Osborne Clarke

GLOBAL COMPLIANCE

Regulatory Outlook

July 2021

Start

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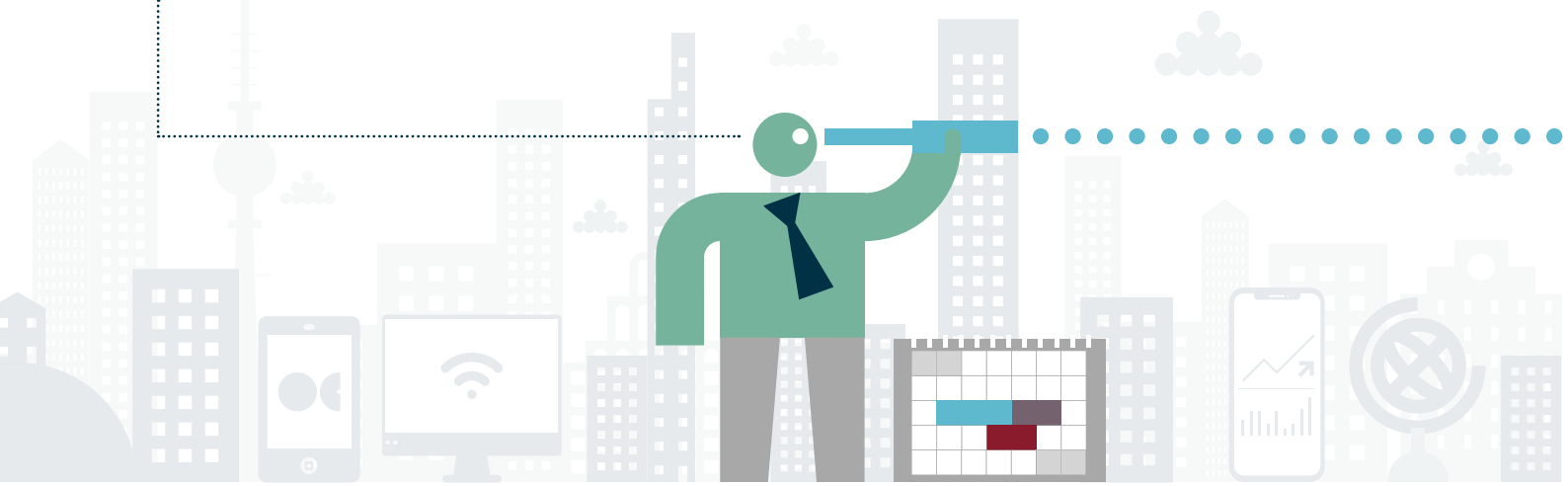

Foreword

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

As the Covid-19 pandemic has continued to surge throughout the world, the impact on individuals – their lives and livelihoods – and on how business has been transacted throughout this period has been significant and is likely to be long-lasting.

For businesses in the UK adapting to their workforces working remotely (or in a more hybrid fashion) there continue to be many regulatory issues to grapple with. Having due regard for the health and safety of the workforce during the pandemic, and knowing what appropriate steps to take as regulations and guidance change continues to be challenging.

The pandemic has accelerated a move to digitalisation as businesses moved towards remote working. One result has been relentless pressure to ensure digital systems are secure and stable in a remote working environment. The right technical and organisational measures need to be in place so that cyber threats can be countered and compliance processes need to work as well remotely at employees' homes as they would on business premises. Ransomware continues to pose a significant risk to businesses.

The UK government and regulators have been extending various measures introduced to support consumers through the pandemic restrictions, with, for example, the Financial Conduct Authority (FCA) extending guidance to help consumers obtain refunds following a cancellation of services as a result of the pandemic.

More generally and away from the immediate impact of the pandemic, several consumer protection initiatives have been announced, likely to affect many sectors. The FCA is consulting on introducing a new consumer duty for retail financial markets. The Advertising Standards Authority and the Competition and Markets Authority (CMA) are working together to produce guidance on misleading environmental claims. The government intends to regulate the security of network-connectable consumer devices, and also to restrict the promotion of certain foods high in fat, sugar and salt, as well as certain drinks.

Globally, regulators are focusing on the implications of rapid technological change. The EU has unveiled its proposed regulatory regime for artificial intelligence. The EU is also intending to further regulate digital services and has published its Digital Services Act, addressing the new challenges of digital regulation since the e-Commerce Directive was introduced in 2000. The UK's equivalent measure, the Online Safety Bill, is intended to protect users of online content-sharing platforms from harmful material. Both measures are passing through legislative processes.

Competition regulators are also keen to involve themselves in digital markets. In the UK a new Digital Markets Unit has been set up within the CMA to oversee a new pro-competitive regulatory regime. In the EU, a draft Digital Markets Act has been published. This will be significant new legislation and businesses should consider engaging in relevant consultations.

National security is also high on the UK government's agenda, with the National Security and Investment Act introducing significant change to the corporate landscape, as the government can block, review and modify affected transactions on national security grounds and a mandatory notification regime is introduced. Similarly, a Telecoms Security Bill is intended to strengthen the legislative framework for telecoms security and resilience, with the government able to restrict vendors on national security grounds.

For businesses trading across the UK and the EU, the consequences of the UK leaving the Single Market and Customs Union at the end of 2020 are becoming clearer. Different compliance regimes are emerging (in, for example, emissions trading, and data) and future divergence from common standards will pose new complexities and increase the compliance costs of trading as businesses navigate these new rules. Examples of new requirements include the rules on exporting food and agricultural products between Great Britain, Northern Ireland and the EU, and new conformity marking requirements for products.

The limits on international travel caused by pandemic restrictions have masked the impact of the changes to the rules for business travel between the EU and the UK and as travel opens up many businesses will be dealing with that new business travel regime for the first time.

Regulators as well as businesses are focusing on environmental, social and governance (ESG) issues. The Environment Bill is continuing its progress through Parliament, and measures on packaging waste and recycling are proposed. Mandatory climate-related financial disclosures are being considered for companies and partnerships of a certain size. The forthcoming UN Climate Change Conference (COP26) taking place in November in Scotland will focus attention even more on green initiatives. In the pipeline in the UK a new labour supply chain body has been proposed by the government, to regulate employment intermediaries. Businesses are increasingly becoming aware of the commercial effect of failing to consider ESG factors, as well as of the compliance risk.

It has been a turbulent year, with many changes for businesses to adapt to. Our regulatory and global compliance teams can help you to understand the regulatory risks to your business now and those coming down the track; spot the gaps and areas for improvement; and implement long-lasting improvements to your compliance programmes and culture.

If you would like to receive regulatory and compliance updates from us, including invitations to our extremely popular twice-weekly webinar series, "Eating Compliance for Breakfast" you can do so **here**. Each week we cover current hot topics across a wide range of regulatory issues in a snappy 30-minute webinar.

We have also produced a series of Road Maps for different compliance areas, which provide you with a set of questions to discuss with your business to help you assess whether there are gaps in your compliance approach. You can find out more details **here**.

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01 Advertising and marketing

Current issues

Restrictions on advertising food and drink products linked with childhood obesity

The government has announced that new **restrictions on advertising** food and drink products linked to childhood obesity will come into effect at the end of 2022.

The restrictions will ban certain food and drink products that are linked to childhood obesity and meet the definition of foods that are high in fat, salt and sugar from being advertised in paid-for online advertising and before 9pm on television and video-on-demand services.

The ban only applies to businesses with 250 or more employees. Further exemptions are expected to be announced along with clarification on the exact types of food and drink products intended to be caught (for example, nuts and butter could be unintentionally caught by the proposal).

ASA undertakes project on racial and ethnic stereotyping

The Advertising Standards Authority (ASA) **announced** in December 2020 that it is undertaking a project on racial and ethnic stereotyping. After the death of George Floyd, the ASA has been reflecting on how racial and ethnic stereotyping in advertising may contribute to real world harms.

As a proactive regulator, the ASA is also seeking to understand how societal values and prevailing standards are constantly evolving and the impact this may have on the interpretation and application of the advertising rules.

The ASA closed a call for evidence on 14 July 2021. A report is expected later this year.

ASA and CMA focus on environmental claims

The ASA and the Competition and Markets Authority (CMA) have been working closely together on combatting misleading environmental claims. In May 2021, the CMA published a public consultation on draft guidance to help consumers make better informed decisions about products and services. The guidance is broadly in line with the ASA's current position but does adopt stricter positions than existing Trading Standards guidance.

The ASA has also launched its Climate Change and the Environment project, which will examine the effectiveness of existing rules and review the positions taken by other regulators and countries.

UK Online Safety Bill impacts advertising

The UK published its **draft Online Safety Bill** (which has broadly similar aims as the EU's Digital Services Act) in May 2021. It applies to "user-to-user services" and "search services".

While in its early stages, the draft Bill excludes paid-for ads from its scope of regulated content. However, any organic ad content (for example, posted by an influencer on a social media platform) may still be within scope.

The draft Bill is expected to go through pre-legislative scrutiny later in 2021.

EU Digital Services Act: key advertising impacts

The EU released its **draft Digital Services Act** at the end of 2020, which will replace the e-Commerce Directive.

The draft legislation requires platforms that display paid-for advertising to ensure that users can identify: that the information displayed is an ad; the identity of the advertiser; and the targeting parameters used to serve the ad.

"Very large online platforms" must also compile and make public a repository of information about ads shown in the previous year, and consider the risks arising in their ad serving mechanisms in risk assessments. The European Commission will also encourage codes of conduct relating to online advertising.

Dates for the diary

September 2021

CMA misleading environmental claims guidance expected.

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02 Anti-bribery, corruption and financial crime

Current issues

Updated national anti-money laundering (AML) risk assessment

As required to do under the Money Laundering Regulations, the UK government has published its **updated national anti-money laundering risk assessment**.

This highlights changes in the AML risk profile across a number of key sectors including financial services and real estate.

Cryptocurrency is within the risk assessment for the first time and there is heightened risk noted within the property and estate agency sector.

Businesses are advised to review their own AML risk assessments in light of the revised national picture, and consider whether further or improved internal systems and controls are needed to mitigate any new or increased risks.

Possible uptick in HMRC corporate tax evasion prosecutions in aftermath of Covid-19

HMRC has stated that it has over 30 investigations or opportunities relating to the potential enforcement of the corporate failure to prevent the facilitation of tax evasion offence, and is likely to come under significant pressure from HM Treasury to assist in increasing the tax intake in light of the huge sums spent in tackling the pandemic.

In light of the risk presented by this offence to some businesses, the due diligence undertaken on third parties performing services for or on its behalf should be reviewed and any necessary measures adopted. These might include requiring warranties from third parties that they will comply fully with all tax obligations and adopting relevant contractual provisions in the event that they fail to do so.

Revised CPS guidance on prosecuting the section 330 failure to disclose offence

On 2 June 2021 the Crown Prosecution Service (CPS) issued revised guidance relating to its approach to the prosecution of the failure to disclose offence contained in section 330 of the Proceeds of Crime Act 2002.

Critically, in a departure from its previous position with regard to the offence, the guidance now provides that it will not be necessary to prove that money laundering had been planned or undertaken.

This change had not been flagged to, or anticipated by, either the financial services sector or the legal community. The offence has not previously been prosecuted on a regular basis and whether this change in guidance signals a more aggressive approach to enforcement remains to be seen. However, given the change, which is not retrospective in effect, the regulated sector should now have regard to the new guidance when considering the need to make any future disclosure and should err on the side of caution if in any doubt, taking expert legal advice as and when necessary.

Dates for the diary

2022

Possible extension of the corporate failure to prevent offence to cover all forms of economic crime including money laundering and fraud, which may follow the current Law Commission review of corporate criminal liability.

Late 2021/2022

Possible changes and improvements to the Suspicious Activity Report system and/or Action Fraud reporting, aimed at enabling the authorities to receive more focused reports that will provide increased intelligence.

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03 Competition

Current issues

Mandatory notification regime for mergers in certain sectors

On 29 April 2021, the **National Security and Investment Act 2021** received Royal Assent and is expected to come into force towards the end of 2021. The Act will create a stand-alone notification regime, distinct from the competition merger control regime, enabling the government to review and block or modify transactions on national security grounds.

The Act establishes a mandatory notification regime for transactions involving the direct or indirect acquisition of more than 25%, more than 50%, or 75% or more of the voting rights in qualifying entities active in one of 17 high-risk sectors (including defence, transport and energy). It will be unlawful to complete a notifiable transaction in any of these sectors without prior approval from the Secretary of State. Failure to notify will render the transaction void, and civil and criminal penalties may be imposed. This means that transactions which may fall within the mandatory regime will have to be structured so that completion cannot take place until clearance has been obtained. There will be an initial 30 working day review period after a notification has been accepted, with the government then able to initiate a further 30-75 working day review.

Alongside the mandatory notification regime, there will be also be a voluntary notification regime for transactions which do not concern one of these 17 sensitive sectors but which may give rise to national security concerns. Although voluntary, the Secretary of State will have powers to "call in" transactions, including minority investments and asset acquisitions, for review for up to five years. Companies will need to consider whether the risk of the transaction being called in merits a voluntary notification. Notably, unlike other international foreign investment control regimes, the Act does not differentiate between foreign and UK investors, with the latter still being subject to the regime (even if transactions involving UK investors are less likely to be called in).

The shift to a mandatory up-front notification regime is a significant change. The UK's existing framework for national security review gives the government a reactive ability to review a tightly limited class of national security deals. These existing powers catch only a handful of deals each year. Moving from this to a new system under which companies have to notify and obtain approval upfront is major gear shift to which investors and companies need to adapt quickly, even if the government has stated it anticipates that only a small number of deals are likely to require remedies.

In particular, merging parties will need to consider whether their transaction could be caught and how it may affect the transaction timetable. Merging parties required to notify under the mandatory regime will be unable to complete a transaction without approval from the Secretary of State.

UK Digital Markets Unit

In the UK, addressing competition concerns identified in digital markets remains a focus for the UK's competition regulator (the Competition and Markets Authority, or CMA) following several years of analysis of the working of competition in digital markets, culminating with the publication of the CMA's market study in 2020.

On 7 April 2021, a new regulator, the **Digital Markets Unit** (DMU), was established in shadow form within the CMA to oversee a new pro-competitive regulatory regime for digital markets. While the DMU's powers will require legislation, it is **expected to impose rules** on the most powerful digital firms: those with "strategic market status". The government has **committed to consulting** on these proposals – for instance, on how status is designated and to whom the rules will apply – in summer 2021. In the meantime, the DMU is carrying out preparatory work, gathering evidence and engaging stakeholders.

While the DMU is yet to receive its powers, the CMA has already been active in following up on the concerns identified in its market study, launching a number of investigations into the practices of some of the biggest global online platforms. It also, on 15 June 2021, launched a further market study into mobile ecosystems.

Given the potential impact of the new regulation, which will likely be informed by the CMA's ongoing investigatory work, businesses active in digital markets should stay up to date with the CMA's activities and look for opportunities to engage in the upcoming DMU consultation and the CMA's ongoing work, to help shape outcomes in this important area.

EU Digital Markets Act

On 15 December 2020, the EU published a draft of its **Digital Markets Act** (DMA). This new legislation is aimed at boosting competition in EU digital markets, with new rules aimed at online "gatekeepers"; that is, players that determine how other companies interact with online users.

Similar to the proposals for the UK, the DMA will combine ex-ante regulation with traditional case-by-case ex-post enforcement. The new rules will impose a set of obligations on gatekeepers – such as requirements about interoperability and promoting access to data – alongside a set of prohibited behaviours, including self-preferencing.

This is a significant new piece of legislation for players in digital markets and while the final rules are not expected until 2023 at the earliest, the rules are, and will remain, a key topic of discussion over the next year and beyond as the legislation passes through the EU legislative process. While the drive to regulate big tech has broadly met with support among EU Member States, there are concerns that the DMA may be drafted too broadly (catching challenger players in addition to those with significant market power), and may also not go far enough to address concerns.

Businesses active in digital markets should keep up to date with the developments in order to be prepared for any new rules and consider whether to engage in any consultations.

Reform of the Vertical Agreements Block Exemption Regulation

The Vertical Agreements Block Exemption Regulation (VABER) provides a general exemption for most vertical agreements entered into by businesses with market shares of 30% or less. If a vertical agreement falls within the terms of the VABER it is automatically exempt from the Chapter I prohibition/Article 101 of the Treaty on the Functioning of the European Union (TFEU), that is, prohibitions on anti-competitive agreements.

The VABER is set to expire on 21 May 2022 and the European Commission is **undertaking a review** of the regulation. Consultations to date have resulted in a number of issues being raised, including that the rules:

- are no longer fit for modern markets (in particular e-commerce markets); for example, there are difficulties in applying rules to companies that do not fit into traditional supply and distribution concepts, as well as to new online sales restrictions; and
- do not reflect the more nuanced approach that case law has taken to e-commerce restrictions.

Potential reforms that the European Commission is considering include addressing increasing pressures on physical stores due to the growth in online sales since the last VABER was introduced – for example by removing a prohibition on dual pricing (allowing differential pricing for online and offline sales channels).

The European Commission is reviewing consultation responses on the potential reforms and will publish a draft of the revised rules for comment in the course of this year.

In the UK, the VABER **forms part of retained EU law** and the CMA has announced its own review of the regulation to examine whether "it serves the interests of UK businesses and consumers". While there may be some divergence in the final rules adopted at EU and UK level, the CMA has stated it will draw on relevant evidence from the Commission's review. On 18 June 2021, the **CMA launched a consultation** into its proposed recommendations, with responses sought by 22 July 2021.

At both UK and EU level, there is opportunity to engage in discussions to shape regulations that have a significant impact on day-to-day distribution arrangements.

Dates for the diary

26 July 2021

Deadline to submit view on issues raised in statement of scope for CMA's Mobile Ecosystems Market Study.

Summer 2021

Consultation on powers for the new DMU.

Autumn 2021 (estimated)

CMA's final recommendation to Secretary of State on VABER reform.

Autumn/winter 2021

National Security and Investment Act set to come into force.

2021

European Commission to publish draft revised VABER for comment.

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04 Consumer credit

Current issues

Woolard Review looks at change and innovation in the unsecured credit market

The **Woolard Review** sets out 26 high-level recommendations on how regulation can better support the unsecured lending market. The report highlights risks posed to consumers by some of the recent innovations in the unsecured market, including unregulated buy-now pay-later (BNPL) finance, employer salary advance schemes and the growth of digital technology in the provision of consumer credit.

Chiefly, the review recommends BNPL products should be brought within the scope of Financial Conduct Authority (FCA) regulation as a matter of urgency, meaning that BNPL lenders, and retailers who "introduce" their customers to those lenders, may require FCA licences.

FCA consults on new Consumer Duty to increase consumer protection in retail financial markets

The FCA is proposing to expand its existing rules and principles applicable to firms, in order to provide a higher level of consumer protection.

A new "Consumer Duty" could form a package of measures, comprised of a new "Consumer Principle" which provides an overarching standard of conduct, supported by a set of additional Handbook rules and outcomes that set clear expectations for firms' cultures and behaviours.

The **consultation** is open for comment until 31 July 2021. The FCA expects to consult again on proposed rule changes by the end of 2021 and make any new rules by the end of July 2022.

FCA publishes new best practice guidance for firms to protect vulnerable consumers

The FCA increasingly expects firms to do more to ensure vulnerable consumers are receiving positive outcomes. It has published **guidance** to provide a framework for firms to assess whether they are treating vulnerable customers fairly.

The guidance sets out what firms should do to understand the needs of vulnerable customers, ensure skills and capability of staff are appropriate, take practical action in respect of product/service design and delivery, and monitor the effectiveness of their approach.

The guidance provides examples of how firms can put these requirements into practice, together with case studies showing good and bad practice.

FCA extends guidance to help consumers obtain refunds following a cancellation of services

The coronavirus pandemic has led to a large number of consumers experiencing cancellations of travel arrangements and other events, such as weddings.

Following consultation, the FCA published temporary **guidance** in October 2020 setting out its expectations of insurance and card providers when they are helping consumers who are trying to claim money back following a cancelled trip or event.

The guidance has now been extended and will remain in place during the exceptional circumstances arising out of Covid-19 until varied or revoked by the FCA.

High Court considers when loan made by individuals might be carried on 'by way of business'

The High Court has considered in ***Jackson v Ayles and another*** (2021) whether an individual who lent money did so "by way of business", which in the circumstances required FCA authorisation. Lending without requisite authorisation is a criminal offence and can render a loan unenforceable.

The case indicates that individuals are more likely to be lending "by way of business" if:

- the relationship arises out of commercial dealings, not friendship;
- the lending is not an isolated event;
- the value of total lending and/or the number of different borrowers is significant;
- professional advice has been sought about lending and/or template documentation is used; and
- the loans bear interest in excess of market rates.

Dates for the diary

31 July 2021

Deadline for response to the FCA's consultation paper (CP21/13) on a new consumer duty, which will set a higher level of consumer protection in retail financial markets to which firms should adhere.

25 October 2021

Date from which firms must use the revised versions of the FCA's consumer credit information sheets, in line with the requirement in section 86A(7) Consumer Credit Act 1974 that new versions of these sheets take effect three months after publication.

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05 Consumer regulation

Current issues

EU to introduce 'New Deal for Consumers' consumer law overhaul

The **New Deal for Consumers** (Omnibus Directive) is an overhaul of consumer law, giving it more teeth against non-compliant businesses, and bringing EU legislation (some of which was passed in the 1990s) up to date for our modern, digital markets.

One of the most significant changes will be the introduction of "GDPR-inspired" fines, meaning that national regulators may impose fines of not less than 4% of a trader's annual turnover (in the affected EU Member State(s)) in the event of "widespread" consumer law infringements. This, combined with the proposed collective action enforcement mechanism, means that consumer law compliance is set to become a board level issue.

Other changes include new consumer rights for contracts for free digital services, harmonised remedies for unfair commercial practices, rules around dual quality products, and more transparency for consumers in online marketplaces.

Going forward companies should be looking to achieve compliance by design for new products and services (such as websites and marketplaces), and should also start to review compliance for existing products and services now – to avoid scrambling to achieve compliance in advance of the deadline.

EU to bring in sweeping changes for regulation of digital content

The **Digital Content Directive** aims to fully harmonise across the EU a set of key consumer rights and remedies concerning contracts for the supply of digital content or services (such as games, music or video) even where there is no payment, and to reduce legal fragmentation in the area of consumer contract law. The intention is this will reduce the costs of compliance for businesses.

These rules will break new ground in the EU, offering the first set of consumer law covering mobile applications and software.

EU to change significantly regulation of consumer goods/'goods with digital elements'

The Sale of Goods Directive will bring in a sea change as to how sales of consumer goods are regulated across the EU, and what rights and remedies consumers will have. It also introduces the concept of "goods with digital elements" for goods with installed digital content (for example, a laptop), and specifically regulates these.

Dates for the diary

28 November 2021

Deadline for EU Member States to implement Omnibus Directive.

1 January 2022

Member States' implementing legislation of the Digital Content Directive takes effect.

1 January 2022

Member States' implementing legislation of the Sale of Goods Directive takes effect.

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06 Cyber security

Current issues

Increased remote working has increased breach exposure

Internet-facing devices and applications are ever more commonly used for remote working. Increased digitalisation and internet-facing infrastructure increases the attack surface which attackers seek to exploit.

The obligation for the data controller is to have in place **appropriate technical and organisational measures** to protect personal data. When notified of an incident, the Information Commissioner's Office (ICO) may take the opportunity to assess such measures in detail. The monetary penalty notices issued to British Airways and Marriot remain a key source of the **technical** and **organisational** measures that the ICO expects to see. The European Data Protection Board (EDPB) Guidelines on Examples regarding Data Breach Notification also provide helpful guidance on technical and organisational measures (see below).

A review of the measures in place, including vulnerability scans to identify potential gaps, may avert the exploitation of any issues in that increased attack surface. Companies should also be proactive in asking their suppliers and contractors what they are doing to bolster their cyber defences, to avoid supply chain risk.

Ransomware continues to present significant business risk

Increasingly common ransomware attacks continue to pose both significant business disruption risk and considerable regulatory risk, not least because such attacks are often accompanied by exfiltration of data. "Ransomware as a service" models have upskilled would-be attackers and provided access to more sophisticated malware, which can extract data without trace.

When faced with circumstances in which there are pragmatic reasons to pay a ransom to release encrypted data or seek to prevent the release of exfiltrated data, **very careful consideration** is required as to whether it would be legal (and otherwise sensible and ethical) to make any ransom payment.

Follow on litigation

Follow on litigation arising from data protection issues is becoming a business risk that may rival or exceed regulatory action. The data claims market in the UK is particularly active, with claimant firms poised to seize on any publicised data security incidents.

European Data Protection Board Guidelines on Examples regarding Data Breach Notification

The EDPB has published **guidelines**, for consultation at this stage, which set out examples of data incidents and the responses that the EDPB would expect to those scenarios. This extends to whether notification to a supervisory authority or to data subjects would be expected. The stated aim is to help data controllers decide how to handle data breaches and the factors to consider during risk assessments. The guidance is intended to sit alongside the existing 6 February 2018 Article 29 Working Party guidance on assessing risk, which was adopted by the EDPB.

The guidelines document is not yet in its final form. Businesses were invited to provide comments by 2 March 2021. A date has not yet been given for the provision of an updated version.

The guidelines offer insight into the expectations of the supervisory authorities that form the EDPB, and include helpful lists of the technical and organisational measures that may have mitigated the examples provided.

Proposed legislation for security requirements in smart devices

A **new law** to make sure virtually all smart devices meet new requirements has been proposed by the Department of Culture, Media & Sport. The ubiquitous use of internet-enabled and smart devices, many of which have been developed with little regard to security, has encouraged the government to act in response to the threat posed by these devices.

The proposal includes that virtually all smart devices would meet new requirements:

– customers must be informed at the point of sale of the duration of time for which a smart device will receive security software updates;

– a ban on manufacturers using universal default passwords, such as “password” or “admin”, that are often preset in a device’s factory settings and are easily guessable; and

– manufacturers will be required to provide a public point of contact to make it simpler for anyone to report a vulnerability.

The government intends to introduce legislation as soon as parliamentary time allows.

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07 Data protection

Current issues

Third country transfers

Organisations are now able to use the European Commission's long-awaited new Standard Contractual Clauses (SCCs) for data transfers from the European Economic Area (EEA) to recipients in third countries. Issued on 4 June 2021, they replace the existing, or old, SCCs, which have been the most commonly used mechanism to provide for adequate safeguards when exporting personal data from the EEA. The new SCCs include terms to bring them in line with requirements under the General Data Protection Regulation and now cover four different transfer scenarios (controller to controller, controller to processor, processor to controller, and processor to (sub-)processor).

You can find out more in our **Insight**.

The new SCCs should be read alongside the European Data Protection Board's (EDPB) recently published **final recommendations** on supplementary measures to ensure compliance with data protection laws when transferring personal data from the EEA.

Following the UK's departure from the European Union, the new SCCs and the EDPB recommendations will not apply in the UK, but the ICO has announced plans to publish UK-specific SCCs later this year.

AI regulation

The European Commission has unveiled its proposed regulatory regime for artificial intelligence (AI) which is set to harmonise the laws in this area across the EU and which includes hefty fines for non-compliance. In our **Insight**, we explain the proposed tiered system which categorises different AI systems into those which are: "prohibited" (including automated facial recognition except in limited circumstances), "high risk" systems which must meet six areas of compliance, and lower risk systems which must comply with certain transparency obligations.

Once this legislation is finalised, it is likely that it will be 18 to 24 months before it comes into effect.

While this Regulation will not be directly applicable in the UK, it is likely still to affect businesses which trade with the EU market. Meanwhile, the UK government has released public sector guidance in the form of an **Ethics, Transparency and Accountability Framework for Automated Decision-Making**.

Promoting ESG and privacy

There has been a market shift in using tech and data for Environmental, Social and Corporate Governance. We explore the regulatory concerns in our **Insight**. From a decarbonisation perspective, "green tech" is a popular area for many start-ups using emerging technologies such as the Internet of Things, artificial intelligence and digital twins – all of which are data intensive.

There is also a shift in the type of personal data organisations collect about their employees in order to understand and address diversity and equality in the workplace. Diversity data is often special category data and needs extra protection (see our **webinar** on this topic).

Online harms – what you need to know

The UK government has **published** its draft Online Safety Bill, designed to protect users of online content-sharing platforms from harmful material.

Our **Insight** discusses its wide scope and features, such as placing a duty of care on applicable companies to improve the safety of their users online. The Bill aims to improve child safety, reduce online terrorist activity, reduce online fraud and generally combat "harmful" content.

The Bill needs to go through the legislative process and is likely to be subject to some amendments. The Bill will be important for any company which allows user generated content on their platform, with the potential for fines as high as £18 million or 10% of global turnover (whichever is higher).

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08 Employment, immigration and workforce solutions

Current issues

IR35

The new IR35 rules relating to engaging staff contractors came into force for private sector employers on 6 April 2021. The reforms bring potentially significant financial repercussions where services are received from a professional service company (PSC), directly or indirectly, for example through staffing companies, umbrella vehicles or consultancy companies.

The reforms mean that liability for determining whether or not a consultancy agreement falls inside or outside IR35 shifts from the PSC to the end user (the company using the consultancy services). If the consultancy arrangement is found to fall inside the IR35 regime, then the fees payable in connection with the consultancy agreement must be paid subject to tax and national insurance contributions (NICs). If the end user fails to carry out the IR35 determination, or incorrectly categorises the arrangement as outside IR35 and pays the consultancy fees without deduction on that basis, then HMRC could seek repayment of the tax and NICs. It also has the power to issue late payment fines and interest and a further penalty of up to 100% of the tax/NICs liability. The legal costs of defending any investigation or tax assessment would also be considerable.

You can hear more on the current challenges we are helping businesses tackle in **our Tax Break podcast**, and **read our seven tips** on the new regime.

Responding to the coronavirus pandemic

The Coronavirus Job Retention Scheme (CJRS) is open until 30 September 2021. **Under the extended scheme**, the government pays 80% of wages for unworked hours of furloughed staff, up to a maximum of £2,500 per employee each month. Employers remain responsible for NICs and pension contributions. Since 1 July 2021, employers have had to contribute 10% towards the cost of the grant for unworked hours (with the government contribution reducing to 70%) and from 1 August 2021 until the scheme closes, employers must contribute 20% (with the government contribution reducing to 60%). **HMRC are carefully scrutinising the use of the CJRS**. Employers should consider carefully whether or not they meet the eligibility criteria and ensure that any claims are made in accordance with the scheme rules.

With the CJRS set to close on 30 September 2021, employers should also consider their workforce requirements from October 2021 onwards and what this means for their existing staff. While some redundancies may be inevitable, employers are also looking at permanently or temporarily changing terms and conditions of employment or introducing more flexible work arrangements to accommodate staff, all of which raise a number of legal and employee relations issues.

Employers should also ensure appropriate steps are taken to **address other issues** arising from the pandemic, including ongoing support for mental health and wellbeing (which remains prominent in many business agendas), managing performance and absence issues where an employee is suffering from "long Covid" and, as increasing travel is permitted, updating holiday policies on how requests will be dealt with and setting out the company's position where an individual is unable to return to the UK or is required to quarantine or self-isolate in accordance with government guidance.

Remote/hybrid working

Many employers are currently considering new permanent hybrid or remote working models in light of the advantages identified during the Covid-19 pandemic for businesses and employees in permitting some flexibility in working arrangements.

Remote/hybrid working models do expose businesses to **new risks** which should be carefully considered, including data protection, health and safety, and misuse of confidential information and intellectual property. Such arrangements also throw a spotlight on mental health and wellbeing issues, with trade unions calling for the government to bring in a "right to disconnect". Permitting employees to work from overseas may also bring complex immigration, tax and social security issues.

The government had indicated that it is also looking to make **flexible working the default** unless there are good business reasons not to (at present a statutory request for flexible working can only be made by an employee who has 26 weeks' continuous service). While there was no Employment Bill mentioned in the Queen's Speech, there has been media speculation that we may see a consultation on new rights in this respect this summer.

Impact of Brexit on recruitment

Since 1 January 2021, any EEA/Swiss national (excluding Irish nationals) looking to come to the UK to work requires sponsorship under the new Skilled Worker route (unless they qualify under another applicable category under the new rules). Employers who do not have a sponsorship licence should consider applying for one now to ensure that they are in a position to sponsor overseas workers when needed, especially given the delay caused by the amount of applications and Covid-19.

Any EEA employee in the UK before 11pm on 31 December 2020 was required to apply under the EU Settlement Scheme by 30 June 2021 for settled or pre-settled status. Those who did not do so may have lost their right to work in the UK, save in exceptional circumstances. While employers are not obliged to carry out retrospective right to work checks on EEA nationals who were employed on or before 30 June 2021 (and **current guidance** confirms that provided the original check was carried out validly, an employer will benefit from the statutory excuse against a civil penalty if it transpires that the employee does not have a right to work), this lack of status will have significant ramifications for the employee (and potential criminal liability for the employer where it knows that the employee does not have the requisite status but continues to employ them, as well as the possible loss of staff). Some employers are considering carrying out retrospective checks but it is important that these are carried out in a non-discriminatory manner; EEA nationals should not be singled out. Employers may wish to invite/encourage employees to use the government's online checking service but an employee cannot be forced to do so.

Right to work checks

The **ability to carry out "adjusted" right to work checks** in light of the pandemic will end on 31 August 2021. From 1 September 2021 employers need to ensure that an individual attends the place of work so that their original documents can be checked, unless the individual permits the employer to check their right to work using the government's online service.

Business travel after Brexit

The EU-UK Trade and Cooperation Agreement (TCA), which details the UK's trading relationship with the EU from 1 January 2021, includes a number of provisions that have the potential to affect consultancies, recruiters, staffing companies and trading companies. There are particularly important rules about deploying UK contractors and consultants into EU countries and other possible restrictions on how UK workforce solutions companies can operate across the EU. The TCA also provides that while short-term, visa-free business trips are permitted for some specific listed purposes, such as attending meetings, this is subject to national "reservations" or exceptions, which vary by EU Member State. Employers and workforce solution businesses will need to consult the detail of the TCA and **the latest government guidance** to check for any restrictions or requirements in relation to planned trips for work purposes.

New vehicles for engaging staff

As businesses adapt to the new legal landscape, including Brexit and the recent IR35 reforms, we are seeing businesses increasingly start to use or consider using umbrella companies/professional employer organisations (PEOs) as a model of engagement. Our workforce solutions team **explore the issues that the use of umbrellas/PEO raises and our predictions for businesses here**. To avoid inheriting liabilities under tax avoidance legislation from umbrellas/PEOs that use aggressive tax planning arrangements, all those in the supply chain will need to carry out spot checks that credible after tax amounts are being paid into UK bank accounts in the name of the individual worker.

Addressing the ESG agenda

Employment issues are set to play a central role in organisations' Environmental, Social and Governance (ESG) agendas. The government has announced a new labour supply chain enforcement body (see dates for the diary below). Diversity, inclusion, mental health and wellbeing all form part of the social agenda.

Recent reports and government guidance continue to highlight the **important role diversity and inclusion plays in a business's success**, coupled with evidence of the disproportionate impact that Covid-19 has had on different sections of society. The Black Lives Matter movement has thrown a spotlight on racial inequality, just as #MeToo shone a light on sexual harassment in the workplace.

It is critical for employers to **continue to address diversity and inclusion** as well as continuing to support mental health and wellbeing, as the workplace seeks to attract and retain talent post Covid-19 and potentially moves to new, more hybrid ways of working.

Future of work

The pandemic has accelerated transformation in the workplace as businesses look at increasing digitalisation and a move towards more hybrid/remote working, combined with the end of free movement between the UK and EU and organisational commitments around decarbonisation and diversity. We set out in this **Insight** our predictions on the future of work and the issues employers will need to consider as they embrace the challenges ahead.

Dates for the diary

5 October 2021

Gender pay reporting: Qualifying employers (more than 250 employees) were under a statutory obligation to report on their gender pay data on 4 April 2021. However, the government Equalities Office has indicated that in light of Covid-19 it will not take any enforcement action for **a failure to report until 5 October 2021**.

Ethnicity pay reporting: The government has previously consulted on a new ethnicity pay gap reporting obligation. We are still awaiting the outcome of that consultation. However, the recent report from the Commission on Race and Ethnic Disparities commissioned by the government stops short of recommending the introduction of mandatory reporting.

2021/2022

Skills and education: As part of the Queen's Speech it was confirmed that **a Skills and Post 16 Education Bill** will legislate for landmark reforms that will transform post-16 education and training. The government has also introduced a **Professional Qualifications Bill** to recognise professional qualifications from across the world.

Legislative change not expected before 2022

New labour supply chain enforcement body proposed: The UK government has proposed merging the Employment Agency Standard Inspectorate (which enforces recruitment law rules), the Gangmasters and Labour Abuse Authority and the National Minimum Wage enforcement section of HMRC to create a super agency to enforce **compliance in labour supply chains**. This step may also involve new legislation to regulate employment intermediaries such as umbrella companies.

Whistleblowing: While the UK is no longer required to implement the EU Whistleblowing Directive by 17 December 2021, Covid-19 has brought **calls for our current legislation to be reformed** to provide greater protection for whistleblowers.

Neonatal leave and carers leave: The government has consulted on introducing two new leave rights: a **statutory paid leave entitlement for parents whose babies spend an extended period of time in neonatal care**, and a statutory right for **unpaid carers to take one week's unpaid leave** a year to carry out caring responsibilities for individuals with physical or mental health problems, disability or issues related to old age. No draft legislation has yet been published nor a specific time-frame set out for the introduction of these new rights but they may be included in any future Employment Bill. There are also calls on the government **to reform the existing Shared Parental Leave rules**.

Extending redundancy protections: The **government has consulted on enhancing redundancy protection** to prevent pregnancy and maternity discrimination. No draft legislation has yet been published nor a specific time-frame set out for the introduction of this right but it may be included in any future Employment Bill.

Non-compete provisions: We are awaiting the outcome of **a consultation on continued use of non-compete clauses** in employment contracts. The government is proposing a ban on such clauses or providing for them only to be enforceable where an employee's remuneration continues for their duration.

Non-disclosure agreements: Following a consultation in July 2019, **the government announced** that it would introduce new legislation to tackle the misuse of non-disclosure agreements (including confidentiality clauses) in employment documentation. Although a full response to the document was published on 29 October 2019 there is no draft legislation yet and the implementation date is unknown. In the meantime, employers should understand any restrictions put in place by regulators, including those on legal advisers advising on agreements.

Sexual harassment in the workplace: The Equality and Human Rights Commission (EHRC) is expected to **publish a statutory Code of Practice for employers on harassment in the workplace**. This Code will have the effect that Employment Tribunals will be obliged to take an employer's non-observance of the Code into account when ruling on a claim. It is expected that the Code will **reflect guidance** issued by the EHRC earlier in 2020.

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09 Environment

Current issues

Climate and Energy (Revocation) (EU Exit) Regulations 2021

The **Climate and Energy (Revocation) (EU Exit) Regulations 2021** were made on 28 April 2021 and came into force on 20 May 2021. The regulations follow on from the UK's departure from the European Union, and revoke EU law relating to greenhouse gas emission reduction commitments and associated obligations to report under the Paris Agreement and Kyoto Protocol.

Businesses should watch this space for any new regulations and laws pertaining to greenhouse gases in future.

Environment Bill

The **Environment Bill** (EB) is expected to receive Royal Assent in autumn 2021.

On 18 May 2021, the government **announced** that the EB will be amended to require a legally binding target on species abundance for 2030. At the same time the government announced an England Peat Action Plan to protect and restore peatland, an England Trees Action Plan which aims for woodland coverage to be expanded to 12% by 2050, and species reintroduction measures.

As reported **previously**, the EB contains provisions which will affect regulated businesses.

Office for Environmental Protection

As outlined in our **January 2021 report**, the EB will introduce the Office for Environmental Protection (OEP). The OEP will oversee environmental governance in the UK as an independent body, and its powers will include taking action against public authorities for environmental law breaches.

An **Interim Office for Environmental Protection** will be set up in a non-statutory form from July 2021 onwards. The Interim Office for Environmental Protection will have powers including developing the OEP's strategy (including enforcement policy) and publishing an independent assessment of progress in relation to the government's implementation of the 25 Year Environment Plan. The Interim Office for Environmental Protection will be replaced by the OEP once the EB has received Royal Assent.

The Interim Office for Environmental Protection and the OEP will be able to introduce policies and strategies that impact regulated businesses.

Emissions Trading

As of 1 May 2021, the UK is no longer a participant of the EU Emissions Trading System (EU ETS). This has been replaced by the UK **Emissions Trading Scheme** (UK ETS), which was launched on 1 January 2021.

The UK ETS applies to energy intensive industries, the aviation industry, and the power generation sector. Various guidance is available on the gov.uk website about the UK ETS, which operates in a very similar way to the EU ETS.

Operators who had obligations under the EU ETS **must still comply** with those obligations for the 2020 scheme year, which ended on 30 April 2021. Other businesses in the affected sectors should be aware of future changes.

Draft Ecodesign and Energy Labelling Regulations 2021

The government has published its **response** to its consultation on the draft Ecodesign and Energy Labelling Regulations 2021, as reported in our **January** regulatory update.

The government's response stated that, following a positive reception, it planned on laying regulations to bring the new measures into force in summer 2021. On 28 April 2021, the **draft Ecodesign for Energy-Related Products and Energy Information Regulations** 2021 were put to Parliament along with a **draft explanatory memorandum**.

Government consultations

The government has **launched consultations** on the Extended Producer Responsibility (EPR) for packaging; measures to improve recycling collection; and a deposit return scheme for drinks containers.

The government launched a second consultation on the introduction of **EPR for packaging**. This would ensure that producers pay the full costs of dealing with packaging waste that they have produced. This aims to reduce waste by encouraging recyclable products, and transfers costs of disposing of unrecyclable packaging onto producers. The government hopes to introduce the scheme using a phased approach from 2023 onwards. Powers imposing sanctions are likely to be in the EB.

On 7 May 2021, the Department for Environment, Food and Rural Affairs (Defra) launched a **consultation into recycling collection**. They aim to improve recycling by making collections more frequent and clarifying what materials can be collected. There would be more stringent requirements on councils to provide recycling services for plastic, glass, metal, food waste, and paper and card. The goal for the government is to increase recycling and cut down on landfill waste. This would assist with achieving the goal in 2035 of at least 65% municipal waste recycled and no more than 10% of waste sent to landfills, and the 2050 goal of eliminating all "avoidable" waste.

The government launched a consultation on 24 March 2021 on a **deposit return scheme** for drinks containers. This scheme would encourage drinks containers to be recycled and seeks to change consumer behaviour.

Businesses should ensure that they are compliant with packaging and recycling requirements, and should be aware of the government's recycling and waste initiatives.

Dates for the diary

Summer 2021

The government intends to bring in the Ecodesign and Energy Labelling Regulations.

Autumn 2021

The Environment Bill 2020 is expected to receive Royal Assent.

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10 Environmental, social and governance (ESG)

Current issues

Mandatory reporting in accordance with the Taskforce on Climate-related Financial Disclosure (TCFD)

The UK government intends to require mandatory reporting of climate risk from large parts of the economy in accordance with the recommendations for the Taskforce for Climate-related Financial Disclosures (TCFD). The roadmap for this strategy can be found **here**.

Under TCFD, a business reports on the financial risk to it as a result of climate change covering both physical risk, due to changes in climate patterns, and transition risk, due to legal, technological and market changes that will happen as we move to a low carbon economy. Disclosures are made against four overarching pillars: governance, strategy, risk management, metrics and targets.

In accordance with the roadmap:

– The Financial Conduct Authority (FCA) has **introduced** a new listing rule and guidance which requires commercial companies with a UK premium listing to include a compliance statement in their annual financial report, stating whether they have made disclosures consistent with the recommendations of the TCFD or providing an explanation if they have not done so. This rule applies for accounting periods beginning on or after 1 January 2021. The first annual financial reports subject to this rule will be published in spring 2022.

– The UK government ran a **consultation** from March to May 2021 on how this would be implemented for the next group of entities in scope, which includes UK registered companies admitted to AIM with more than 500 employees, and large private companies and limited liability partnerships (those with more than 500 employees and a turnover of more than £500 million). The final regulations will be made by the end of 2021, to come into force on 6 April 2022, and to be applicable for accounting periods starting on or after that date.

– The FCA is **consulting** until 10 September 2021 on proposals to extend the application of its TCFD-aligned Listing Rule for premium-listed commercial companies to issuers of standard listed equity shares. It is also to introduce TCFD-aligned disclosure requirements for asset managers, life insurers and FCA-regulated pension providers. The FCA will confirm its final policy on these consultations before the end of 2021.

Increasing focus on supply chain compliance issues

The European Commission was due to publish a proposed law on human rights due diligence in June 2021. At the time of writing, it is expected imminently. This builds upon existing state-level human rights due diligence laws, such as the "law of vigilance" in France, and conversations that are going on at senior government level in Germany and elsewhere. The UK

government committed to strengthening the transparency in supply chains reporting obligation, under the Modern Slavery Act, in September 2020. Businesses need to be aware both of developments in specific regimes (in the UK and elsewhere) but also, the longer term trend in law and expectations on this issue. In this context, it makes sense to build for the future, developing existing due diligence systems to ensure they are effectively mapping, assessing and mitigating compliance risks in your supply chains.

SFDR Regulatory Technical Standards implementation delay

The effective date of the EU Sustainable Finance Disclosure Regulation (SFDR) Regulatory Technical Standards has been **deferred by six months** to July 2022 due to regulators and industry struggling with the complexity involved in implementing the standards. This highlights some of the practical challenges in implementing ESG commitments, and the need for regulators and businesses to commit sufficient resources and allow sufficient time to ensure commitments can be matched by actions.

Dates for the diary

Imminent

The European Commission proposal for a human rights due diligence law is expected to be published (it was due in June 2021). The practical implications, in terms of systems, policies and processes, could be significant, particularly for businesses that have not focused upon the operation and impact of their supply chains.

1-12 November 2021

COP26 will be taking place in the UK.

17 December 2021

Implementation date for EU Whistleblowing Directive for companies with 250 employees or more. A good whistleblowing system should be one of the "low hanging fruit" in implementing an effective approach to ESG. Even if your business is not subject to the process and outcome requirements of the EU Whistleblowing Directive, it provides another indicator of what good looks like for whistleblowing processes.

Late 2021/2022

Updates to the Modern Slavery Act transparency in supply chains obligation are anticipated to be brought forward, though no firm date has yet been set.

6 April 2022

Intended date for implementation of mandatory TCFD-aligned reporting for large UK companies and LLPs.

Spring 2022

First TCFD-aligned disclosures by commercial companies with a UK premium listing.

July 2022

SFDR Regulatory Technical Standards to become effective.

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11 Financial regulation

Current issues

The Financial Services Act becomes law

The **Financial Services Act 2021** is now law. The Act addresses issues relating to UK financial services and financial regulation arising from the UK's departure from the European Union, and makes extensive reforms affecting a variety of sectors and regulatory frameworks (including in relation to overseas access to the UK's financial services market, insider dealing and money laundering). Details on a proposed duty of care to consumers by financial services firms, referred to in the Act, can be found in the **Consumer Credit** section.

Financial services firms should review the contents of the Act and consider what impact it may have on their current (or future planned) business and operations.

Regulators publish final rules and guidance on operational resilience

The **Prudential Regulation Authority** (PRA) and the **Financial Conduct Authority** (FCA) published their final policy and supervisory statements on operational resilience on 29 March 2021.

The changes will affect banks, building societies, designated investment firms, insurers, Recognised Investment Exchanges, enhanced scope senior managers and certification regime firms and entities authorised or registered under the Payment Services Regulations 2017 or the Electronic Money Regulations 2011.

By 31 March 2022, firms must have identified their important business services (IBSs), set impact tolerances for the maximum tolerable disruption and carried out mapping and testing to a level of sophistication necessary to do so. Firms must also have identified any vulnerabilities in their operational resilience. As soon as possible after 31 March 2022, and no later than 31 March 2025, firms must have performed mapping and testing so that they are able to remain within impact tolerances for each IBS.

Regulator calls for purposeful anti-money laundering controls and highlights the fight against scams

Mark Steward, Executive Director of Enforcement and Market Oversight of the FCA, **delivered a speech** on 24 March 2021 emphasising the importance of firms having effective anti-money laundering (AML) controls. In particular, he warned that AML systems can become *"overly complicated, bureaucratised, vulnerable to gaming by less scrupulous players, and expensive"* and that as a result, there is a risk that complex systems lose a sense of what they exist for. Accordingly, firms should ensure that they are challenging themselves with the central question: is what we are doing effective to counter evolving AML risk in our business?

Separately, the **FCA has confirmed** that its Warning List will be updated on a daily basis. All firms should ensure they are not dealing with firms on the FCA's Warning List, and make this check an essential component of their existing systems and controls.

New prudential regime for UK investment firms

The FCA has been **consulting** on proposed rules to introduce the UK's Investment Firm Prudential Regime, which will come into effect from 1 January 2022.

The new regime will represent a significant overhaul of the current rules, both in terms of the way investment firms are categorised from a prudential perspective and in terms of the requirements to which they are subject.

Solo-regulated MiFID (Markets in Financial Instruments Directive) investment firms as well as AIFMs (alternative investment fund managers) or UCITS (undertakings for collective investment in transferable securities) management firms with MiFID permissions should continue to assess the likely scope and consequences of the new regime.

The FCA intends to publish its third (and final) consultation paper in the third quarter of 2021. Policy Statements and rules for the FCA's **second** and third consultations will be published over the course of this year.

Regulatory initiatives grid updated

This updated **Grid** from the Financial Services Regulatory Initiatives Forum, published on 7 May 2021, sets out the planned regulatory initiatives for the next 24 months across a variety of different sectors (including banking, credit and lending, insurance, investment management, pensions, and retail investments). In this edition, a new indicator has been included for initiatives that might be of interest to consumers and consumer organisations.

Firms should review the Grid to identify any regulatory initiatives which may affect them and plan for implementation.

Dates for the diary

31 December 2021

Deadline for removing LIBOR reliance.

1 January 2022

UK's Investment Firm Prudential Regime due to come into effect.

31 March 2022

Firms in scope of the FCA and/or PRA rules and guidance on operational resilience must have identified their important business services, set impact tolerances and carried out mapping and testing to a level of sophistication necessary to do so.

Q3 2022

Diversity in Financial Services policy statement expected to be published.

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12 Food law

Current issues

FSA deadline for CBD novel food product applications has passed

The Food Standards Agency (FSA) asked food business operators selling cannabidiol (CBD) food products in England and Wales which were on sale on 13 February 2020 to submit retrospective **novel food applications** for their CBD products. The deadline was 31 March 2021.

Validated applications (which is the initial step of the application process and is distinct from a novel food authorisation) can continue to be sold after 31 March 2021 until the FSA makes a decision on whether to grant a novel food authorisation in respect of each validated application.

Ban on HFSS advertising announced

The **Queen's Speech** in May 2021 announced that the UK government will restrict the promotions on high fat, salt and sugar food (HFSS) and 25 drinks in retailers from April 2022 in order to tackle obesity.

The Health and Care Bill will also include measures to ban junk food adverts before the 9pm watershed on television and for a wide-ranging ban online.

CMA publishes new guidance on green claims

The Competition and Markets Authority (CMA) issued, for consultation, draft consumer protection law guidance for all businesses making environmental claims. The **guidance** helps determine which types of claims may be misleading to consumers and best practice around formulating green claims.

The **consultation** ran until 16 July 2021, with the aim of publishing the final guidance by the end of September 2021. The CMA will also issue a short guide for consumers to help them to understand the sort of questions they should be asking themselves when deciding whether or not they should trust environmental claims being made by businesses.

UK government publishes updated guidance on movement of food products

The UK government has published updated guidance on the export of **food and agricultural products** across the borders between Great Britain, Northern Ireland and the **European Union**.

In particular, the government has published new guidance on **moving composite food products** across the border as the EU rules have tightened from 21 April 2021. The guidance covers which composite products are still exempt from an Export Health Certificate, which are exempt from border control inspections and when a private attestation may be required.

EPR and Deposit Return Schemes for single use plastics – UK consultation results

A 2019 Department for Environment, Food & Rural Affairs (Defra) consultation proposed to include disposable cups within the extended producer responsibility (EPR) system for

packaging, in addition to take-back schemes, reporting and recycling targets for single use plastic cups. The **results of the consultation** were published on 24 March 2021 and it was confirmed that these initiatives will be introduced via the Environment Bill. It is not yet clear what obligations producers will have and by when. We should know more by autumn 2021, once Defra has publishes its conclusions following a **further consultation** on EPR proposals which closed on 4 June 2021.

The government has also announced that it plans to introduce a Deposit Return Scheme (DRS) from 2024 in which a small levy is placed on the cost of a drink's container at the point of sale. This levy is then returned to the consumer when they return the empty drinks container to a dedicated collection point. The specific details of the DRS, including the material and drinks to be included in scope, are to be addressed via a **second consultation** which closed on 4 June 2021. The results are expected in autumn 2021.

New Office for Health Promotion to replace Public Health England

A new **Office for Health Promotion** (OHP) was announced on 29 March 2021. The UK government has said it will lead national efforts to improve and level up the public's health and sit within the Department of Health and Social Care (DHSC). The OHP will replace Public Health England.

The extent to which this invites a change in strategy, particularly around voluntary reformulation programmes to reduce levels of salt, free sugar, and calories in products, remains to be seen.

Single Use Plastics Directive

The Single Use Plastics Directive came into force across the EU on 3 July 2021, requiring certain receptacles to carry a new mark indicating that the packaging is made from single use plastic. This will not apply in Great Britain, as the Directive comes into force after 31 December 2020 and is therefore not retained EU law. For more information, see **Product Regulation**.

Dates for the diary

September 2021

The CMA to publish final guidance on green claims.

1 October 2021

New allergen labelling rules apply to food pre-packaged for direct sale under **Natasha's Law**.

Autumn 2021

Results from Defra's consultations on Extended Producer Responsibilities and Deposit Return Schemes for single use plastics to be published.

31 December 2021

Under the EU-UK Trade and Cooperation Agreement, traders will now need to have obtained declarations from their suppliers that a product meets the Trade and Cooperation Agreement provisions on Rules of Origin. Until now, guidance only required that they are confident that the goods do meet the Rules of Origin. Businesses may be asked to retrospectively provide a supplier's declaration after this date. See **guidance** here.

31 December 2021

For goods imported in Great Britain from the EU from 1 January 2021 to 31 December 2021, traders now have up to 175 days to complete customs declarations. This approach, **announced in March 2021**, grants traders extra time to make necessary arrangements to evidence their claim to the preferential tariff rate under Rules of Origin.

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13 Health and safety

Current issues

Fire safety

The **Fire Safety Act** 2021 received Royal Assent on 29 April 2021 and amends the Fire Safety Order 2005. It is part of a collection of new legislation that aims to tackle the recommendations from the Grenfell Tower Inquiry.

It clarifies that references to external walls in the Order include "doors or windows in those walls" and "anything attached to the exterior of those walls (including balconies)" meaning building owners or managers in multi-occupied residential buildings must include an assessment of risk related to fire and take precautions to reduce the risk of fire spreading in respect of these parts of the relevant premises.

Businesses should check that the scope of their fire risk assessment covers these areas and that if issues are identified, they know who is responsible for any further measures required.

The clarity that this change brings means that it will be easier for regulators to identify those with responsibility and ultimately prosecute if fire safety deficiencies persist.

Mental health

The first global standard for the management of workplace mental health risks has been finalised and made available (**ISO 45003:2021** "Occupational health and safety management – Psychological health and safety at work – Guidelines for managing psychosocial risks").

ISO 45003 provides practical guidelines for how an organisation can meet its duties around the mental health of employees and others under health and safety law, which includes a legal duty to manage mental health risks in the same way as physical health risks. The new guidelines will also assist employers in meeting some of the anticipated wellbeing challenges they will face as their employees emerge from the pandemic.

We would encourage companies to view ISO 45003 alongside the Health and Safety Executive's (HSE) helpful **Stress Management Standards Workbook**. This gives a practical step-by-step guide to how to assess the mental health risks arising from workplace stress and introduce an effective wellbeing programme.

While ISO 45003 does not currently offer certification, following its guidelines will assist organisations in achieving ISO 45001 (occupational health and safety management).

Driving for work

Statistically, driving remains the most dangerous activity that most people undertake. Employers have the responsibility to ensure that employees are not put at risk due to work-related driving activities.

The HSE is aiming to launch new website guidance on **work-related driving** this summer. Accompanying this, it can be expected that there will be a renewed focus on what measures

employers are taking. The HSE and the Department for Transport considered that the old guidance was too focused on fleet managers rather than work-related driving more generally.

The new guidance is likely to retain the "safe driver, safe vehicle, safe journey" approach, with links to topics such as poor weather, time keeping and monitoring technology.

Organisations need to have policies and procedures in place (for example, Driving at Work Policy) to effectively manage work-related road safety. These should include elements such as driver training, vehicle maintenance and journey planning. Historically this has been an issue that has been overlooked by the regulator in all but the most extreme cases, but we anticipate that there will be an increased focus, so now is the time for employers to review their approach.

Building Safety Bill

A draft Building Safety Bill was published last summer, but it was confirmed in the Queen's Speech on 11 May 2021 that it would now be brought forward.

The Bill will introduce a new regulatory regime, overseen by the HSE, to enhance the fire and structural safety of new and existing residential buildings (with an initial focus on high rise).

Primarily oversight will be through a system of "gateways" for HSE approval before residential development can proceed. Following occupation there will be new duty holders created with significant obligations such as to ensure information about the safety of a building is updated and retained as well as a requirement to keep residents informed.

Although not expected to enter into force until 2023, the government announced that gateway one would be introduced from 1 August 2021 through amendments to the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended), and an associated instrument.

There remain considerable details to be debated and determined before the Bill becomes law (including payment for necessary works to existing buildings), but it is clear that the legal obligations on those with an interest in residential property are expanding. As such it is sensible for businesses to review now how best to protect their exposure rather than be on the back foot as the new regime becomes law.

Use of technology to reduce risks and improve work safety

The general legal duty on all employers is to ensure that the risks created to the health and safety of its employees and others by its activities are controlled as far as is reasonably practicable. As technology advances and new ways of working become available and affordable, it is important to consider how the measure of what is reasonably practicable will change.

Greater sophistication of technology could mean that an employer could reduce the risk of work activities previously carried out manually.

Examples of safety-tech include drones, wearable tech (to record and transmit data) and other forms of artificial intelligence and robotics.

In the wake of an incident, one of the first questions that the regulator will be looking at is whether a business had taken all reasonably practicable steps to reduce risk. This would include whether the activity needed to be done at all in a way that exposed a person to risk.

Dates for the diary

August 2021

Possible introduction of **building safety planning gateway one**.

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14 Payments

Current issues

FCA further extends deadline for SCA implementation

The Financial Conduct Authority (FCA) announced on 20 May 2021 that it has further extended the deadline for implementing **Strong Customer Authentication** (SCA) for e-commerce transactions (that is, online card payments) to 14 March 2022.

This six month extension recognises the need for further coordination between acquirers, processors and merchants to minimise disruption to consumers. While the FCA continues to "encourage" merchants to be SCA-ready and expects firms to take robust action to reduce the risk of fraud, the new 14 March 2022 deadline is the latest the FCA expects full SCA compliance for e-commerce transactions.

E-commerce merchants should speak to their providers (for example, acquirers and gateways) to understand the steps to take in order to prepare and meet the agreed timeline, such as adopting 3D Secure v2.0 or higher. Acquirers and gateways should be tracking e-merchant progress and actively reaching out to those that have not yet taken action (which may include sending their merchant customers an **agreed industry communication** as requested by the FCA).

FCA's 'Dear CEO letter' to e-money institutions

The FCA sent a "**Dear CEO letter**" to electronic money institutions (EMIs) on 18 May 2021 expressing its concern that many EMIs compare their services to traditional bank accounts, but do not adequately disclose the differences in protections, in particular the fact that the Financial Services Compensation Scheme (FSCS) does not apply to e-money balances.

In light of the perceived risks, the FCA required EMIs to take three steps (the deadline for complying with the first requirement has passed but the second requirement is ongoing):

1. To write to their customers within six weeks of the date of the letter (that is, by 29 June 2021), reminding them of how their money is protected through safeguarding and that FSCS protection does not apply;
2. To review their financial promotions against FCA Handbook rules (specifically BCOBS 2.3.1AR and BCOBS 2.3.4G) to ensure that the promotions give customers enough information and that any promotion that refers to the FCA as regulator clearly distinguishes those products and services that are not regulated by the FCA; and
3. To ensure that the Board has considered the letter and has approved the actions taken in response.

The FCA proposes to follow up with a sample of firms to assess the action taken. EMIs should therefore ensure that they can evidence compliance with the requirements and should have continuing regard to the FCA's concerns expressed in the letter, particularly in the context of marketing materials relating to e-money accounts.

New special administration regime for payment and electronic money institutions

Following HM Treasury's **consultation** on the insolvency of payment institutions and electronic money institutions, the draft **Payment and Electronic Money Institution Insolvency Regulations** have now been laid before Parliament.

If made, the draft regulations will create a new special administration regime for payment and electronic money institutions (referred to as "pSAR"). The pSAR will create three special administration objectives which administrators will have a duty to follow:

– Objective 1 is to ensure the return of relevant funds as soon as is reasonably practicable;

– Objective 2 is to ensure timely engagement with payment system operators, the Payment Systems Regulator and the Bank of England, HM Treasury and the FCA; and

– Objective 3 is to either rescue the institution as a going concern, or wind it up in the best interests of the creditors.

The pSAR would give insolvency practitioners administering the insolvencies of payments or electronic money institutions an expanded toolkit. This would allow insolvency practitioners to keep an insolvent institution operational and prioritise the return of client assets.

Regulator highlights risks associated with 'Deposit Aggregators'

The Prudential Regulation Authority and the FCA wrote to banks and building societies on 14 April 2021 to **highlight the risks** associated with the increasing volumes of deposits that are placed with these firms via Deposit Aggregators.

Deposit Aggregators are providers of intermediary services who sit between savings account providers and retail customers. Depending on the model, the core activity of a Deposit Aggregator may not be regulated.

The regulators flag that customers may not fully understand how these models work: for example, customers may not know that FSCS payments can take longer for deposits placed via a Deposit Aggregator under the trust model. There are also scenarios where customers may have less FSCS protection than they expected, for example where they hold deposit accounts at a bank or building society under both a direct and trust model and have balances that in total exceed £85,000.

In terms of actions and mitigating measures, the regulators point to the importance of:

– compliance with the FCA's financial promotions rules;

– preparing for an orderly resolution;

– managing their own liquidity risk (in light of the fact that aggregated deposits may represent a concentrated liquidity risk); and

– senior manager oversight.

Extension of annual financial crime reporting obligation

As set out in its **policy statement**, the FCA has extended the scope of firms which are required to submit the annual financial crime report (REP-CRIM). In particular, the policy statement proposes that all electronic money institutions, certain payment institutions, crypto-asset businesses and custodian wallet providers should be brought into scope of the return based on their business activities and the potential money laundering risks.

While the FCA is conscious of the need to allow firms that have been brought into scope the time to have the correct systems in place, the FCA also believes that the data covered by REP-CRIM should already be held by firms in order for them to be able to manage effectively their financial crime risks. Accordingly, firms being brought into scope are required to submit their first REP-CRIM within 60 business days after their first Accounting Reference Date falling after 30 March 2022.

Dates for the diary

July/August 2021

Payment Systems Regulator expected to publish consultation on phase 2 of introduction of Confirmation of Payee.

Autumn 2021 (expected)

FCA to publish updated and revised policy statement on changes to the regulatory technical standards on secure customer authentication, its payment services and electronic money approach document and Perimeter Guidance Manual.

Q4 2021

Payment Systems Regulator expected to publish final decision relating to approach to delivering the New Payments Architecture.

14 March 2022

Deadline for full Strong Customer Authentication compliance for e-commerce transactions.

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15 Product regulation

Current issues

Brexit brings new conformity markings for Great Britain and Northern Ireland

From 1 January 2022, any goods placed on the GB market which previously required a CE mark will need to carry the **UKCA mark**. The UKCA mark will not be recognised in the EU, and products will continue to require a CE mark for sale in the EU.

To regulate the flow of products across the Northern Ireland–EU border, goods placed on the Northern Irish market from Great Britain will require a UKNI mark alongside the CE mark where they have been conformity assessed by a UK-based Approved Body. Products which have been assessed by EU Notified Bodies do not require a UKNI mark to be placed on the Northern Irish market and can continue to use the CE marking only.

Manufacturers, along with platforms and importers, are encouraged to check that products have the relevant marks for each jurisdiction as soon as possible.

New marking requirements for single use plastic products from 3 July 2021

Under the **Single Use Plastics Directive** (SUPD), EU Member States must require that single use plastic cups for beverages bear a **label of a dying turtle** on its packaging from 3 July 2021. As part of the Northern Ireland protocol, the changes will take effect from 1 January 2022. England is not implementing the SUPD. Scotland and Wales are consulting on their own devolved legislation which aims to meet the SUPD requirements.

Due to Covid-19 delays, we are still waiting for the publication of the European Commission's finalised SUPD guidelines which should clarify the scope of "cups for beverages".

Alongside the new marking requirements, from 3 July 2021 Member States must take measures to inform consumers about the availability of reusable alternatives and the impact of littering, as well as introduce a ban on certain single use plastic products including expanded polystyrene food containers and cups, plastic stirrers, cotton bud sticks and plastic cutlery.

EU announces potential major changes to General Product Safety

Between June and October 2020, the European Commission carried out a consultation on consumer policy which included a review of the General Product Safety Directive (GPSD) to establish whether it is still fit for purpose.

The outcome of the review is a **proposed General Product Safety Regulation**, which will replace and modernise the GPSD. The proposed regulation contains sweeping reforms which are likely to change significantly the way that both modern and traditional products are produced, supplied and monitored across the EU. It will raise the requirements of safety and add sophistication in terms of compliance obligations for all non-food products and the businesses involved in manufacturing and supplying them to end users.

Osborne Clarke will be publishing more detailed analyses and summaries of the changes, but an initial article on the regulation is available **here**.

Home Office proposes a specific exemption for CBD products

In January 2021, the **Home Office announced** its proposal to create a specific exemption from the Misuse of Drugs Regulations 2001 for cannabidiol (CBD) products meeting certain criteria. The proposal states that a product will be exempt if it does not contain more than a specific threshold of cannabinoid chemicals THCV, THC and CBN. The suggestion is the threshold should be set somewhere between 0.01% and 0.001%.

The Home Office has asked the Advisory Council on the Misuse of Drugs (ACMD) to give recommendations as to which substances should be controlled and what the threshold should be. ACMD's **call for evidence** was concluded in April 2021 and we are now awaiting its recommendations.

If the proposal is enacted, CBD manufacturers who can demonstrate that the level of THC and other controlled substances are below the threshold will have increased certainty that their CBD products do not qualify as illegal drugs.

Government sets out policy on safety of consumer IoT devices

The government has published its **response** to last year's call for views on consumer connected products, revealing plans to legislate to regulate the security of consumer Internet of Things (IoT) devices.

The intended legislation will apply to any network-connectable devices and their associated services that are made available primarily to consumers, including smartphones, connected cameras, smart TVs and baby monitors.

Connected consumer products will be required to meet new safety requirements and designated standards, such as a ban on universal default passwords, before they can be placed on the UK market, and manufacturers will be required to publish a declaration of conformity.

UK Product Safety Review: call for evidence

Following Brexit, the Office for Product Safety and Standards has taken the opportunity to carry out a broad review of the UK's current product safety legislation to ensure that regulations are relevant to new and novel products and business models. The government ran a **call for evidence** between March and June 2021, gathering public and industry feedback on product safety laws and how the framework might be modernised.

The Product Safety Review focuses on the regulations applicable to the majority of consumer products, including electrical equipment, cosmetics, toys and gas appliances, as well as those that seek to protect users of machinery, lifts, equipment used in explosive atmospheres and pressure equipment. It also includes regulations, such as the General Product Safety Regulation 2005 and product-specific rules.

The questions explore product design, manufacture and placing on the market, new models of supply, new products and product lifecycles, enforcement considerations and a diverse and inclusive product safety framework.

Osborne Clarke **responded** to the call for evidence which closed on 17 June 2021 and we would be pleased to discuss our comments.

Packaging waste: Extended Producer Responsibility

The government recently consulted on proposed upcoming changes to its Extended Producer Responsibility scheme for packaging. The proposed changes would mean that packaging producers will pay the full cost of managing packaging once it becomes waste. The government's stated aim is *"to encourage producers to use less packaging and use more recyclable materials, reducing the amount of hard to recycle packaging placed on the market"*.

The proposals include extending the obligations to online marketplaces and platforms who will need to account for *"the amount of filled packaging that is sold on the UK market via their platforms/websites by businesses based outside the UK. Online marketplaces must pay fees to cover the costs of managing this packaging waste, as well as other scheme costs"*. Given the complexities for online marketplaces to account for the applicable packaging, as they may never own it themselves, the government has proposed online marketplaces submit for approval to the regulator methodologies to compensate for any gaps. The consultation closed on 4 June 2021 but businesses should review the proposed changes and start to prepare for the government's target implementation date of 2023.

Further detail is provided in the government's **consultation documents**.

Dates for the diary

1 January 2022

Any goods placed on the GB market which previously required a CE mark will need to carry the UKCA mark.

1 January 2022

Single use plastic cups for beverages in Northern Ireland must bear a label of a dying turtle on the packaging.

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16 Regulated procurement

Current issues

New national procurement policy statement

The Cabinet Office has published **Procurement Policy Note (PPN) 05/21** on the new National Procurement Policy Statement (NPPS). Forming part of the government's plans for "transforming public procurement" in the UK, the NPPS sets out the national priorities for public procurement and actions to support their delivery.

The NPPS priorities are split into three areas:

1. Commercial and procurement delivery – contracting authorities should consider whether they have the right policies and processes in place to manage the key stages of contract commercial delivery. The greater the complexity, cost and risk, or the more important a project or programme will be, then the more robust and rigorous a process is required to successfully set up, procure and manage contracts relating to it. The government's Sourcing Playbook and Consultancy Playbook provide additional detail on how procurements should be run. There is also a focus on the publication of procurement pipelines.
2. Social Value – contracting authorities should take a broad view of value for money that must include improvement of social welfare or wellbeing.
3. Skills and capability for procurement – contracting authorities should carry out an analysis to ensure that they have the correct organisational capability and capacity with regard to procurement and commercial skills to deliver their procurement pipelines.

The NPPS is not focused on bidders, although it provides very helpful insight into how to engage with contracting authorities at pre-procurement market engagement stage and where the public sector focus will be in evaluating tenders.

The requirement to publish procurement pipelines will be helpful for bidders to prepare for contracting opportunities coming to market. The focus on the delivery of social value through public contracts is only going to increase. Bidders who want to succeed in winning public sector contracts should ensure they understand their compliance with social value obligations such as delivering net zero carbon by 2050 and eliminating modern slavery in supply chains and can evidence these when required to do so in procurements.

Carbon reduction requirements in procurement of major government contracts

On 5 June 2021 the Cabinet Office published PPN 06/21 ***"Taking Account of Carbon Reduction Plans in the procurement of major government contracts"***. The PPN provides that from 30 September 2021, when bidding for contracts valued at more than £5 million, bidders will be expected to submit a Carbon Reduction Plan (in the form set out in Annex A of the document) as part of the selection stage, and bidders must commit to achieving carbon net zero by 2050. Bidders who do not make that commitment may be excluded from bidding (although the PPN stops short of requiring that bidders must be excluded for failing to make this commitment).

Further, the PPN anticipates that carbon reduction requirements will be a factor in *"most, if not all"* contracts, regardless of their value, and specifically for contracts which have a direct impact on the environment or require the use of natural resources, buildings and/or transportation of goods or people.

Businesses should review the requirements now and start putting in place the commitments necessary to be able to submit a completed plan when bidding for contracts from 30 September 2021.

Exclusions, conflicts of interest and whistleblowing

The government has issued **updated guidance** (PPN 04/21) on managing conflicts of interest in public procurements following the publication of the Boardman Review (which recommended improvements to government procurement in view of the prevalence of direct awards due to Covid-19).

The guidance outlines a framework to be adopted by public bodies to prevent, identify, record and remedy conflicts of interest. The framework includes the relevant processes, procedures, and appropriate checks and balances to manage effectively conflicts of interest in a commercial context.

When bidding for public contracts suppliers must take care to ensure that they are not in a conflict of interest position. In particular, incumbent suppliers should consider how to ensure they do not have involvement in the procurement procedure or access to information not available to other bidders.

Sourcing and Consultancy Playbooks

The current Outsourcing Playbook is being replaced by the rebranded and reframed Sourcing Playbook (**PPN 03/21**), which seeks to support public bodies understand a *"range of delivery models that should be carefully considered as part of a 'mixed economy' approach to service delivery"*. Refining and building on the policies within the Outsourcing Playbook, the new Sourcing Playbook provides guidance on:

- commissioning consultants in an effective and more valuable manner (as addressed in the new Consultancy Playbook);
- designing Key Performance Indicators, and publishing the three core KPIs of each of the government's *"most important contracts"*;
- integrating the Social Value Model and the **evaluation of social value** in the award of contracts; and
- improved delivery models (including the Should Cost Model for complex outsourcing projects).

All suppliers to the public sector will find helpful information in the Sourcing Playbook to support their approach to responding to public tenders. The content should also be considered if a supplier believes that a procurement is not being run in a compliant way, prejudicing its chances of winning the contract being procured.

New Public Procurement Bill planned for September 2021

The Queen's Speech outlined the intention to introduce a new Public Procurement Bill in September 2021. The Bill is expected to implement the new procurement regime proposed in the **Green Paper** published in December 2020. The consultation closed on 10 March 2021, and the government will consider responses before moving forward with the legislative process.

The Green Paper sets out proposals for a number of major changes to the current public procurement regime including:

- replacing the four existing sets of procurement regulations with a single piece of legislation;
- amending current processes to leave only three procurement procedures which can be used by a contracting authority or utility;
- allowing contracting authorities to include social value evaluation criteria beyond the subject matter of the contract;

– removing the requirement for standstill letters, and replacing it with a requirement to disclose more documents about the process when the award decision is announced;

– requiring contracting authorities to record and publish key performance information on contracts;

– introducing new Civil Procedural Rules for procurement challenges;

– amending the legal test to lift automatic suspensions;

– capping damages which can be awarded for breaches of procurement law, to legal fees plus 1.5x bid costs; and

– applying a standstill period of ten days for contract amendments.

Proposed reform to the NHS procurement regime

On 11 February 2021, the government published a **White Paper**, *"Integration and innovation: working together to improve health and social care for all"*, setting out legislative proposals for a new Health and Care Bill.

The White Paper proposes that NHS health services remain outside the scope of the Public Contracts Regulations 2015, and that the NHS (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 be repealed. Instead, NHS entities will need to follow a new "Health Services Provider Selection Regime" when selecting service providers, intended to give commissioners greater flexibility in procuring services.

The new regime is expected to allow commissioners to extend an incumbent's contract, or directly award to a new provider, without a new tender where certain requirements are met. If the criteria are not met, the commissioner must run a procurement.

Dates for the diary

Summer 2021

Government's response to its consultation on the public procurement Green Paper expected to be published, and information on the new Public Procurement Bill expected to be released.

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17 Sanctions and dual-use export control

Current issues

New recast EU Dual-Use Regulation to come into force

The European Commission has been proposing for some time to amend and recast the legislation underpinning the current European dual-use export control regime, **the EU Dual-Use Regulation**. The proposed changes aim to harmonise, simplify, and introduce a new "human security" dimension to the existing European dual-use export control regime.

The European Parliament and the European Council finally adopted the recast regulation in May 2021. Once the recast regulation is published in the EU Official Journal it will enter into force 90 days later.

The adoption of the recast regulation is the first significant example of divergence between UK and EU dual-use export controls. The UK government is not committed to remaining aligned with those new rules and so it might be tempting for UK exporters to do nothing for now. But given the wider scope of the new restrictions, businesses operating within the EU would be well advised to assess whether the new rules cover their EU operations. For example, the new rules extend the controls on brokering services to brokers that are not resident or established in an EU Member State.

Assessments will be particularly important for UK exporters dealing in "cyber-surveillance items" – that is, dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems. This type of technology forms a central pillar of the new rules and is subject to extensive "catch-all" restrictions.

ECJU makes substantial amendments to IT security OGELs

The Export Control Joint Unit (ECJU) has made **substantial amendments** to two key information security open general export licences (OGELs). The purpose of these revised OGELs is to allow the export of "low risk" information security items deploying encryption to a wide range of destinations.

ECJU publishes new guidance on dual-use controlled technology

The ECJU has published **updated guidance** on the definition and scope of the regulations around transferring military or dual-use controlled technology. Importantly for businesses, the guidance includes a series of case study examples of how it would expect different exporting scenarios to be treated. Those examples cover a manufacturer of night vision sights for small arms, right through to a cloud service provider.

New sanctions case law development on the EU's Blocking Regulation and Iran

The EU Blocking Regulation and the equivalent UK legislation prohibit EU/UK nationals without authorisation from "complying" directly or by "deliberate omission" with certain US sanctions that target Iran (or Cuba). Unfortunately, this can leave UK/EU entities with interests in Iran between a rock and a hard place: the demands of the US sanctions system on the one hand, and those of the EU/UK on the other.

On 12 May 2021, the Advocate General delivered his **opinion** in the Court of Justice of the European Union (CJEU)'s *Bank Melli* case, which provides that where the Blocking Regulation has been infringed, it confers on the "wronged" Iranian counterparty a right of action to, for example, compel performance of the contract and that EU persons must objectively justify termination of a contract with an Iranian entity (that is, show that it was not driven by US sanctions).

Businesses will be looking to see whether the opinion is followed by the CJEU and whether this could herald a harder line in the enforcement of the EU Blocking Regulation by authorities. Decisions about how to deal with conflicting US and EU/UK sanctions demands are likely to become more acute and future Iranian related transactions will be subject to increased scrutiny (as will dealing with existing commercial relationships).

New UK global anti-corruption sanctions

On 26 April 2021, the UK brought in a new Global Anti-Corruption Sanctions regime. The **regulations** give the government the power to sanction individuals and entities in relation to serious cases of corruption, including bribery. Much like the new Global Human Rights list, the regime is not confined to specific countries and currently targets 22 individuals from a number of states (including the UAE, Guatemala and Russia). These new cross-border regimes, and in particular the designation, for example, of UAE residents, demonstrate the need for businesses to have adequate procedures in place to ensure sanctions compliance.

Dates for the diary

Second-half 2021

Recast EU Dual-Use Regulation expected to come into force.

Second-half 2021

UK government expected to publish the 24th edition of its Annual Report on Strategic Export Controls. The report provides a snapshot of strategic export controls policy and export licensing decisions for the 2020 calendar year (read the 2019 version **here**).

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18 Telecoms

Current issues

Implementation of the EECC

As featured in our **January 2021 edition** of the Regulatory Outlook, updates to Ofcom's General Conditions of Entitlement (GCs) following implementation of the **European Electronic Communications Code** (EECC) in the UK remains one of the key upcoming changes in telecoms regulation. The EECC replaces the existing European telecoms regulatory framework and aims to harmonise the EU regulatory framework for electronic communications.

Member States were required to implement the EECC by 21 December 2020. The UK did so through the Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020 that made updates to the Communications Act 2003 and the GCs as well as the Wireless Telegraphy Act 2006.

Due to the impact of the Covid-19 pandemic and its recognition that providers would need time to make changes to their systems and processes, Ofcom confirmed on 27 October 2020 that it would allow providers 12 months from publication of the final notification containing the revised General Conditions (published on 19 December 2020) to implement the relevant changes. The three implementation phases can be broadly summarised as follows, with changes applying depending on the customer type:

– December 2021: The majority of the changes will come into force on this date, including the ban on selling locked devices to residential customers; requirements on accessibility of information; new rules for bundles; and requirements on contract duration.

– June 2022: Entry into force of the requirements on pre-contract information and contract summary, and on customers' right to exit following contractual changes and after a fixed commitment period.

– December 2022: Entry into force of the new rules on switching and porting.

Where applicable, the changes will require providers to undertake system changes to ensure compliance, which could have a significant impact. Businesses will need to understand the impact of these changes on their activity, and set aside budget and time over the coming months to ensure compliance on time.

Government announces new Telecommunications (Security) Bill

On 24 November 2020, the Department for Digital, Culture, Media & Sport (DCMS) published the **Telecommunications (Security) Bill**, to strengthen the legislative framework for telecoms security and resilience, focusing in particular on 5G and full fibre networks, and to enable the government to take action on the use of "high risk" vendors on national security grounds. The Bill, which amends the Communications Act 2003, is currently making its way through the legislative process.

The Bill contains three main themes:

1. Placing new, increased duties on public telecoms providers to identify and reduce security risks in UK telecoms networks;

2. Granting the Secretary of State powers to designate vendors as "high risk" and control the use of their goods, services or facilities; and

3. Placing Ofcom under a new duty to monitor compliance and granting new investigative and enforcement powers, including the ability to levy fines of up to 10% of annual turnover or £100,000 per day in the case of continuing contravention.

The Bill also gives the Secretary of State power to make regulations imposing duties on providers to identify, reduce and take specified measures in response to security compromises (a draft of which was published by DCMS in January 2021 in the form of the **Draft Electronic Communications (Security Measures) Regulations**). The Bill results from the government's 2019 **UK Telecoms Supply Chain Review Report**, and its announcement in January 2020 that new restrictions should be placed on high risk vendors in such networks. In July 2020, following a ban on the use of Huawei equipment in the core parts of 5G networks, DCMS announced that UK telecoms providers should not procure any new 5G equipment from Huawei after 31 December 2020 and that all Huawei equipment must be removed from 5G networks by the end of 2027.

Queen's Speech unveils proposals for a Product Security and Telecommunications Infrastructure Bill

In the **Queen's Speech** delivered on 11 May 2021, which set out legislative plans for the next session of Parliament, the government proposed a new Product Security and Telecommunications Infrastructure Bill. The Bill has two main focuses:

– ensuring that smart consumer products such as smartphones and televisions are secure against cyber attacks, to protect the privacy and security of individuals; and

– accelerating and improving the deployment of 5G and gigabit-capable broadband by supporting the installation, maintenance, upgrading and sharing of apparatus to promote coverage and connectivity.

The government seeks to achieve these aims by:

– setting minimum security standards for manufacturers, importers and distributors in relation to smart products made available to UK consumers; and

– amending the UK Electronic Communications Code to foster quicker, more collaborative negotiations for the use of land for telecommunications deployment, and to put in place a suitable framework for the use of installed apparatus.

Government's Wholesale Fixed Telecoms Market Review 2021-2026: investment and competition

In March 2021, Ofcom **announced its decisions** from its Wholesale Fixed Telecoms Market Review 2021-26, setting out how the fixed telecoms markets that support broadband, mobile and business connections will be regulated in the UK from April 2021 to March 2026.

Against the backdrop of a 40% increase in data use year-on-year by UK households, Ofcom underscores the importance of delivering future-proof gigabit-capable broadband, by promoting competition and investment (mainly by private companies, but the government has also committed at least £1.2 billion between March 2021 and 2024/25 to subsidise rollout in more remote areas of the UK).

The review continues the trend of recent telecoms regulation towards extending access to BT's infrastructure to other operators, having identified BT as having market power in providing physical telecoms infrastructure and in the wholesale markets underpinning broadband and leased line services.

Key decisions in the review:

– Ofcom clarifies its regulatory approach to fibre, stating that it does not expect to introduce cost-based price controls until at least 2031.

– Openreach must continue to allow all network operators to use its ducts and poles to roll out their own networks.

– Openreach's residential broadband products will be regulated according to the level of competition in an area. In areas where Openreach is the only operator providing a large-scale network, Ofcom is setting a cost-based charge control to allow Openreach to recover investment costs across both its existing copper network and new full-fibre networks.

– Openreach's leased lines (which underpin the UK's mobile and broadband networks) will be regulated in a similar way to residential broadband, with the approach varying according to levels of competition.

– Openreach will be able to charge more (£1.70 per month extra) for full-fibre broadband, and will be supported to retire its copper network.

– Openreach is prohibited from offering geographic discounts on its superfast broadband wholesale services, including full fibre.

– Openreach's quality of service rules for repairs and installations are broadly being retained with some temporary leeway allowed in light of Covid-19.

These decisions should make it easier for new market entrants providing broadband and leased line services to gain traction.

Dates for the diary

17 December 2021

Entry into force of the majority of the changes to Ofcom's GCs as required by the implementation of the European Electronic Communications Code, including the ban on selling locked devices to residential customers; requirements on accessibility of information; new rules for bundles; and requirements on contract duration and termination.

17 June 2022

Entry into force of further revisions to the GCs: the requirements on pre-contract information and contract summary, and on customers' rights to exit following contractual changes.

19 December 2022

Entry into force of further revisions to the GCs: the new rules on switching and porting.

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