods for export so as to ensure compliance with the UK export control legislation.

This service should be used by any business that is concerned that its goods are subject to export control restrictions.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

The Sanctions and Anti-Money Laundering Act received Royal Assent in May 2018 and creates a framework for the UK to implement its own sanctions regime. It is unlikely that further substantive legislation will be required before the end of the transition period.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

The position in respect of financial sanctions has not changed. The Office of Financial Sanctions Implementation was established on 1 April 2016 (pre-Brexit referendum). Part 8 of the Policing and Crime Act 2017 creates powers for HM Treasury to impose monetary penalties for breaches of financial sanctions. OFSI will apply these powers.

Export control will continue to fall under the remit of the Department for International Trade.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

No. Sanctions are set at the EU level and implemented by Member States. There is no mechanism for recognising Third Country regulatory regimes.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

It is likely that the UK will continue to implement EU sanctions legislation into UK law and work with the EU during the sanctions adoption process.

However, the new UK regime will give the UK the opportunity to create sanctions regimes that are broader than those regimes determined at the UN or EU level.

Enforcement of sanctions breaches has always been done on a Member State level, with each Member State being responsible for putting in place secondary legislation to create the offence of breaching EU sanctions. The enforcement regime, therefore, is unlikely to change post-Brexit.

### What should businesses be doing now to prepare for Brexit?

Continue to make sanctions compliance a priority. Although significant enforcement action for sanctions breaches has not taken place since OFSI was established, it is likely that the UK will take a robust approach sanctions compliance. You should therefore ensure that:

- you have a robust sanctions compliance policy in place;
- the policy is widely known in the business, with a stress-tested escalation structure that includes reporting any breach to the OFSI; and
- all staff members receive training so that they are able to spot red-flags and escalate the matter appropriately.

# Food Law

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**Katie Vickery**
Partner
T: +44 20 7105 7250
E: katie.vickery@osborneclarke.com

## Current issues

### Welsh Assembly: Minimum Unit Pricing for Alcohol Bill:

The Welsh Assembly has agreed the wording of the Minimum Unit Pricing for Alcohol Bill.

It is expected that a consultation on the minimum unit price will be opened towards the end of 2018, with new minimum unit pricing legislation coming into force in 2019.

We expect that this will add to the pressure on the government to adopt similar regulations in England.

### Food Standards Agency: acrylamide and furan survey:

The Food Standards Agency (FSA) conducted a study between January and December 2017 to look at levels of acrylamide and furan in an 'extensive range of UK retail foods'. This was part of an on-going response to the European Commission's recommendation to all Member States to investigate the levels of these chemicals in food and drink.

The FSA has **reported** that the levels found do not increase concern about the risk to human health and the FSA will not be changing its advice to consumers.

### EU Regulation on the reduction of the presence of acrylamide in food:

This EU Regulation came into force on 11 April 2018. Food business operators therefore need to be complying with it now.

The Regulation places an obligation on food business operators to ensure that the food they produce and place on the market has levels of acrylamide that are below the benchmark levels established by the Regulation, and are also as low as is reasonable achievable.

### Groceries Code Adjudicator: best practice for forecasting and promotions:

The Groceries Code Adjudicator (GCA) has issued a revised Statement for Forecasting and Promotions, following its review of retailers' compliance with its initial forecasting statement of best practice, which was issued in March 2016.

Whilst the GCA's results of the review concluded that the approaches of retailers 'appear to be compliant with the Code', suppliers have continued to report issues to the GCA. Consequently the GCA decided to update its initial statement and consider issues relating to promotions.

The GCA has requested that *'retailers consider what improvements they could make to the transparency of their communications with suppliers about forecasting, to allow suppliers to meet orders and to anticipate and calculate the full costs of supply'.* The GCA has suggested a number of ways in which this may be achieved in the revised statement.

### UK government childhood obesity plan:

The government has **published** chapter 2 of its childhood obesity plan.

Key points include the following:

– a possible extension of the Soft Drinks Levy to sugary milk drinks;

– a consultation on banning the sale of energy drinks to children;

– a consultation on mandating consistent calorie labelling in restaurants, cafes and takeaways in England; and

– banning the promotion of unhealthy food and drink by location in retail and the out-of-home sector – specifically at checkouts, the end of aisles and store entrances.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

Yes, in particular the controversial requirement to specify when the primary ingredient of a food differs from the stated (or implied) country of origin of the product. This comes into effect on 1 April 2020.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

Food regulation is governed by the Food Standards Agency (and equivalents in the devolved nations) and DEFRA; and enforced in the main by local authorities. Therefore no new regulator is needed post-Brexit. However, there will be an increase in workload for these regulators, so there will be a need to provide additional funding and recruit skilled staff.

If regulatory equivalence is not achieved, there will also be a need to increase the current resourcing at Border Inspection Posts. Currently, only non-EU food is checked to ensure that it meets hygiene, safety and labelling standards.

The UK regulators are, however, dependent on activities carried out by the European Food Safety Authority (EFSA) in terms of scientifically assessing the safety of food ingredients. None of the existing UK regulators carry out the functions of EFSA. Post-Brexit the UK can pay to have access to the EFSA services, which is the most likely outcome.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

Yes, in certain areas of food law (such as approved establishments that produce food of animal origin) there is recognition under the EU regime that certain Third Countries meet the standards required in respect of certain foods.

When the UK becomes a Third Country, we would hope its food regulatory regime is recognised as part of any agreement. If there is no agreement, there would be a period of time when UK businesses would need to go through more laborious processes in order to export into the EU. This would be significant given that 72% of UK food and drink exports (excluding alcoholic drinks) go to the EU.

Post-Brexit, the UK will also need to be satisfied that it can similarly recognise the regulatory regime of Third Countries. Currently, the EU makes this assessment on the UK's behalf. This is likely to be challenging, not least because there are not enough skilled personnel to carry out this task.

A further concern in the food sector is the so called 'hidden hard Brexit' around rules of origin. This has been explained in an excellent **report** by the FDF. In essence, assuming the UK and EU can agree a free trade agreement (which will hopefully avoid the imposition of tariffs on food and drink), for both sides to benefit from that arrangement, the goods will need to meet the rules of origin requirements. There is a risk that a food product that is made from raw materials that are imported from Third Countries may not be considered to have 'originated' from the UK and therefore would not benefit from the free trade arrangements when exported to the EU.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

The relationship between the UK and the rest of Europe in relation to food exports and imports should mean that no significant regulatory changes are made. 40% of the food

consumed in the UK is from the EU, and the EU is the UK's biggest export market. Having that degree of dependency provides a strong incentive to maintain regulatory alignment and trust in each other's systems and procedures. Food manufacturers are also going to be unwilling to engage in a situation where they are required to produce two varieties of the same product – one for the UK market and one for the EU. Therefore any attempts by the government to introduce material changes to regulation, and attempts to then enforce that legislation, would likely be strongly resisted.

However, in the longer term, it may well be possible for government policy to promote food innovation through changes in regulation but still ensure mutual recognition with the EU. There is also the prospect that free trade arrangements with other countries may require regulatory changes.

## What should businesses be doing now to prepare for Brexit?

Whatever the future Brexit deal, so many of the issues for food and drink businesses center around the supply chain. Focus your Brexit planning by conducting a full review of your supply chain and, in particular the following:

- **Sourcing**: where are you sourcing your raw materials or products from? Are there options to source from the UK? Are any of your products likely to be affected by rules of origin? Have you worked out the cost to your business in a worst case scenario (a 'hard Brexit' and WTO tariffs)?
- **Borders**: do you import or export raw materials or finished product across borders? If there are delays what are your contingency plans, particularly for fresh and chilled items?
- **Workers**: have you taken steps to reassure and assist your own workforce? If Brexit results in a skills shortage, are you able to get involved to support the development of more homegrown talent? Could automating part of your processes assist in addressing any skills shortages?

# Health and Safety

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**Mary Lawrence**
Partner
T: +44 11 7917 3512
E: mary.lawrence@osborneclarke.com

## Current issues

### Fire safety standards in high rise buildings:

Following the Grenfell Tower disaster, an Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt has was **published** in May 2018.

The report recommends a step-change in the regulatory framework for fire safety, including the creation of a new Joint Competent Authority (JCA), clarification of roles, responsibilities and accountability of duty holders and more 'teeth' for regulators.

The proposed changes will be significant for many businesses and are especially relevant to developers, investors and other building owners / landlords. The report focuses initially on High Rise Residential Buildings (10 storeys or more) and recommends that 'duty holders' (the framework of whic is likely to mirror that under the CDM Regulations) consult with the JCA at three separate 'gateway points' during the life-cycle of the project in order for the development to progress.

### Use of combustible cladding in high rise residential buildings:

The government has launched a **consultation** on banning the use of combustible cladding in high-rise residential buildings in England, which ends on 14 August 2018.

The consultation has been launched despite Dame Judith Hackitt's review (see above) not recommending a ban in these materials.

The government's preferred approach, as set out in the consultation, would be to amend the existing Building Regulations 2010 to ban the use of combustible cladding materials.

The government is also committed to clarifying 'Approved Document B', the guidance document that accompanies the regulations. These documents do not create a legal obligation, however, and it would be possible to avoid following them if the rationale for safety could be demonstrated in a different way (such as adherence to the objective in the Building Regulations).

### HSE priorities for 2018/19:

The Health and Safety Executive (HSE) has published its **business plan** for 2018/19, which sets out its work priorities for the coming year against a backdrop of a decrease in government funding from £142.6m in 2015/16 to £130.6m in 2018/19.

The HSE's priorities include: a focus on reducing levels of occupational lung disease, musculoskeletal disorders and work-related stress; enabling the proportionate management of health and safety in SME's; managing the regulatory framework as a consequence of Brexit; delivering 20,000 proactive inspections and a timely completion of investigations; and delivering targeted interventions on controlling risks from legionella, fairgrounds and major construction projects.

### Revision of workplace exposure limits for 31 chemical substances:

The HSE is proceeding with its proposals to introduce revised workplace exposure limits (WEL's) for 31 hazardous chemical substances, through changes to its guidance. These revised WEL's must be published by the HSE by 21 August 2018 in order for the UK government to comply with the implementation deadline of EU Council Directive 2017/164 concerning the protection of workers from risks related to chemical agents at work.

The HSE has pointed out that if businesses are currently compliant with the Control of Substances Hazardous to Health Regulations 2002, the additional costs associated with the revised WEL's should be minimal.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

EU Council Directive 2017/164 concerning the protection of workers from risks related to chemical agents at work is due to be implemented on 21 August 2018 (see above).

The European Commission still intends to amend the Workplace Directive (89/654/EC) to seek a more dynamic definition of the 'workplace' to reflect changes in modern working. However, no legislation has been proposed as yet.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

Health and safety in the UK is regulated by UK regulatory authorities, including the HSE and local authorities. The legislation and regulations are also UK regulations (albeit some of them implement EU directives). A new regulator will therefore not be needed.

The HSE has started to introduce technical regulations under the new European Union (Withdrawal) Act 2018 to ensure retained EU law still functions effectively on exit.

The HSE will continue to act as the 'competent authority' so far as the enforcement of the EU Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is concerned. However, it remains to be seen whether the UK will be granted associate membership of the European Chemicals Agency after exit.

There is important liaison and know-how sharing with European organisations, as well as global organisations such as the International Labor Organisation, and it is hoped that this will continue in some form post-Brexit.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

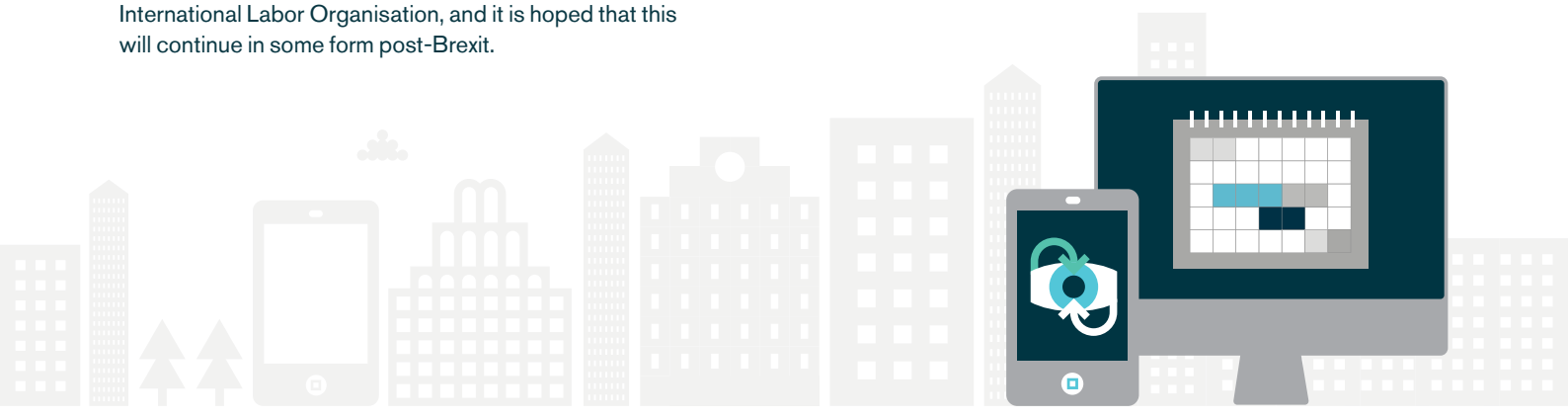
No. Health and safety regulatory regimes are operated at a national level, so there is no mechanism for recognising Third Country business operating in the UK needs to comply with UK legislation and regulations, irrespective of where the business is located.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

There is no indication at present that there will be any divergence between the UK health and safety regulatory regime and EU regulation post Brexit. However, there continues to be pressure by government to cut 'red tape' and therefore it could be that complex health and safety legislation that has derived from the EU may be looked at more closely in terms of its effectiveness.

### What should businesses be doing now to prepare for Brexit?

We do not expect Brexit to have any significant impact on the health and safety regulatory regime in the UK so there is no need to businesses to adopt any new practices as such.



# Dates for the diary

## September 2018

The Sentencing Council will publish its definitive guideline on the sentencing of manslaughter offences relating to individuals prosecuted of the offence, including gross negligence manslaughter in workplace accident scenarios. These are expected to come into force in December 2018.

## End of 2018

The HSE will publish guidance for businesses on the proportionate implementation of ISO 45001, the international standard on occupational health and safety management systems that was published on 12 March 2018. This will include guidance on the sensible use of accreditation schemes

## 31 March 2019

The HSE will publish revised guidance for employers by this date on the assessment and management of work-related mental ill-health.

# Payments

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**Paul Anning**
Partner
T: +44 20 7105 7446
E: paul.anning@osborneclarke.com



**Kate Johnson**
Partner
T: +44 20 7105 7230
E: kate.johnson@osborneclarke.com


## Current issues

### New requirements for secure communication among payment service providers:

The European Banking Authority's Regulatory Technical Standards (RTS) on common and secure communication (CSC) and strong customer authentication (SCA) were **published** in the Official Journal on 13 March 2018.

Regarding CSC, this means that:

- Account Servicing Payment Service Providers (ASPSPs) that operate payment accounts that are accessible online must have in place at least one access interface that meets the requirements in the RTS by 14 September 2019.
- These ASPSPs must also make the interface technical specifications available to appropriately authorised or registered TPPs and provide a testing facility for connection and functional testing for TPPs six months before the market launch of the interface – that is, by 14 March 2019.
- The interface must allow the TPP to identify itself towards the ASPSP, so the existing practice of TTP access without identification (sometimes referred to as 'screen scraping') will no longer be allowed in relation to online payment accounts from 14 September 2019.

### New requirements for strong customer authentication among PSPs:

The RTS on SCA referred to above means that from 14 September 2019 onwards, PSPs will be required to apply SCA when initiating or executing (acquiring in the context of card payments) electronic payment transactions within the EEA (subject to any applicable exemption).

The EBA has stated that the RTS on SCA apply only on a best-effort basis for cross-border transactions with one leg out of the EEA.

### 5th Anti-Money Laundering Directive: extending anti-money laundering legislation to cryptocurrency exchanges and custodian wallet providers:

Bringing virtual currency exchange platforms and custodian wallet providers under the scope of the 4th Anti-Money Laundering Directive as 'obliged entities' means they will be subject to the same obligations as other firms (such as banks and payment institutions) to implement preventive measures relating to customer due diligence, including 'know-your-customer' procedures, and report suspicious activity to domestic financial intelligence units.

Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the 5th Anti-Money Laundering Directive by 10 January 2020, however, it is possible that UK regulators will choose to implement the reforms sooner than that.

### New transparency requirements for PSPs:

From 31 October 2018, PSPs (including banks, electronic money issuers, UK authorised payment institutions, and UK small payment institutions, as well as EEA-authorised payment institutions operating in the UK on a cross-border services basis, or through a local branch) **will be required** to comply with key transparency requirements under the Payment Accounts Regulations 2015 where they offer a 'payment account' (as defined in the regulations).

They will be required to:.

– use the terms on the **final UK list** of most representative services linked to a payment account and subject to a fee; and

– provide consumers with a pre-contractual fee information document and an annual statement of fees.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

Certain of the RTS on SCA will come into effect before the end of the proposed transition period. Given their importance, it is likely that the UK government will seek to incorporate the standards into UK domestic law.

In addition to the EU's anti-money laundering measures (such as the 4th and 5th Anti-Money Laundering Directives), there are four key pieces of existing EU payments legislation that would need to be incorporated more fully into UK domestic legislation if the UK leaves the EU on 29 March 2019 without a transition period in place:

– the Second Payment Services Directive (PSD2);

– the Second E-money Directive;

– the Cross-border Payments Regulations; and

– the Interchange Fee Regulations.

It is currently proposed that this 'on-shoring' of EU legislation will be achieved through the publication of statutory instruments under the European Union (Withdrawal) Act 2018.

In the event of a transition period post-Brexit, it is expected that these SIs would be 'paused' by a further Bill (the 'Withdrawal Agreement and Implementation Bill').

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

The UK government plans to delegate powers to the Bank of England, the Prudential Regulation Authority, the Financial Conduct Authority and the Payment Systems Regulator to make the required changes to on-shored Binding Technical Standards and regulatory rulebooks to ensure that there is a complete and robust legal framework for financial regulation in the UK in the event of a failure to agree a transition period.

The UK government and FCA propose to consult upon a temporary permissions regime that would allow incoming EEA APIs and EMIs to continue providing services in the UK for a time-limited period after the UK has left the EU, even if there is no implementation period.

Firms wishing to continue carrying out business in the UK in the longer term will also be able to use this period to obtain full authorisation (or recognition) from UK regulators without disruption to their business.

The FCA has stated that it will set out separate details in due course for EU entities that currently access or do business in the UK through means other than an EU passport.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

The UK is currently part of the geographical scope of the SEPA schemes due to its EU membership.

If the UK remains in the EEA post-Brexit or the UK implements requirements equivalent to the criteria for participation in the SEPA schemes, UK PSPs are likely to be able to continue their participation in the schemes post-Brexit.

In the latter scenario, it is likely that the European Payments Council would need to assess and confirm any functional equivalence of the UK's legal framework with EU law and consult with the Commission in order to make any final determination in respect of the UK's SEPA membership.

If the UK's SEPA membership is preserved after the transition period, this will mean that UK PSPs can continue to interact with counterparts in other SEPA countries on current terms.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

Within the payments sector, it is expected that the UK will largely follow the EU regulatory regime.

### What should businesses be doing now to prepare for Brexit?

If your firm is a retailer, you should determine:

– the location of your headquarters and your payment processing centre;

– the location of your consumers – are they mainly inside the UK or mainly outside the UK?; and

– the location of your acquirer.

The answers to these questions will determine the impact of Brexit and may bring into question the location of your headquarters and your payment processing arrangements.

Any PSP that relies on passporting rights to passport its services from the EU27 into the UK will need to consider whether any of its activities are regulated for the purposes of the Financial Services and Markets Act 2000, whether it will need to be authorised by the FCA in order to continue to provide those services post-Brexit, and whether it may need to set up a branch or a subsidiary in the UK in order to apply for the necessary FCA permission.

# Dates for the diary

### 12 July 2018

Deadline for FCA to have approved the additional information provided by UK authorised payment institutions, e-money institutions or small e-money institutions under PSD2 in order continue providing payment services on or after 13 July 2018.

### 13 August 2018

Deadline for responding to the European Banking Authority's consultation paper on the conditions to be met under Art 33(6) of the RTS on SCA and CSC.

## 13 October 2018

The latest date for small payment institutions to make their application to the FCA and provide any relevant new information requested in order to continue providing payment services on or after 13 January 2019.

## 31 October 2018

PSPs required to comply with key transparency requirements under the Payment Accounts Regulations 2015 where they offer a 'payment account' (as defined therein).

## 14 March 2019

Deadline for all ASPSPs that operate payment accounts that are accessible online to make the interface technical specifications available to appropriately authorised or registered TPPs and provide a testing facility for connection and functional testing for TPPs.

## 14 September 2019

Deadline for all ASPSPs that operate payment accounts that are accessible online to have in place at least one access interface that meets the requirements in the PSD2 RTS.

## 14 September 2019

Deadline for all PSPs to have implemented PSD2's SCA in full, including the exemptions available under the EBA RTS.

# Product regulation

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**Katie Vickery**
Partner
T: +44 20 7105 7250
E: katie.vickery@osborneclarke.com

**Claire Temple**
Associate Director
T: +44 20 7105 7034
E: claire.temple@osborneclarke.com


## Current issues

### Drone regulation:

Pending the UK's draft Drone Bill (which is anticipated by the end of summer 2018), interim measures are in place via an amendment to the Air Navigation Order 2016:

- as of 30 July 2018, all drones are restricted from flying above 400ft and within 1km of airport boundaries;
- as of 30 November 2018, all owners of drones weighing 250 grams or more will have to register with the Civil Aviation Authority (CAA) and pilots will have to take an online safety test.

Looking to the EU, the European Parliament has voted in favour of the EU-wide drone rules drafted by the European Union Aviation Safety Agency (EASA). This will give EASA powers as to how commercial drones are regulated and mandate safety features EU-wide.

### Increased enforcement around consumer products and inadequate recalls?:

With the creation of the Office for Product Safety and Standards at the beginning of 2018, there has already been one reported enforcement action by the new regulator. While that was against a timber operator, which is less consumer focussed, we can expect an increase in enforcement for consumer products safety issues as the year goes on.

We can also expect increased scrutiny by regulators of how companies choose to recall products. This is following the publication of the new standard on product recalls. Companies choosing not to follow this as best practice will need to have very good justification for doing so, in order to avoid enforcement.

### UK driverless cars legislation

The Law Commission continues to work on developing laws to promote safe use of connected and autonomous vehicles (CAVs), to support the UK's aims to be a leader in autonomous technology, with legislation to be ready as early as 2021.

The Law Commission is looking at insurance (building on the government's work as part of the Automated and Electric Vehicles Bill), product liability, and the allocation of civil and criminal liability.

The project will also take into account the need for safety standards and regulation of new vehicles, and how CAVs will be used by the public.

### Apps as medical devices

We are beginning to see regulators grapple with the concept of software as consumer products capable of regulation – a good example being the revised **guidance** from the Medicines and Healthcare products Regulatory Agency.

This provides guidance on when standalone software can be considered a medical device; it is important to be aware of this guidance so as not to be caught out. It is particularly relevant to telemedicine, a fast growing area in the UK.

### Increased class action activity?

Whilst historically, the UK has not seen much in the way of consumer product class actions, the New Deal for Consumers, an EU package for improving consumer's rights, might change things.

The proposals include a suggestion for a new representative actions system, which would allow consumer bodies to take action on behalf of groups of consumers and obtain compensation on their behalves.

The timings of this new proposal are such that it is unlikely to be in force before Brexit. However, the UK may still opt to adopt the legislation, or similar, in the future. Any compensation EU citizens obtain, post-Brexit, could also encourage UK-based consumers to pursue a similar compensatory path, since the laws that the actions were based on will be very similar, if not the same, at least to begin with.

### Focus on e-commerce platforms acting quickly to remove dangerous products

Whilst the e-commerce Directive places an obligation on e-commerce platforms to remove listings of dangerous products, there is no prescribed time limit for doing so.

However, the European Commission has been keen to gain positive commitments from online marketplaces to be clearer on what they will do about this. At the end of June 2018, four major online marketplaces signed the Product Safety Pledge: Alibaba (for AliExpress), Amazon, eBay and Rakuten (France) signed a commitment for faster removal of dangerous products.

To achieve this, those marketplaces have committed to a number of measures, including:

– reacting within two working days to authorities' notices;

– providing a clear way for customers to notify dangerous product listings;

– providing specific single contact points for EU Member State authorities; and

– taking measures aimed at preventing the reappearance of dangerous product listings already removed.

Other online marketplaces are encouraged to follow this example.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

EU-wide drone rules drafted by the European Union Aviation Safety Agency are highly likely to be in force and effect by the end of the transition period.

The following legislation could also potentially be in place by then:

– the Regulation on Enforcement and Compliance in the Single Market for Goods (Goods Package), which seeks to secure better compliance of harmonised products with regulations;

– the Regulation on the Mutual Recognition of Goods, which seeks to make it easier to sell products in other member states; and

– the New Deal for Consumers – in particular the legislation on class actions.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

For the large part, we would expect that existing UK regulators will be able to step into any gaps arising out of the UK's exit from the EU. But that could mean expanding those regulators' powers or remits. This could include:

– the HSE replacing the European Chemicals Agency;

– the CAA replacing EASA; and

– the MHRA replacing the European Medicines Agency (EMA).

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes??

In order to supply most consumer products, into the EU, you must comply with EU-wide rules and you must also have an EU authorised representative or responsible body. This applies whichever jurisdiction you are supplying from; complying with a Third Country regulatory regime will not be sufficient, in itself, to lawfully get your products to market.

If that regime is a mirror image of the EU regime, this would help you to ensure that products sold in both territories are compliant, but would not negate any consignment testing or border checks required for imports of those goods from Third Countries.

However, the EMA currently cooperates with a number of countries and organisations outside the EU based on specific types of agreement, which enable the signatories to share confidential information and facilitate market access.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

We do not currently envsiage any such changes post-Brexit.

### What should businesses be doing now to prepare for Brexit?

– Ascertain what products you sell into the EU and work out whether you need to appoint an authorised representative or responsible person, or register with any agencies based in the EU.

– Ensure documentation and product labelling is up to date to reflect revised position and ensure no hold ups at customs.

– If any delays are envisaged at customs, look to ensure that sufficient supply is in place within the EU beyond the UK, to service demand.

# Dates for the diary

### Summer 2018

UK government to publish draft Drone Bill

# Regulated Procurement

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Catherine Wolfenden
Partner
T: +44 11 7917 3600
E: catherine.wolfenden@osborneclarke.com


## Current issues

### Central government to include 'social value' as criteria in awarding contracts

The UK government has **announced** a package of measures in response to the collapse of Carillion, following political pressure to avoid a similar situation in future.

The government has proposed amendments to the Social Value Act 2013 to require central government bodies to explicitly evaluate 'social value' as an award criterion for all major procurements, where appropriate. The intention is to encourage more charities, mutuals, cooperatives and social enterprises to bid for contracts (and stand a better chance of winning).

The current procurement rules require public bodies to consider setting appropriate award criteria based on social, economic and environmental factors, but they are not required to do so. The proposals do not appear to extend to local government and other non-central government bodies at this stage.

The package also includes proposals to require government suppliers to publish data on how they plan to address key social issues and disparities, such as gender pay, ethnic minority representation and modern slavery.

The package also includes measures to ensure business continuity, such as:

– requiring key suppliers to develop 'living wills' – contingency plans so that, in the event of a Carillion-style collapse, public services will not be jeopardised in the short term; and

– enhanced measures to protect suppliers from cyber attacks.

### Need to give adequate reasons for scores in public tenders

Two NHS Foundation Trusts have been successful in a procurement challenge against a local authority.

The court held that the inadequacy of the reasons given by the Council was such that the court was not able to determine whether the scores awarded by the Council contained manifest and material errors.

The case serves as a reminder to contracting authorities of the importance of maintaining thorough records of decisions made at every stage of the evaluation process in order to justify scores if challenged at a later stage. Such records are required in order to comply with the Public Contracts Regulations 2015, but are often overlooked by contracting authorities.

### Labour promises changes to public procurement:

The Labour party has **promised** that, if elected, it would place a moratorium on 'significant' outsourcing contracts by the Ministry of Defence and review whether existing contracts should be brought back in-house.

The announcement follows the decision by the Ministry of Defence to award a £500m contract for military fire and rescue services to Capita, despite Capita achieving the highest possible risk rating in the MoD's internal risk assessment.

Shadow Defence Secretary, Nia Griffiths, announced Labour's promise to introduce 'a clear presumption in favour of public contracts being delivered by the public sector'.

### UK companies shut out of Galileo Satellite initiative:

A majority of EU Member States have voted in favour of commencing the procurement of the next round of contracts for Galileo, an £8bn satellite navigation system intended to rival the US-controlled Global Positioning System.

The project is being coordinated by the European Commission and European Space Agency. The UK has, so far, taken a central role in the design and build of the project. However, due to the continued uncertainty around Brexit, UK firms are likely to be excluded from the procurement process if it is commenced before negotiations about the UK's future position in relation to Galileo have been finalised. Even if negotiations are concluded in the coming months, it will likely be too late for UK firms to participate in the procurement process for the next round of Galileo contracts.

If the procurement goes ahead, the loss of opportunity would be a blow to the UK defence industry. The UK continues to lobby against commencing the next procurement until Brexit negotiations (in relation to Galileo) are complete.

# In Focus: Brexit

### Is any new EU legislation expected to come into force and effect before the end of the transition period?

There are no major legislative changes to public procurement law proposed at EU level that are likely to come into force before the end of the transition period.

### Is a new regulator needed, or do additional powers to be given to an existing regulator?

A new regulator will not be needed to regulate public procurement post-Brexit. Remedies for breach of the regime will continue to be a matter for the High Court.

### Is there an existing 'equivalence' or 'recognition' regime for recognising Third Country regulatory regimes?

The EU is a signatory to the WTO Government Procurement Agreement. The GPA is a multilateral agreement by which signatory states provide access to suppliers/contractors from other signatory states to tenders for certain types of public contracts on a reciprocal basis, depending on which schedules to the GPA the states sign up to.

The UK government has indicated that the UK intends to sign up to the GPA in its own right after Brexit. If so, this would provide UK suppliers/contractors with access to tenders for EU public contracts broadly similar to that which they currently enjoy.

### Does current UK government policy mean that (subject to the terms of a future trade agreement between the UK and the EU) material changes to regulation or enforcement are likely post-Brexit?

In theory, after the UK leaves the EU, it will no longer be bound by EU procurement rules, so would be free to change procurement rules to 'cut red tape', to reduce bureaucracy, to assist SMEs and, potentially, to favour domestic suppliers/contractors.

However, any future trade deal between the UK and the EU may well include a term providing for continued (fair) access to each other's markets. As noted above, the UK also intends to accede to the GPA, which would require it to continue to provide access to other signatory states.

There may, though, be scope for the UK to make some changes, such as to the remedies regime, or to make further provisions to support SMEs or take further account of social and economic factors, which could support local suppliers/contractors.

### What should businesses be doing now to prepare for Brexit?

– For businesses that tender for public and utility contracts in EU Member States, but are not domiciled there or do not currently have a registered base there, a failure by the UK and the EU to reach a deal that covers public and utility procurement would, on the face of it, mean they may not be able to bid for those contracts after the end of the proposed transition period (or sooner, if the Withdrawal Agreement is not ratified).

– If the UK becomes a signatory to the GPA though (as discussed above), there may not be any significant changes to procurement rules in the short term.

– In order to preserve the right to bid for future public and utility opportunities in the EU in the event of a hard Brexit, businesses could consider setting up a registered office in another EU Member State. If the Withdrawal Agreement is ratified, such alternative arrangements for bidding for future EU opportunities would not need to be in place until 31 December 2020. However, as we are not likely to get certainty on the Withdrawal Agreement until late 2018, businesses may wish to explore contingency plans now.

# Dates for the diary

### Q3 2018

Judgment is expected from the Court of Appeal in Faraday's **challenge** against West Berkshire's decision to enter into a development agreement in such a way as to avoid running a procurement under the Public Contracts Regulations 2006. Faraday's appeal centres on the legality of inserting an 'option' into the development agreement that allows the contractor to choose to take on a legal obligation to redevelop the works.

If Faraday's appeal is successful, it will introduce a fundamental change to the way in which contracting authorities can procure development agreements without being obliged to follow the public procurement rules.

### Q4 2018

The Secretary of State for Defence is due to announce whether changes to the Single Source Contracts Regulations 2014 (SSCR 2014) proposed by the Single Source Regulations Office, following public consultation, will be implemented.

SSCR 2014 governs the profit and costs allowed to be charged by contractors operating in the defence sector under Ministry of Defence contracts where there has not been a competitive regulated procurement process leading to the award of the relevant contract.

### Q4 2018

The independent inquiry into the Nuclear Decommissioning Authority's failed procurement of decommissioning contracts for the Magnox nuclear power sites, resulting in settlement with claimants in excess of £100m, is expected to conclude during late 2018.

An interim report published in October 2017 set out criticism and recommendations in respect of four key themes, covering: the design of the procurement process; the conduct of the competition; certain resourcing issues; and governance and assurance. We expect that the final report will have a guiding influence on the design and conduct of future major government project procurement.

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