Regulatory Outlook

Osborne Clarke

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Regulation and Responsibility

From one of the largest oil and gas multinationals pledging to reach "net zero" to the world's biggest asset manager "placing sustainability at the centre of our investment approach", responsible business is becoming a keystone of the corporate strategy of businesses of all types and across all sectors.

It should also be at the heart of a business's approach to regulatory compliance. Governments and regulators are responding to calls from sections of society to compel businesses to operate and trade sustainably, ethically, and in a way that is socially responsible. In this edition of the Regulatory Outlook, we look at how concepts of business responsibility are shaping the regulatory landscape across 15 areas of business regulation. From this, some common themes emerge:

A broad church: business responsibility is multifaceted and different considerations come to the fore in different regimes, even within the same sector. Within financial services, for example, the focus for investment funds is on ESG (environmental, social and governance) investment, often focussing on sustainability. But when it comes to consumer finance, social responsibility – the protection of vulnerable customers – is the government and regulators' priority. In other areas, such as regulated procurement, businesses are encouraged to consider a range of factors including sustainability and labour practices in supply chains and the impact delivering public sector contracts has on the local community.

Regulatory levers: the nature of responsible business does not lend itself naturally to regulation under a rules-based approach. Alternative regulatory tools include principles-based regulation (as in the case of financial regulation), corporate reporting (including the new Streamlined Energy and Carbon Reporting regime), industry initiatives (such as those promoting ESG investment) or government purchasing power (in the case of regulated procurement).

A team effort: at one time, sustainability and social responsibility may have been the domain of corporate social responsibility teams. Now, an effective responsible business strategy needs to be a combined effort, involving compliance, procurement, legal, finance and other teams, with buy in from the most senior stakeholders. Business also need to listen to the demands on these issues being made by clients, customers, consumers.

Part of a bigger picture: with climate change having been described as **"the greatest threat facing humanity"**, it is no surprise that many of the responsible business initiatives are driven by international consensus, including through organisations such as the OECD, the UN and the G20. But whether it is modern slavery, socially responsible advertising or wellbeing in the workplace, the UK is often in the vanguard in regulating responsible business.

As governments and regulators work together, businesses should also be thinking globally when it comes to their operations and their compliance risks. A dynamic system with a proactive culture is at the core of good compliance. But compliance is never achieved through systems alone. It requires a willingness by everyone in the business to want to comply. Our regulatory and **global compliance** teams can help you to understand the regulatory risks to your business now and coming down the track; spot the gaps and areas for improvement; and implement long-lasting improvements to your compliance programmes and culture.

To discuss how we can help you to understand and manage your regulatory risks, please contact one of the experts listed in relation to the relevant area, or your usual Osborne Clarke contact.

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Advertising and Marketing

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Current Issues

New CMA consumer law enforcement powers

The Competition and Markets Authority **continues to press** for increased consumer law enforcement powers, including the power to impose fines directly for misleading advertising and other consumer law breaches. Reports in 2019 suggested that the Department for Business, Energy and Industrial Strategy would introduce a package of reforms early this year.

Alongside the General Data Protection Regulation (GDPR)-style fines regime in the EU Consumer Omnibus Directive, the new measures look set to do for consumer law what the GDPR did for data protection. Consumer-facing businesses should consider briefing their boards and allocating additional resource and budget to consumer law compliance.

ASA reviewing competitor complaint procedure

As envisaged in its **2019-2023 Strategy** the Advertising Standards Authority (ASA) contacted industry stakeholders in October 2019 for feedback on its competitor complaints procedure. It looks like the regulator is considering various possible measures to speed up and improve the handling of competitor complaints, including, amongst other things, potentially full mutual disclosure of submissions (with confidential information redacted), oral representations and a "complaint fee". Further news on this is expected in the first half of 2020.

Adtech: ICO enforcement action expected

The Information Commissioner's Office (ICO) has **warned** that those in the adtech sector who "have ignored the window of opportunity to engage and transform" must now prepare for enforcement action. Adtech vendors who have not signed up to and fully implemented the Internet Advertising Bureau's transparency and consent framework would appear to be at greater risk, as would those who say they rely on "legitimate interest" as their GDPR basis for processing. Advertisers and online media owners should engage with their suppliers and partners in the adtech eco-system to understand their approaches to compliance and Data Protection Impact Assessments.

In Focus: Regulatory Powers and Trends

Which aspects of responsible business are driving the regulatory agenda?

Social responsibility has long been a key focus of the Advertising Standards Authority (ASA) and Competition and Markets Authority (CMA).

In seeking to protect children and the vulnerable, the ASA has in recent years given particular attention to topics such as: advertising viewed by children (including ads for HFSS (high in fat, salt or sugar) foods, gambling and other age-restricted products), age targeting techniques and the sexualisation of under-18s in advertising.

The ASA has also taken a strong line on gender stereotyping in advertising, leaving marketers at times struggling to navigate the regulator's assessments as to what is "harmful" and what is acceptable.

With many businesses wishing to make "green" and environmental impact claims, the ASA has tended to set the bar high for substantiation of claims: a product can only be described as "environmentally friendly" without qualification if the business can provide convincing evidence that its product will cause no environmental damage, taking account of the full life cycle of the product from manufacture to disposal.

In addition, the ASA and CMA have worked together on ensuring that influencers are transparent about any commercial elements of social media posts. In 2020, the ASA and CMA are expected to continue working together on initiatives to drive responsibility. Most recently, the CMA announced it is developing guidance on messaging in the IVF sector, and the ASA has indicated it is supporting this initiative.

Are responsible business considerations having an impact on the tools that regulators are using?

The existing legal and regulatory framework comprises both specific prescriptive rules and more general, principles-based requirements. The latter have generally enabled the Committee of Advertising Practice (CAP) and the CMA to issue guidance in response to these issues. The Codes enforced by the ASA in particular contain broad requirements that marketing communications must be prepared with a sense of responsibility to consumers and to society.

Some media owners, such as Transport for London, have taken a stricter view than the regulators on certain issues. TfL for instance operates a policy that generally prohibits ads for HFSS foods and drinks.

Which of the recent or upcoming developments are based on international consensus or agreements?

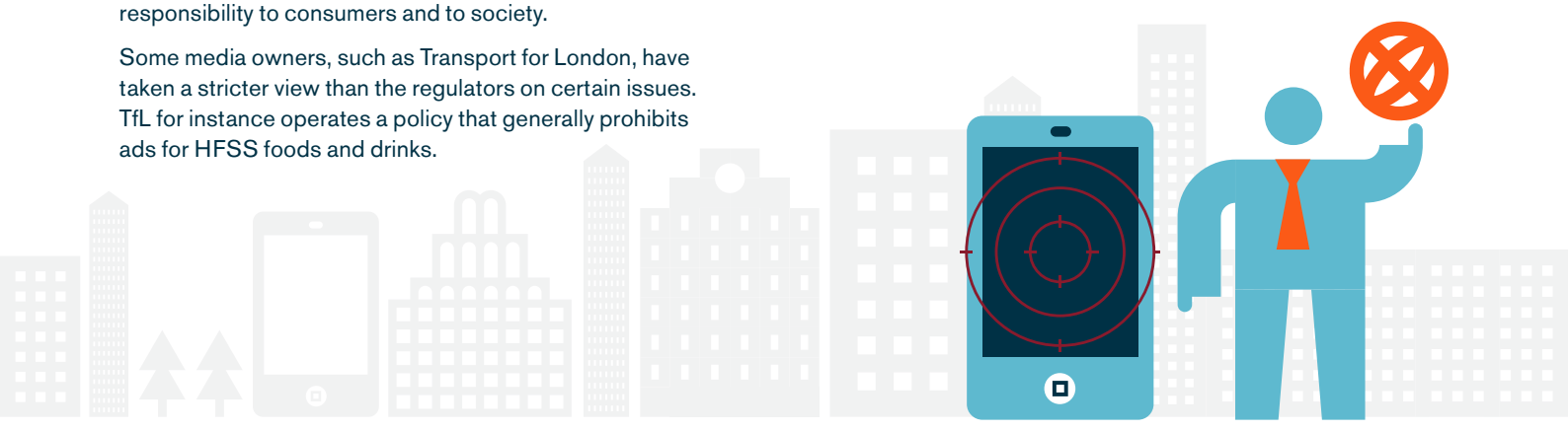
The activities of the ASA and the CMA have to some extent been influenced by their involvement in the European Advertising Standards Alliance and the Consumer Protection Co-operation Network respectively. However, in its approach to gender stereotyping in ads the ASA is very much in the vanguard of regulators internationally.

In addition, in Q4 of 2020, the European Commission has plans to prepare legislation to boost consumer participation in the green transition. Although the UK may not be required to follow that legislation post-Brexit, this initiative may lead to change in the UK too.

What are the main challenges for businesses in complying with these developments?

Some of the developments discussed above challenge established commercial practices and societal norms, as has been demonstrated through the volume of upheld ASA complaints. This means advertisers and brands sometimes need to make some tricky judgement calls as to whether conventional (or, in some cases, stereotypical) storylines, characters and cultural references are appropriate to use – while still ensuring that an ad appeals to its target audience and/or generates media attention for the right reasons.

As for environmental claims, the high threshold for substantiation can sometimes limit what can be said in marketing (including on companies' own websites) about de-carbonisation activities and environmental impact reduction.



Dates for the Diary

4 March 2020

Information Commissioner's Office consultation on Direct Marketing Code of Practice closes.

12 July 2020

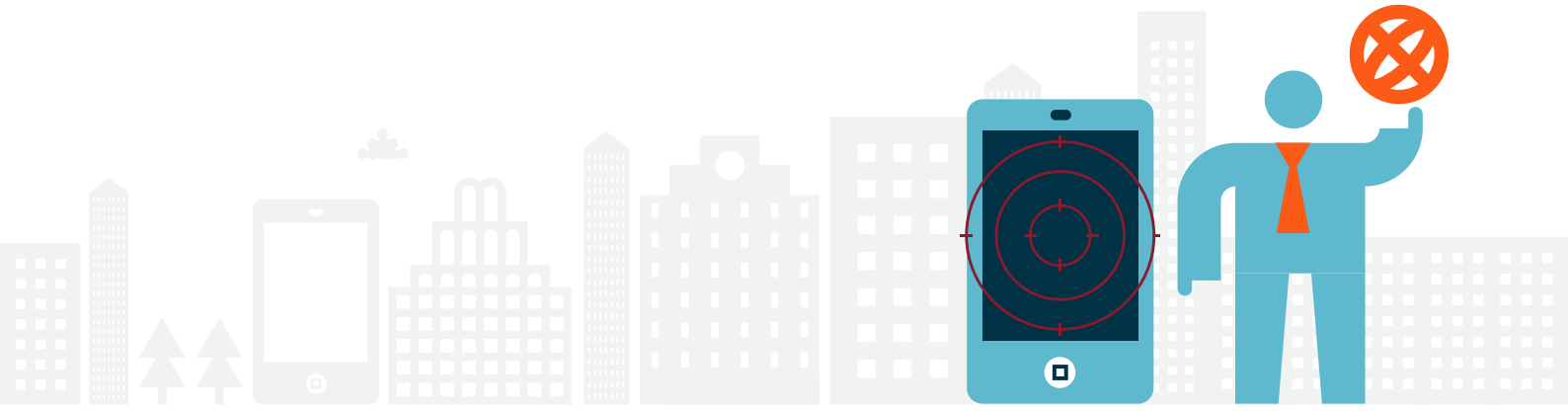
EU Platform-to-Business Regulation comes into force.

H1 2020

ASA proposals due for changes (if any) to competitor complaints handling.

H1 2020

UK government to publish outcome of its 2019 consultation on further advertising restrictions for HFSS products.



Anti-bribery, Corruption and Financial Crime

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Current Issues

SFO guidance on effective compliance

In January 2020, the Serious Fraud Office (SFO) added a section to its Operational Handbook to give guidance on what it will view as constituting an effective corporate compliance programme. (We analysed this guidance in this **Insight**.) The SFO has made it clear that it will focus on assessing compliance programmes as an integral part of any investigation and will want to be satisfied that a commercial organisation has a "fully proactive and effective" programme in place and not simply a "paper exercise". The SFO's assessment in this regard will be likely to be central to any decision taken as to whether a deferred prosecution can be offered or whether a full prosecution should be brought.

UK Money Laundering Regulations updated

The Money Laundering and Terrorist Financing (Amendment) Regulations 2019 came into force on 10 January 2020, implementing the Fifth EU Money Laundering Directive (5MLD) and updating the UK's anti-money laundering (AML) regime.

The new regulation brings four additional sectors within the ambit of the AML regime: cryptoasset exchange providers; custodian wallet providers; art market participants; and letting agents. The new regulations also provide further requirements as to the need for enhanced due diligence to be undertaken where any party to a transaction is established in a high-risk country. There is also now an obligation to report discrepancies in information received when undertaking AML due diligence with the detail held at Companies House and on the People with Significant Control Register.

For more detail, see our **Insight** on the new regulations.

Airbus penalty confirms upward direction of travel for financial crime sanctions

On 31 January 2020, Airbus SE entered into the UK's seventh Deferred Prosecution Agreement (DPA), agreeing to a total sanction being paid in the UK of €990. This was part of a global settlement of €3.6bn also involving France and the USA. The underlying conduct leading to the UK DPA related to a failure to prevent bribery within Airbus's Commercial and Defence and Space divisions occurring across five jurisdictions between 2011 and 2015. In addition to the financial sanction, an enhanced compliance programme was required to be adopted.

The process by which the court arrived at the DPA followed that seen in previous DPAs, most notably Rolls-Royce. The decision underscores the seriousness with which courts will approach offending of this nature whilst making it clear that significant reduction in sanctions are available for organisations that self-report and cooperate fully with the authorities. (We look at DPAs as part of our **Straight to the Point video series**).

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

In the financial crime space, ethical business practices along with the continuing need to tackle terrorist and other illicit financing remain of paramount importance. The Fifth Money Laundering Directive (discussed above) reflects these imperatives. In the UK, difficulties with proving corporate criminal liability continue to exercise enforcement agencies, in particular the SFO.

The corporate failure to prevent offences (presently relating to bribery and the facilitation of tax evasion) have been enacted to try and address this issue, and we expect that the offence will be extended to cover all forms of economic crime, including money laundering, in the next two to three years.

Are responsible business considerations having an impact on the tools that regulators are using?

As the corporate compliance guidance (discussed above) issued by the SFO reflects, the UK agencies, in particular the Financial Conduct Authority, issue guidance to assist business. However, by comparison with the US, such guidance might be viewed as being less detailed and therefore potentially less helpful.

For example, no further guidance has yet been issued to assist in determining what would constitute adequate procedure for the purposes of establishing the statutory defence to the corporate offence of failing to prevent bribery, beyond that issued by the Ministry of Justice in 2011, when the Bribery Act 2010 first came into force.

Which of the recent or upcoming developments are based on international consensus or agreements?

Supranational organisations such as the G20 and the OECD play a significant role in shaping national policy agendas in relation to anti-bribery and corruption. The G20's Anti-Corruption Working Group, for example, has produced **high-level principles** that are intended to form the basis for national legislation. As a result, other countries, such as France, have been introducing or strengthening their anti-bribery and corruption regimes.

In relation to enforcement, multi-jurisdictional investigations have been common for some time, and often require difficult tactical decision to be made, as ultimately each jurisdiction involved can follow its own path, and impose its own sanction. A number of jurisdictions are, however, following broadly similar processes when it comes to Deferred Prosecution Agreements and in this respect the SFO has indicated it will look to work closely with Australia, France and the US among others.

The SFO, under its new director, Lisa Osofsky, has repeatedly indicated that it will look to progress its investigation leveraging increased co-operation from other international enforcement agencies.

What are the main challenges for businesses in complying with these developments?

As with all areas of compliance, the pace with which new laws are adopted, both in the UK and internationally, can be challenging. As the UK moves forward post-Brexit and looks to develop new trading partnerships, those challenges may only increase, and countries with whom the UK seeks extensive trading relationships may in due course seek to impose additional compliance burdens that mirror those in place in their respective jurisdictions.

It remains imperative that businesses understand the financial crime risks that they face wherever they undertake business, and then take proportionate steps to mitigate those risks.

Dates for the Diary

Throughout 2020

A number of developments in high-profile SFO cases including Amec, BAT, De La Rue, ENRC and G4S are expected this year that could provide informative pointers as to future enforcement trends.

2020/21

Changes to the UK's Suspicious Activity Report process aimed at improving the system and the quality of intelligence it produces, are hoped to come into effect.

Competition

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Current Issues

CMA set to receive new consumer protection powers in 2020

In February last year, the Competition and Markets Authority (CMA) published a series of proposed reforms designed to address its perceived difficulties in adequately protecting consumers under the current legal framework. Reports at the end of last year suggested the Department for Business, Energy and Industrial Strategy (BEIS) is supportive of the proposals and is in line to grant new powers to the CMA in 2020.

The proposals, which include a new statutory duty on the CMA and the courts to treat the protection of consumers as paramount – replacing its current duty to promote competition law – along with new enforcement powers, reflects wider debates about the adequacy of competition law to deal with consumer harms in fast-moving modern markets. With the proposals designed to strengthen the CMA's hand, both because they will enable the regulator to act more quickly and because of the relative ease of proving a consumer law breach compared to a competition law breach, any consumer facing businesses will need to stay alert to the developments.

Vertical Agreements under the spotlight

In recent years, we have seen increasing enforcement by competition authorities worldwide of vertical restraints - that is restrictions in agreements between companies at different levels of the supply chain. Restrictions are prevalent in online markets, as highlighted by the European Commission's e-commerce sector enquiry, including Resale Price Maintenance, "Most Favoured-Nation" clauses and online sales bans have been under attack by the regulators as competition law rules have come into conflict with brand owners seeking to protect their brand amidst the radical growth of online sales.

With the current Vertical Block Exemption Regulation (VBER) – which exempts certain restrictions which would otherwise infringe competition law – set to expire in 2022, the European Commission's ongoing review of the rules this year will ensure that these restrictions remain under scrutiny. The European Commission's final decision on whether to extend or change the existing rules will have a significant impact on brand owners and distributors, but, in the meantime, with vertical restrictions under the spotlight, businesses will need to ensure that any attempts to protect their brand online are done within the confines of competition law.

Government commissions CMA to publish a "state of competition" report

The CMA has been commissioned by BEIS to publish a regular "state of competition" report, with a preliminary report expected by summer 2020. While the form of the reporting is yet to be confirmed, the scope is broad and designed to help BEIS gain clarity on "how well competition is working across the economy".

Beyond the significant workload this may result in for the CMA – which may limit its ability to take on discretionary work – the main take-away from the Commission, and the letter from BEIS to the CMA, is the Chancellor's expression that effective competition is "at the heart of this Government's vision for the economy". The Government appears to be setting out its stall as an interventionist force and we may expect it to try and make some significant changes to the regime, particularly post-Brexit.

Current Issues

Digital Markets under scrutiny worldwide with potential intervention

Competition authorities worldwide are increasing the pressure on "big tech" companies as a series of reviews of the sector are carried out. The announcement in February that digital platforms are to face an industry-wide probe by European regulators as they consider how to make sure competition rules are "fit for a digital age" follows the CMA releasing its interim report for its online platforms and digital advertising market study.

The studies have the potential to result in significant interventions and changes to the regulatory landscape for businesses active in these markets. Proposed interventions by the CMA include, for example, a new enforceable code of conduct for platforms of a certain size, and rules to force companies to provide access to data to competitors and give greater power to consumers over their data.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

The main theme driving the regulatory agenda for competition authorities across the EU is protection of the vulnerable consumer and, in particular, protecting consumers that have suffered damage as a result of a perceived failure of competition law to regulate modern markets. The CMA has explicitly set out a significant change of direction in this respect, with its proposals to the Department for Business, Energy and Industrial Strategy (BEIS) last year suggesting a radical change in the regulator's priorities and enforcement approach. Similarly, the protection of consumers in fast-moving digital markets – where the effectiveness of competition law to tackle harm quickly enough to prevent abuses has been questioned – is a high priority for the European Commission and the national authorities, and changes to the way that these markets are regulated is expected to result.

Are responsible business considerations having an impact on the tools that regulators are using?

We are seeing a shift away from traditional rules-based regulation in an attempt to tackle harms in markets where "one size fits all" regulation is not appropriate due to a market's complexity. The CMA's market study into online platforms and digital advertising is illustrative of this; building on previous recommendations by an expert panel who carried out a study into digital market; central to the CMA's proposals at the interim report stage is to introduce an enforceable code of conduct for online players' with significant market power.

Which of the recent or upcoming developments are based on international consensus or agreements?

Given the global nature of the markets under scrutiny, there is significant international consensus in tackling the issues that competition authorities perceive to be harming consumers. The scrutiny of digital markets is truly international in scope; just as the European Commission will no doubt use the findings of the CMA as it embarks on its own probe of digital markets, the CMA has referred to the report of the Australian Competition and Consumer Commission which was produced in 2019.

However, despite this global consensus on the challenges of the digital economy, national divergences in actually tackling the issues are to be expected. In the UK for instance, the CMA's chief executive has an expressed a desire to more aggressively pursue anti-trust investigation – including large mergers – against US tech giants after Brexit.

What are the main challenges for businesses in complying with these developments?

A current difficulty for businesses seeking to ensure they stay on the right side of the competition regulators is that, while compliance with competition law may no longer be enough to satisfy the regulators, it is uncertain at this stage how the regulators intend to tackle consumer harm and who the targets will be. In the case of the CMA's potentially strengthened hand in relation to consumer law enforcement, the concept of unfair behaviour is potentially easier for the regulator to prove than, for instance, proving dominance. Similarly, while the scrutiny into digital markets continues, it is unclear what conduct will be tackled, and which players will be subject to the new regulation.

Dates for the Diary

Q1 2020

European Commission's digital strategy published.

Q1 2020

BEIS expected to publish white paper including proposed legislation to reform competition rules and set to include details of a new "digital markets unit".

12 February 2020

CMA market study into online platforms and digital markets: deadline to submit comments on the CMA's Interim Report.

Q2 2020

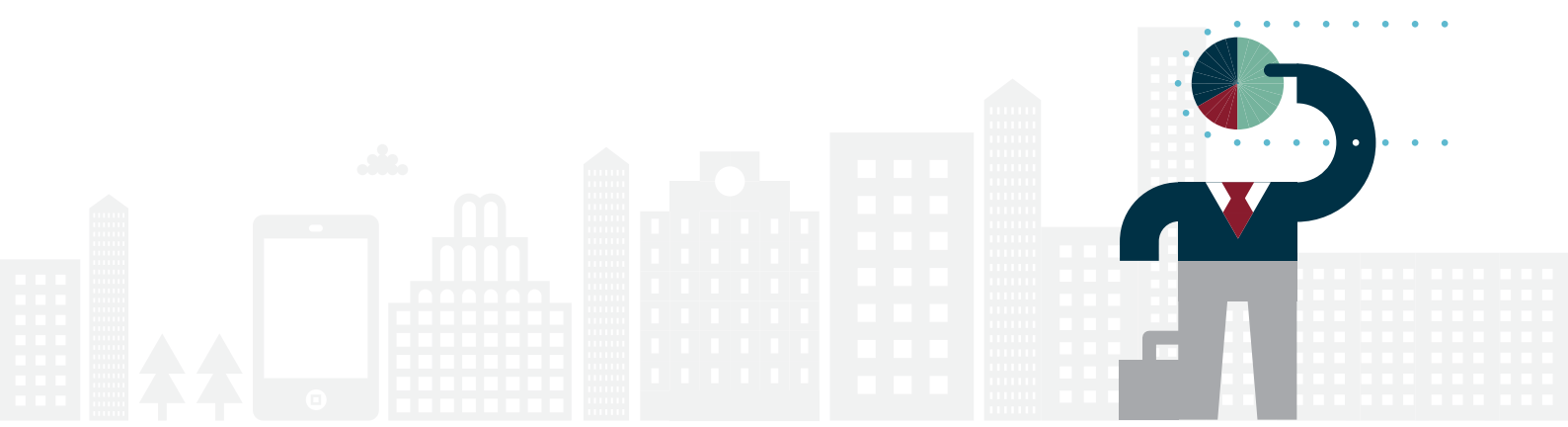
European Commission expected to report on its evaluation of Vertical Block Exemption Regulation.

Q2 2020

CMA to publish preliminary "state of competition" report.

2 July 2020

CMA market study into online platforms and digital markets: deadline for the CMA to publish its final report.



Consumer Finance

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Current Issues

Retail finance providers in the FCA's sights

On 29 January 2020, the Financial Conduct Authority (FCA) published a portfolio strategy letter aimed at firms operating in the retail finance space. The FCA is concerned that many of these firms do not always adequately understand, or are not sufficiently focussed on, the interests of their credit customers, and are poor at recognising consumer vulnerabilities and assessing affordability.

The FCA's retail finance strategy covers the period to March 2021 and firms should be aware that the regulator may come knocking on their door to assess whether the CEO, other senior managers and the firm as a whole are taking reasonable steps to mitigate risk of harm and remedy any harms that have occurred.

Mortgage advice and selling standards

On 31 January 2020, the FCA published a **policy statement** setting out its final rules and guidance relating to changes to giving mortgage advice and selling standards. The changes made in the policy statement make it easier for firms to present options to consumers without giving regulated advice, and help firms make execution-only sales channels easier to use.

Open Finance to transform financial services

On 17 December 2019 the FCA **launched** a "call for input" on the opportunities presented by "open finance". The evolution of open finance will be relevant to all firms that provide products and payment services to consumers. It is a strategic priority for the FCA, and envisages a wider range of data being shared by product providers to verified third parties. This includes data in relation to consumer credit, such as: product information (features, fees or charges and other terms); credit amounts, limits and balances; and payment and usage history.

The FCA is seeking feedback by 17 March 2020 and will publish a feedback statement in summer 2020.

New rules in effect on cross-border payments

On 16 December 2019, new EU rules came into effect ensuring that all cross-border payments in euro in non-eurozone Member States – Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Iceland, Liechtenstein, Norway, Poland, Romania, Sweden and the United Kingdom – will be priced the same as domestic payments.

Payment service providers must therefore ensure that all cross-border payments in euro in non-eurozone states are priced the same as domestic payments.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Ensuring that markets work well and provide fair outcomes for longstanding and vulnerable consumers continues to be a key priority for UK regulators. While significant progress has been made, the FCA is concerned that in some cases firms are still failing to consider the needs of consumers who are most at risk. As a result, the FCA is calling for more consistency across the financial services sector and is considering how it regulates and supervises firms to improve outcomes for consumers.

This work is being carried out alongside the FCA's approach to fair pricing in financial services and its current consultation on guidance for firms on the fair treatment of vulnerable customers. In addition, following the FCA's High Cost Credit Review, new rules aimed at improving customer engagement and awareness of overdrafts (and reduce repeat use) came into force on 18 December 2019. The remaining overdraft rules which seek to simplify the pricing of all overdrafts and end higher prices for unarranged overdrafts come into force on 6 April 2020.

Are responsible business considerations having an impact on the tools that regulators are using?

The FCA's proposed guidance for firms on the fair treatment of vulnerable customers does not aim to provide a checklist of required actions; rather, the FCA's objective is to provide options for ways in which firms can comply with their overarching Principles for Business. This allows individual firms to apply the guidance in a way that is reflective of their specific context, taking into account their size, the markets they operate in and the characteristics of their customers.

Ultimately, the FCA wants to see firms doing the right thing for vulnerable consumers and embedding this in their culture. The draft guidance gives the FCA's view on what its Principles for Businesses require of firms to treat vulnerable consumers fairly.

Which of the recent or upcoming developments are based on international consensus or agreements?

While the FCA has drawn upon international experiences to help identify underlying harm to consumers and tackle it in an imaginative and collaborative way, the UK's regulatory approach to tackling the specific issue of vulnerable consumers has largely been UK-driven.

For example, the House of Commons Committee of Public Accounts report on Consumer Protection, the House of Lords Select Committee on Financial Exclusion, the Department for Business and the Energy and Industrial Strategy Consumer green paper and, more recently, an inquiry by the Treasury Select Committee, all identify areas where UK regulators could do more to address consumer vulnerability in their sectors.

What are the main challenges for businesses in complying with these developments?

Firms will need to assess their current policies and procedures to identify where improvements can be made to embed true cultural change. This will involve looking at product and service design, accessibility requirements, communication channels and every aspect of the business that may be used by vulnerable customers. They will need to build in a process to monitor the outcomes experienced by vulnerable consumers and learn from this continuously, using critical self-reflection to deliver ongoing improvements.

The FCA has adopted a wide definition of what constitutes a "vulnerable consumer" since vulnerability can result from multiple challenges. Firms will therefore need to ensure that their staff have the requisite skills and capability to address the needs of these consumers. Professional training that focuses on dealing with vulnerable customers should be made a priority for firms. Time and resource will be a crucial factor for firms, and having more staff available to deal with routine, day-to-day matters will allow specialist teams to focus on and deliver appropriately enhanced services to vulnerable consumers.

Dates for the Diary

6 April 2020

The FCA's final rules apply in relation to its overdraft pricing remedies as set out in PS19/16, as part of the FCA's broader review of high-cost credit.

9 April 2020

Deadline for responses to FCA consultation paper "CP20/1: Introducing a Single Easy Access Rate for cash savings".

April 2020

FCA to start review of the rent-to-own price cap.

Consumer Law

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Current Issues

New rules for online marketplaces and search engines

The **Platforms for Business Regulation** came into force in July 2019 and will apply from 12 July 2020. The Regulation aims to promote fairness and transparency for business users of online intermediation services (search engines and online marketplaces) in order to remedy a perceived imbalance in the relationship between online marketplaces and the traders. Online intermediation service providers will need to implement a raft of changes to comply with the Regulation.

The GDPR of consumer law is on its way

The **Consumer Omnibus Directive** (or "New Deal for Consumers") requires Member States to introduce powers to fine traders up to 4% of the trader's annual turnover for breaches of consumer protection law, along with other reforms.

Member States will have until 28 November 2021 to adopt and publish measures to comply with the Directive, and will then have to apply those measures by 28 May 2022. Unless the Brexit transition period is extended beyond that date, the UK will therefore not be compelled to apply these reforms. UK traders selling to consumers in EU Member States will still have to comply with the new rules when selling in the EU, and the UK may choose to align with them.

New digital content consumer protections on the horizon

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.

The Digital Content Directive will apply from 1 January 2022, so as with the Consumer Omnibus Directive, is unlikely to be required to be implemented in the UK, but will apply in relation to consumers based in the EU and the UK could choose to align with the rules.

New laws for consumer group actions have been proposed

The proposed **Collective Redress Directive** aims to protect the collective interests of consumers by allowing consumer group actions for breaches of consumer law. The new rules address concerns raised by recent high profile cross-border scandals.

The Directive would allow group action against trader violations with a broad public impact in domestic and cross-border cases in various consumer areas. The first meeting of the European legislature took place recently, in January 2020, to hear the proposal. Again, although the Directive is unlikely to be passed and implemented by the end of the Brexit transition period, UK traders selling to consumers in EU member states will still have to comply with the new rules if and when they come in, and the UK may choose to align with them.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

The upcoming step-changes in consumer law, epitomised by the Consumer Omnibus Directive, are driven by a perceived need to enhance consumers' rights. There is a feeling that businesses should be more socially responsibly in their interactions with consumers, and that if some businesses are not inclined to change their approach voluntarily, regulation can be used as a "stick" to drive them to. In the same way that GDPR drove the ethical treatment of data up the agenda, the enhanced consumer regime will do the same for the protection and fair treatment of consumers.

Are responsible business considerations having an impact on the tools that regulators are using?

At the moment, the focus is on the fundamental regulation-based reforms, rather than guidance or codes. However, we expect more detailed guidance to come in time, following the revised legislation.

The reforms do represent a change in emphasis in one respect: the Collective Redress Directive seeks to harness the power of private consumer groups, as opposed to public authorities to enforce breaches of regulation. This "private enforcement" model is a common feature in the US, where class actions represent the major regulatory risk in areas such as antitrust law.

Which of the recent or upcoming developments are based on international consensus or agreements?

The consumer law reforms have been driven at an EU level. Sitting behind many of them is a recognition that in order for them to be enforced effectively and proportionately, multi-national co-operation amongst regulators is required, although this is currently framed within an EU context, rather than globally.

This is perhaps best illustrated by the Consumer Protection Cooperation Regulation that came into force January this year, setting out the framework for international enforcement, knowledge sharing and action amongst EU consumer regulatory bodies.

What are the main challenges for businesses in complying with these developments?

These developments represent a step-change in the scale and likelihood of consumer law enforcement measures. For example, the Consumer Omnibus Directive will bring GDPR-style fines to, and also update, three existing EU Directives.

This means that businesses will have to step up to the compliance plate across both existing and new requirements, which is no quick or easy task.

Dates for the Diary

July 2020

The Platforms for Business Regulation takes effect.

28 November 2021

Member States required to adopt measures implementing the Consumer Omnibus Directive.

1 January 2022

The Digital Content Directive applies.

28 May 2022

National measures implementing the Consumer Omnibus Directive are required to apply.

Data Protection and Cyber Security

06

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Current Issues

Brexit: adequacy for data protection

The UK formally left the European Union on 31 January 2020 and entered the transition period, which will last until 31 December 2020. During this period, EU data protection law will continue to apply (in particular, the General Data Protection Regulation (GDPR)), and the status quo is mostly retained, although the Information Commissioner's Office (ICO) will longer participate in the European Data Protection Board.

It is expected that the UK will apply to the European Commission for an "adequacy" decision to ensure the continued free-flow of personal data between the EU and the UK after the transition period ends, although recent announcements from the prime minister in particular, along with issues concerning the UK's far-reaching surveillance laws, could put that decision at risk.

Businesses should monitor this situation closely, as in absence of an adequacy decision, it is likely that contracts will need to be revisited and standard contractual clauses entered into to legitimise EU-UK data transfers after 31 December 2020.

Commission report on the evaluation and review of the GDPR

According to Article 97 of the GDPR, the Commission is due to submit its first report on the evaluation and review of the GDPR to the European Parliament and Council by 25 May 2020.

The Commission will examine, in particular, the application and functioning of the provisions of the GDPR concerning: (i) transfers of personal data outside the European Economic Area (which, from the end of the transition period, will include the UK); and (ii) co-operation and consistency between regulators. The Council has already set out **its position and findings**, which the Commission is required to take into account in its review.

ePrivacy Regulation

The **rejection** in November 2019 of the latest draft of the ePrivacy Regulation has taken matters back to the drawing board. It is now for the Croatian presidency to submit a new proposal to Member States. Failing that, the German presidency takes over in July 2020, so we could see some movement in Q3/4 of 2020.

Many commentators do not expect the regulation on ePrivacy to come into force before 2023, with a 24-month implementation period, which will mean that it won't come into effect before 2025.

This brings continued uncertainty to organisations that operate in certain sectors (particularly adtech) and to technologies such as artificial intelligence, the internet of things and connected and autonomous vehicles. There also remains unsatisfactory and inconsistent overlapping regulation between the GDPR and the (now very outdated) e-Privacy Directive.

Current Issues

ICO focus on adtech

In June 2019, the ICO published its update report into adtech and real-time bidding, following an industry-wide information gathering exercise. Since then, the ICO has published several **blog posts** reiterating the issues identified in its report, including an over reliance on legitimate interests, a lack of transparency, and the processing of special category data without explicit consent. The ICO has also expressed its disappointment in the failure of the adtech industry to generally engage with it and remedy areas of non-compliance.

However, 2020 looks like it will be the year of change in adtech, both at industry level, with Google announcing its plan to block third-party cookies on its Chrome browser, and at regulator-level, with the ICO expressing its intention to take formal enforcement action against non-compliant players. Businesses operating in this sector (including adtech vendors, publishers and advertisers) need either to take action now to remedy any areas of non-compliance or risk the wrath of the ICO.

Clarity on ICO's approach to GDPR enforcement?

In July 2019, the ICO announced its intention to issue huge fines against British Airways (£183m) and Marriott International (£99m). While the Data Protection Act 2018 requires the ICO to issue its monetary penalty notice within six months of the notice of intent, it appears that the ICO has agreed an extension until 31 March 2020 with both British Airways and Marriott.

Once the notices of intent crystallise into publicly available monetary penalty notices, we hope to have a much greater understanding of the approach that the ICO intends to take in relation to infringements of the GDPR. Our expectation is that the ICO will become increasingly active in enforcement activity for breaches of the GDPR, and will not hesitate to exercise its power to issue large fines.

Follow-on litigation

Regulatory fines are not the only potential significant cost to an entity following a data protection issue. A growing industry of claimant law firms continue to bring speculative data protection claims following data incidents – a trend that is likely to continue to gather momentum.

The Court of Appeal decision in *Lloyd v Google* on 2 October 2019, in which it was held that a loss of control of personal data may give rise to a claim for damages in certain circumstances (even where no pecuniary loss or distress is suffered), provided ammunition to such firms. We have seen an uptick in claims following the decision, and we await the decision of the Supreme Court as to whether it is prepared to hear an appeal of the Court of Appeal decision (the impact of which will be amplified considerably in group claims).

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

In line with its remit to uphold information rights in the public interest, the Information Commissioner's Office (ICO) is actively promoting social responsibility in the use of data. It has been focussing in particular on the protection of children online, the use of facial recognition technology and the processing of personal data for direct marketing purposes.

The pace of technological development has presented a myriad of challenges to the regulatory and legislative agenda, which simply cannot keep pace with the rate of technological development by small and large entities alike. Apps and technologies allow the gathering and analysis of enormous amounts of personal data, which the ICO is working to bring under some semblance of responsible use.

Are responsible business considerations having an impact on the tools that regulators are using?

The development of legislation or rules to protect individuals has struggled to keep up with the pace of technological development and the potential for harm arising from the misuse of that technology. The ICO appears to be turning to the use of guidance and codes, rather than rules based regulation, to seek to assert control in relation to the use of those technologies.

For example, in January 2020, the ICO published:

- its draft Age Appropriate Design Code (a statutory code of practice), which aims to provide protections for children when interacting with a digital environment. It introduces 15 design standards promoting heightened privacy protection and child-friendly measures for online providers to adopt where their services are likely to be accessed by children. The Code will apply to providers of information society services and providers of online products/services (including websites, apps, games, and internet of things devices such as connected toys) that process personal data and are likely to be accessed by children in the UK.

- a consultation on its draft Direct Marketing Code of Practice, which has the aim of promoting good practice around data processing for direct marketing purposes. The draft Code builds upon the ICO's existing direct marketing guidance on areas such as profiling and the distinction between service messages and direct marketing. However, it has also introduced some controversial new guidance around the use of online advertising and new technologies, such as social media marketing – particularly in relation to the use of custom audience and lookalike targeting tools.

As well as this formal guidance, some of the most valuable insights into the ICO's decision-making can be found in the ICO's past decisions. For example, in January 2020, the ICO issued a monetary penalty notice against DSG Retail Limited (under the Data Protection Act 1998) in which the ICO noted that the general public would expect DSG, as a large nationwide retailer, to "lead by example" on cyber security.

The ICO's comments in this respect suggest that the ICO expects organisations to act as "responsible businesses" and in a manner commensurate with the trust that the public places in them.

Which of the recent or upcoming developments are based on international consensus or agreements?

The GDPR is very much a creation of the EU. Some jurisdictions (including US states such as California) are looking at the GDPR model when reforming their own data protection regimes, but with others, including China, taking a markedly different approach, there is far from an international consensus on the regulation of data protection.

In relation to enforcement action within the EU, each Member State appears to be setting its own agenda. While Germany and the Netherlands have adopted fining models for GDPR infringements, the UK has adopted no such structure. Based on the European Council's position and findings on the application of the GDPR (which will feed into the European Commission's review), we expect that the Commission will seek to further strengthen the co-operation among regulators, particularly for the supervision of cross-border processing which – in the Commission's view – involves significant risks to the rights and freedoms of individuals, such as is undertaken by large technology companies.

In respect of e-privacy compliance, despite local implementing legislation being derived from the e-Privacy Directive, the rules governing cookies and other similar tracking technologies vary, or at least, have been interpreted differently, even within the EU (and the UK). This is highlighted by the recent guidance issued by different data protection regulators (specifically, the UK, Spain and France) on this topic. This lack of consistency has caused a compliance headache for publishers that operate websites across multiple EU Member States. The hope is that harmonisation will come in the form of the ePrivacy Regulation, which will have direct effect across all EU Member States.

In Focus: Responsible Business

What are the main challenges for businesses in complying with these developments?

The main challenge for businesses, particularly those that span more than one jurisdiction, is uncertainty. The regulatory agenda is presently driven by guidance, which remains more changeable than legislation or case law, and uncertainty arises where different jurisdictions may adopt different approaches.

It is also difficult to predict what approach the ICO will adopt in enforcement proceedings, as we await transparency as to the approach that the ICO will take within its first large monetary penalty notices under the GDPR. One thing that does seem clear is that the ICO is ready to exercise its vastly increased fining powers.

Finally, businesses are awaiting clarity as to whether the UK will secure an adequacy decision (or any other arrangements with the EU in relation to data protection) and are having to consider what actions they would need to take if no such decision or arrangement is forthcoming.

Dates for the Diary

By 31 March 2020

ICO is due to issue monetary penalty notices to British Airways and Marriott International.

By 25 May 2020

The European Commission is due to submit its first report on the evaluation and review of the GDPR to the European Parliament and the Council.

Q2-3 2020

Direct Marketing Code of Practice to be introduced into Parliament. If there is no objection within 40 days, the ICO will issue the Code and it will come into force 21 days later.

Q2-4 2020

New ePrivacy Regulation draft expected.

Q2-4 2020

The European Commission plans to report on its review of the 11 adequacy decisions adopted before the GDPR came into effect.

Q3 2021

The Age Appropriate Design Code comes into full effect.

Employment and Contingent Workforce

07

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Current Issues

Brexit | Impact on employment law

We are not expecting significant changes to UK employment rights at the end of the Brexit transition period. However, employers will need to keep a careful watch on the recently announced Employment Bill. The Bill is expected to provide clarification on the extent that our existing and future laws may continue to align with EU employment laws following the transition period.

Employers will also be looking to see whether the government allows courts other than the Supreme Court to depart from EU case law in certain circumstances (using powers conferred by the Withdrawal Agreement Act), as this could re-open issues such as holiday pay that have been determined at by the Court of Justice of the EU.

IR35 reforms

Users and suppliers of contractors/consultants working through personal service companies (PSCs), in both private and public sector situations, must prepare for **IR35 reforms**, which will come into force in April 2020. The reforms bring potentially significant financial repercussions for any organisation that directly or indirectly (through staffing companies or consultancy companies) receives services from PSCs.

Blanket bans of PSCs may lead to a loss of business-critical resource or key talent unless they "gross up" pay rates. Many organisations are therefore adopting a more nuanced approach to compliance.

Reforms to NDAs

The government has proposed legislation on the use of non-disclosure agreements (NDAs) in employment documentation, which will require that:

- employers make the limitations of a confidentiality clause within settlement terms or an employment contract clear, so that individuals fully understand their rights;
- individuals signing non-disclosure agreements must receive independent legal advice on the limitations of that provision; and
- NDAs expressly state that information can still be disclosed to police, regulated health care professionals or legal professionals regardless of the terms of the NDA.

The Equality and Human Rights Commission has also recently issued guidance on best practice when using NDAs when settling discrimination claims.

While we await further developments, employers should use the opportunity to review their use of NDAs in settlement agreements and employment contracts and ensure that they accord with the latest regulatory guidance from the Solicitors Regulation Authority.

Current Issues

Gender, ethnicity and disability transparency

There remains an increasing trend towards greater transparency on diversity issues, particularly around creating a diverse workforce and issues such as pay and career progression. The third round of gender pay reporting is due in April 2020. While we are still awaiting a response from the government following its consultation on the proposed new statutory obligation for employers to report on their ethnicity pay gap, last year the government introduced a voluntary disability, mental health and wellbeing reporting framework.

Raising awareness of neurodiversity and confidently addressing the challenges raised by neurodivergence is also an increasing priority as employers seek to grow and develop a skilled workforce.

Other existing proposals supporting diversity include:

- the extension of the existing protection for women on maternity providing for them to be offered suitable alternative employment on redundancy in priority to others. This consultation looks at introducing regulations which would extend the protected period in relation to redundancy to cover pregnancy and the period of six months after maternity leave ends;
- one week's unpaid leave for carers; and
- the introduction of flexible working for all. More detail may be included in the forthcoming Employment Bill.

Sexual harassment and #metoo

#metoo remains a live issue and we are awaiting the outcome of a recent government consultation which sought views on a number of matters, including introducing a mandatory duty on employers to prevent harassment in the workplace; strengthening and clarifying the law on third party harassment in the workplace; and extending the Employment Tribunal time limits for claims under the Equality Act 2010.

We are expecting the Equality and Human Rights Commission (EHRC) to issue a statutory code of practice. In the meantime, it has published guidance for employers on tackling and dealing with harassment in the workplace.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Being a responsible employer is an area of increasing scrutiny. The work of Matthew Taylor and the government's response in its Good Work Plan focused on protecting low paid and vulnerable workers, including those working in the gig economy. This has been coupled with government initiatives such as naming and shaming employers who fail to pay the statutory minimum national pay rates (which was suspended last year but the government has indicated will be re-introduced this year).

While some reforms arising from the Good Work Plan are already in force or are due to come into force this year – such as the right for all workers to receive a payslip detailing their hours and rate of pay and deductions by umbrella companies and a statement setting out the particulars on which they are engaged – we are expecting more significant reform. The government has indicated that in the forthcoming Employment Bill it will be looking to introduce reforms such as:

- creating a new single enforcement body offering greater protection for workers around the minimum pay rates, sick pay and health and safety; and
- allowing workers engaged on zero-hour contracts to request a more predicable contract.

We may also see reforms around "employment status", providing much-needed clarity on the statutory employment rights an individual is entitled to.

Top of employer agendas is also the impact of the #metoo movement, which has become a global cause, and has had an impact on women and men in all sectors of business and education worldwide. The #metoo movement is now a real driver for employers in shaping the way their employees conduct their business and ensuring a safe workplace culture. A government consultation recently sought views on a number of matters including: introducing a mandatory duty on employers to prevent harassment in the workplace; strengthening and clarifying the law on third-party harassment in the workplace; and extending the Employment Tribunal time limits for claims under the Equality Act 2010.

In Focus: Responsible Business

Are responsible business considerations having an impact on the tools that regulators are using?

The government has previously sought to tackle some issues, such as a failure to comply with the statutory national minimum wage rates, through a "naming and shaming" scheme. This was suspended in 2018 to review what impact it had in practice, but the government has indicated that it will be re-introduced this year. The government is also now focused on introducing legislative reform and a new enforcement body to protect vulnerable workers.

In an attempt to tackle harassment in the workplace and change workplace culture, employers are encouraged to take a zero tolerance approach to harassment and also set up groups to establish a supportive and empowered culture. The government has indicated that it would prefer not to impose a mandatory statutory duty on employers to prevent harassment (subject though to the outstanding consultation response) and instead is looking to the Equality and Human Rights Commission (EHRC) to issue a statutory code of practice on harassment in the workplace.

In the meantime, the EHRC has issued guidance for employers on sexual harassment in the workplace and the use of non-disclosure agreement in settlement agreements and employment contracts (both of which are non-binding but may be taken into account in Employment Tribunal proceedings). The Solicitors Regulation Authority (SRA) has also issued a warning for solicitors advising on settlement terms around the use of non-disclosure provisions (and which potentially "hide" misconduct). To be valid, an employee entering into a settlement agreement must receive legal advice. The SRA guidance will therefore inevitably impact on the vast majority of settlement arrangements entered into.

Which of the recent or upcoming developments are based on international consensus or agreements?

Both issues relating to the protection of low paid/vulnerable workers, including those in the gig economy and the #metoo movement are not just UK issues. The European Union has recently adopted a new directive on Transparent and Predictable Working Conditions which seeks to address the insufficient protection for workers in more precarious jobs. While the UK will no longer be required to implement this directive (the date of adoption falls after the end of the transitional period as it currently stands), it is likely to still remain influential and highly relevant for international businesses.

With the #metoo movement having garnered global momentum, employers in other jurisdictions are similarly now looking at their own internal processes around dealing with workplace harassment.

What are the main challenges for businesses in complying with these developments?

Statutory reforms protecting "workers" undoubtedly bring increased administrative hurdles and costs, particularly where a business will need to re-scope its employment model. However, increased certainty for all parties should potentially lower the risk of litigation and regulatory interference down the line. It will be critical for employers to take advice to understand who is working in their business and what their obligations are to them (both from an employment and a tax perspective).

It seems likely that end users of contract staff will start looking to shorten and simplify supply chains, and engaging an increasing proportion of contract staff via larger agencies with apparent balance sheet strength and compliance procedures. We may see many companies prohibit unregulated intermediaries such as umbrella companies in their supply chains.

Failing to tackle #metoo and a supportive workplace culture will not only impact the perpetrator and the victim and the related management time and costs involved in resolving any dispute, but also business and team performance more generally. Employers may also find it difficult to attract the staff they require and the related impact on the business's skillset.

Dates for the Diary

1 April 2020

Increases to National Living Wage (NLW) and National Minimum Wage (NMW):

NLW for those aged 25 and over increases from £8.21 to £8.72.

NMW increases as follows:

- Age 21 to 24: £7.70 to £8.20
- Age 18 to 20: £6.15 to £6.45
- Under 18s: £4.35 to £4.55
- Apprentices (subject to apprentice rate qualification rules): £3.90 to £4.15.

4 April 2020

Final date for third round of gender pay reporting for employers with 250 plus employees

5 April 2020

Statutory maternity, paternity, shared parental leave and adoption pay will increase from £148.68 per week to £151.20 per week.

6 April 2020

- New IR35 rules apply impacting on the engagement of contractors through an intermediary.
- Expected that all termination payments exceeding £30,000 will attract liability for employers Class 1A National Insurance Contributions (NICs).
- Right to receive a written statement of terms extended to all new workers.
- Written statement of terms to include additional particulars.
- Agency workers entitled to a "key facts" statement showing all deductions and charges.
- "Swedish derogation" for agency workers repealed.
- Statutory holiday reference period for calculating holiday pay under the Working Time Regulations 1998 changed from 12 to 52 weeks.
- Introduction of a lower threshold for setting up information and consultation arrangements.
- New statutory right to two weeks' unpaid leave on the loss of a child under 18 or on a stillbirth after 24 weeks of pregnancy.
- Statutory sick pay rate will increase from £94.24 per week to £95.85 per week.
- It is anticipated that there will also be changes to a week's pay used for calculating the basic unfair dismissal award and statutory redundancy payments and the unfair dismissal maximum compensation limit. These have not yet been announced.

Environment

08

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Current Issues

Environment Bill 2019-20

The **Environment Bill 2020** was re-introduced to Parliament on 30 January 2020.

This piece of legislation largely reflects the previous bill which fell in the wake of the 2019 General Election. It will establish the core frameworks for environmental governance and regulation post-Brexit. Notably, it does not place a legal obligation on the UK to retain the environmental standards of the EU.

Businesses should be particularly aware of the focus on extended producer responsibility and the introduction of a biodiversity net gain scheme for developers, both of which will place increased obligations on relevant businesses.

Resources and Waste Strategy

The government's current **Resources and Waste Strategy** sets out a timeline for eliminating "avoidable" waste by 2050. This timeline sets out specific governmental targets for 2020.

For 2020, the timeline establishes the government's intention to review and consult on the UK's regulations governing:

- batteries;
- waste electrical and electronic equipment; and
- the essential packaging requirements.

These consultations are likely to extend producer responsibility and shift the associated costs within supply chains towards their source.

Plastic tax

In early 2019, the government **published** a consultation on the introduction of a plastic packaging tax. The tax will target businesses that produce or import plastic packaging that contains insufficient levels of recycled content.

Further details of the tax were to be revealed by the 2019 Budget, which was cancelled as a result of the 2019 General Election. The next budget is scheduled for 11 March and should clarify the applicable liability and exemptions under the tax.

The consultation indicates that liability is likely to arise at the point of production. However, it does not rule out charging at other points of the supply chain, meaning all businesses should take note of the forthcoming announcements.

Disclosure of climate-related risks

In its previously published **Green Finance Strategy**, the government set out an expectation that all listed companies and large asset owners disclose climate-related risks by 2022. The Green Finance Strategy also sets out the government's intention to explore "the appropriateness of mandatory reporting" obligations.

The Financial Conduct Authority has previously **announced** that it will publish its own consultation in early 2020 to propose disclosure rules on a "comply or explain" basis for all regulated businesses.

Current Issues

Although the current disclosure obligations on large companies is voluntary, the shift towards mandatory reporting has been signalled. Relevant companies should be aware of their disclosure obligations and have in place systems for compliance.

Post-Brexit Emissions Trading System

The departure of the UK from the EU on 31 January means that the continued participation of UK companies in the European Union Emissions Trading Scheme (EU ETS) must be decided upon. Until January 2021 (the end of the transition period), UK participants will remain in the EU ETS.

In a previous consultation, the government set out its intention to establish a separate UK scheme linked to the EU ETS via a linking agreement.

However, if no such agreement is obtained then the government will need to consider alternative carbon pricing options.

UK emitters should be aware that there will be no change to their participation in the EU ETS this year, but should be mindful of the forthcoming trade negotiations which will determine the future of carbon pricing in the UK.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

De-carbonisation

In the context of climate change, a core facet of responsible business is the reduction of a business's carbon footprint. The Streamlined Energy and Carbon Reporting regime (SECR) was launched in April 2019. The framework is intended to encourage energy efficiency and reduce the carbon emissions of businesses. Under the scheme, large unquoted companies, large limited liability partnerships and quoted companies need to report on greenhouse gas emissions and energy use.

The reporting obligations apply to the first annual report of a qualified entity after 1 April 2019, which means that most companies will need to comply with the SECR from early 2020 onwards. For more on the SECR see our **Insight**.

Biodiversity

Responsible businesses need to operate in a manner that not only preserves the natural environment but enhances it. In order to ensure that businesses help maintain the quality of their local eco-systems, the Environment Bill 2020 includes a new planning condition that requires developers to provide a biodiversity net gain of 10% as part of projects. The government's intention is that any deterioration of biodiversity caused by a development will be offset by an obligation placed on developers to enhance the local environment.

Are responsible business considerations having an impact on the tools that regulators are using?

De-carbonisation

The Environment Agency (EA) is encouraging environmental responsibility among UK businesses through voluntary environmental disclosures. While qualifying entities face mandatory disclosures under the SECR, the EA encourages all companies to voluntarily report on emissions and energy use. The March 2019 Environmental Reporting Guidelines suggest that all companies can "benefit from lower energy and resource costs, gain a better understanding of exposure to the risks of climate change and demonstrate leadership" through voluntary reporting. Similarly, while qualifying entities are not required to report information about their suppliers and consumers, they are encouraged to do so in order to provide investors with greater information about climate-related risks.

Biodiversity

In January 2020, the Department for the Environment, Food and Rural Affairs published guidance for businesses about taking a **natural capital** approach, as part of a drive to encourage businesses to enhance biodiversity. The natural capital approach is a method by which businesses may identify and derive value from their natural assets. Biodiversity represents an overlooked component of natural capital and the government believes that the voluntary adoption of this approach by businesses will enhance biodiversity in the UK.

In Focus: Responsible Business

Which of the recent or upcoming developments are based on international consensus or agreements?

De-carbonisation

International treaties have informed the UK's commitment to achieving net zero by 2050 and by extension its de-carbonisation policies for this target. While the UK is legally required to achieve a net zero target under the amended Climate Change Act 2008, international agreements have encouraged the government to bind the UK to this target under domestic legislation. Most notably, the UK signed up to the Paris Agreement.

Biodiversity

The recent focus on biodiversity and natural capital is driven in part by international agreements. The UK is required to "halt biodiversity loss" and protect terrestrial ecosystems under the United Nations Sustainable Development Goal 15. Similarly, the UK signed up to the Convention on Biological Diversity at the 1992 Rio Summit. As part of the convention, the UK must meet 20 targets for the improvement of biodiversity by 2020.

Waste and pollution

The Environment Bill 2020 includes the power for the government to ban the export of plastics to countries who are not members of the Organisation for Economic Co-operation and Development. This power mirrors the UK's existing obligation under the Basel Convention. As of 2019, plastic was added to the convention, which controls the movement of hazardous waste between countries and prevents plastic from being exported to countries most vulnerable to plastic pollution.

What are the main challenges for businesses in complying with these developments?

De-carbonisation

While recent regulatory developments (such as the SECR) allow a degree of discretion for businesses, there is a risk that mandatory obligations may soon follow as the UK pursues its net zero target. A significant challenge for businesses will be to begin implementing compliance mechanisms despite the absence of mandatory regulations. Businesses may struggle to justify the voluntarily disclosure of potentially sensitive information to their investors. However, a significant transition period will be required to implement the systems for carbon-related disclosures into a large company. The balance of being appropriately prepared for mandatory compliance whilst fulfilling short-term interests will be a challenge for many businesses.

Biodiversity

Compliance with the 10% net gain to biodiversity may represent a significant cost for businesses. Developers may need to invest in non-traditional design techniques to help achieve the net gain on-site. Otherwise, developers will need to consider off-site offsetting or the purchase of statutory biodiversity units to satisfy the gain. Developers and by extension investors will be faced with increased development costs as a result of the new requirement.

Dates for the diary

11 March 2020

The government is expected to deliver the Budget and the National Infrastructure Strategy.

31 March 2020

The end of enhanced capital allowances for companies in respect of technologies on the Energy Technology List and the Water Technology List.

1 April 2020

The government's Transport Decarbonisation Plan is expected to be published.

June 2020

The Committee on Climate Change is expected to publish an appraisal of the UK's de-carbonisation progress.

Export Control

09

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Current Issues

Use of "compound penalties" on the rise

HMRC has **announced** that between May and October 2019 it issued "compound penalties" between £5,000 and £90,000 to eight UK exporters due to unlicensed exports. In recent years we have seen the increasing use by HMRC of compound penalties: a fine by which HMRC can offer businesses (or individuals) the chance to settle cases that would otherwise justify being referred to the Crown Prosecution Service – generally in a bid to avoid an expensive and protracted criminal investigation.

ECJU updates Brexit guidance

The Export Control Joint Unit (ECJU) has **issued** updated guidance to confirm that the current export licensing arrangements will continue to apply until the end of the transition period on 31 December 2020.

Modernisation of EU dual-use export control regime

The European Commission has been proposing for some time to amend 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.

Last year the **proposals** moved a step further when the European Council issued its mandate for negotiations with the European Parliament. While the Council supports several of the changes originally proposed by the Commission in 2016, it has made material changes to key sections, including to the new "human security" element discussed in further detail below. On the basis of this mandate, the Council will now start negotiations with the European Parliament.

It remains to be seen how far the proposals progress during the Brexit transition period and whether the UK follows any changes to the EU regime.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Responsible business is pivotal for a robust UK strategic export control regime that serves its core purposes of: protecting national security; non-proliferation; and addressing concerns about internal repression and other human rights violations.

Humanitarian considerations have long led the way in shaping the UK government's policy agenda on strategic UK dual-use controls – particularly for technology and items that could be misused for committing serious human rights violations.

For example, when making export licensing decisions for the export of military items and technology, the Department for International Trade must consider an application against the Consolidated EU and National Arms Export Licensing Criteria. This includes an assessment of whether there is a clear risk that an export might be used for internal repression, or in the commission of a serious violation of international humanitarian law.

High-profile litigation in the Court of Appeal shone a light on the issue last year (see our Insight **here**). The court ruled that the UK government acted unlawfully when making export licensing decisions for the sale of arms to Saudi Arabia. The government is now re-assessing past episodes of possible breaches of international humanitarian law by Saudi Arabia, before making decisions about future risks of arms being used to violate humanitarian law in the on-going conflict in Yemen.

Humanitarian issues have also helped shape strategic export controls agendas more globally. The issue rose to particular prominence as a result of the use of EU-origin cyber-surveillance technologies during the Arab Spring protests in 2010. In 2017 the European Commission proposed introducing a new "human security" dimension as part of the modernisation of EU export control law (for information about the cyber surveillance technology covered by the proposals, see our previous **Insight**.)

Are responsible business considerations having an impact on the tools that regulators are using?

In March 2010 the Export Control Joint Unit (ECJU) (previously known as the Export Control Organisation) published its **Compliance Code of Practice**. The Code summarises existing best practice and focuses on practical measures that exporters can take to ensure compliance with the law relating to strategic export controls.

Although the Code is not legally binding, exporters can help mitigate their exposure to regulatory action by complying with it. In particular, the guidance will help exporters manage internal and external audits, and the ECJU is likely to rely on key principles of the Code in the event of any subsequent investigation. The Code's recommendations – such as senior management commitments to compliance, and a red flag checklist for handling suspicious orders – are relatively straightforward to incorporate into existing policies and procedures, particularly for businesses with a robust approach to compliance as a whole.

Which of the recent or upcoming developments are based on international consensus or agreements?

UK dual use export controls are shaped by a range of international (and multilateral) export control regimes, including The Wassenaar Arrangement (dealing with conventional weapons and dual use items) and the Missile Technology Control Regime.

Membership of these international bodies is voluntary and they provide a forum for sharing best practice and raising concerns. As a Wassenaar participant the UK has voluntarily agreed to maintain national export dual-use controls which align with those on the Wassenaar Control Lists.

What are the main challenges for businesses in complying with these developments?

The speed at which new dual-use export controls, and financial and trade sanctions can be implemented to react to geo-political events means that it is now more important than ever for companies to ensure they have a robust export control and sanctions compliance programme in place.

From a dual-use goods list in particular, it is important for exporters to keep up to date with periodic notifications from the ECJU about any changes to the UK Strategic Export Control Lists. For example, those changes arising as a result of any updated to the Wassenaar Control Lists through its Notices to Exporters. Exporters of dual use goods should consider signing up to receive those Notices here.

Companies in traditional defence or dual-use industries will be alive to regulation in this area. However, the increasing focus on cyber-surveillance, cyber-warfare and digital espionage means that a growing range technology and communications providers will need to be aware of the restrictions and obligations around products that may be misused for such purposes.

Dates for the Diary

July 2020

UK government expected to publish the 23rd 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 2019 calendar year. Last year's copy if available **here**.

During 2020

UK government's appeal of Court of Appeal decision on the licensing of military weapons to Saudi Arabia to be heard by the Supreme Court.

Financial Regulation

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Current Issue

Suitability and effective governance

The regulatory spotlight was turned on the financial advisory, alternative investment and wealth management worlds in January, with three "Dear CEO" letters issued by the Financial Conduct Authority (FCA). In each case, the FCA has outlined its approach to tackling key areas of concern and summarised the action it expects firms to undertake.

Suitability and effective governance are central elements of the FCA's supervision strategy. In the alternatives investment sector, this means that firms must adequately consider the appropriateness of investments for their target investors. In relation to financial advice, this requires firms to ensure the advice they provide to consumers is suitable for their needs. In each sector, the FCA will also be focussing on firms' standard of governance, and their efforts to implement the Senior Managers and Certification Regime (SM&CR), where applicable.

New financial services directory

The FCA is due to launch a new financial services directory for banks and insurers in March 2020, which will operate alongside the existing financial services register. The directory will also apply to FCA solo-regulated firms from December 2020.

The directory will include all those who hold senior manager positions requiring FCA approval and those whose roles require firms to certify that they are "fit and proper" under the SM&CR. This includes those in consumer-facing roles, such as mortgage and investment advisers.

Doing the right thing for vulnerable consumers

The FCA plans to issue a response to its consultation on guidance for firms on the fair treatment of vulnerable customers in the first half of 2020.

The proposed guidance sets out the FCA's view of what its Principles for Businesses require of firms to ensure that vulnerable customers are consistently treated fairly across the sector. It is relevant to all firms involved in the supply of products or services to retail customers even if they do not have a direct client relationship with the customers.

The FCA plans to use the guidance as a basis for monitoring and assessing firms' practices, supporting both its supervisory and enforcement work.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Financial regulation is driven by the need to protect society from both systemic risk and risks posed by individual firms. There are more stringent rules, particularly in areas such as consumer finance **[link to consumer finance section]**, aimed at protecting more vulnerable sections of society.

One of the current areas of concern for the Financial Conduct Authority (FCA) is that firms increasingly depend on third-party providers and outsourcers (for example, cloud service providers) to perform certain processes, services or activities on their behalf. Such arrangements give rise to a risk of operational disruption and harm to consumers if they are not effectively managed. This risk is heightened where the outsourcing is concentrated in, for example, a limited number of technology providers. Badly conceived or executed outsourcing arrangements also increases regulatory risk and, in more complex situations, may result in firms having to hold additional capital to cover operational risk.

Addressing the risks of harm that could result from insufficient operational resilience in firms and poor governance of outsourcing and third-party service provision is a key priority for the Bank of England (BoE), Prudential Regulation Authority (PRA) and FCA. These regulators have recently launched co-ordinated consultations on the extent to which their existing policies should be supplemented to improve the resilience of the system as a whole, and to increase the focus on this area within individual firms.

Another major area of focus for the FCA is firm culture, stemming from criticisms that irresponsible practices within firms were a significant contributor to the financial crisis.

In an effort to drive greater responsibility and personal accountability in the financial sector, the FCA introduced the Senior Managers and Certification Regime (SM&CR). The SM&CR requires firms to clearly define the responsibilities and functions covered by senior managers, whose fitness, skill and propriety must be certified on an on-going basis. Conduct rules – including the requirements to act with integrity, to treat customers fairly and to exercise due care, skill and diligence – apply to nearly all staff within scope of the regime. That scope has been expanded, to now cover almost all regulated firms.

Are responsible business considerations having an impact on the tools that regulators are using?

According to the FCA's Mission paper "Approach to Supervision" (April 2019), the FCA's focus is on the drivers of behaviour and the role individuals play within firms. A firm's managers are responsible for the firm's culture and for preventing harm. Rather than laying down prescriptive rules, the FCA will look at the purpose of a firm to understand what it is trying to achieve in practice.

Under the SM&CR, the FCA has set out its expectations of firms and the behaviour of their employees in the form of five conduct rules that represent minimum standards of behaviour (see above). These five principles set the framework for establishing a culture of accountability for conduct at the heart of all firms' activities.

The FCA has also published guidance for firms that fall within scope of the regime. This includes final guidance on how the FCA will enforce a Senior Manager's Duty of Responsibility, and guidance within the FCA's Handbook, for example, about the types of things firms should consider as part of assessing a person's fitness and propriety.

Which of the recent or upcoming developments are based on international consensus or agreements?

The 2008 financial crisis sparked major changes in global financial services regulation with attention and resources focused on the behaviour of firms and senior individuals and how they conduct their business. Regulatory reforms have been designed and implemented globally to address accountability and conduct in financial services.

In line with this trend, the European Commission has, in its recent consultation on the implementation of Basel III reforms, raised the possibility of an "accountability regime" under the Capital Requirements Directive. This could result in an EU-wide individual accountability regime for banks, highlighting the Commission's desire to tackle misconduct, poor culture and excessive risk-taking within the financial sector.

Achieving a better and more trusted corporate culture within the financial services industry was also a key pillar of the speech delivered by Christine Lagarde, managing director of the International Monetary Fund, in February 2019. In her view, it is not stringent legal sanctions or compensation and governance rules that will bring about the necessary cultural change. Rather, what is required is strong individual responsibility that is grounded in values and ethics.

In Focus: Responsible Business

What are the main challenges for businesses in complying with these developments?

In an increasingly complex and fast changing business environment, firms will need to be able to prevent, adapt, respond, recover and learn from disruptive operational incidents. To achieve this, firms will need to consider their dependency on services supplied by third parties and the resilience of these third-party services. This includes those third parties typically outside the regulatory perimeter, where firms retain responsibility for the delivery of their regulated services. The FCA has found that these concepts are not yet part of all firms' thinking.

Similarly, being compliant with the SM&CR is not just about providing accurate and up-to-date records, ultimately it will require a cultural change within financial services firms to ensure that all staff understand where responsibility lies, and who is accountable when things go wrong. This may be challenging for many firms, particularly those that have evolved from start-ups in recent years, who may not have the formal structures in place to attribute responsibility in the manner envisaged under SM&CR. Being able to create firm-wide cultural change is an issue all businesses face, and in financial services there is no definitive rulebook to follow.

Dates for the diary

March 2020

The FCA's directory (the FCA's proposed public register that enables consumers, firms and other stakeholders to find information on key individuals working in financial services) is expected to go live in March 2020 for banks and insurers.

3 April 2020

Deadline for comments on the PRA's Consultation Paper: Outsourcing and third-party risk management (CP30/19) and the FCA, PRA and BoE's joint consultation papers (CP 29/19) on operational resilience in the financial services sector.

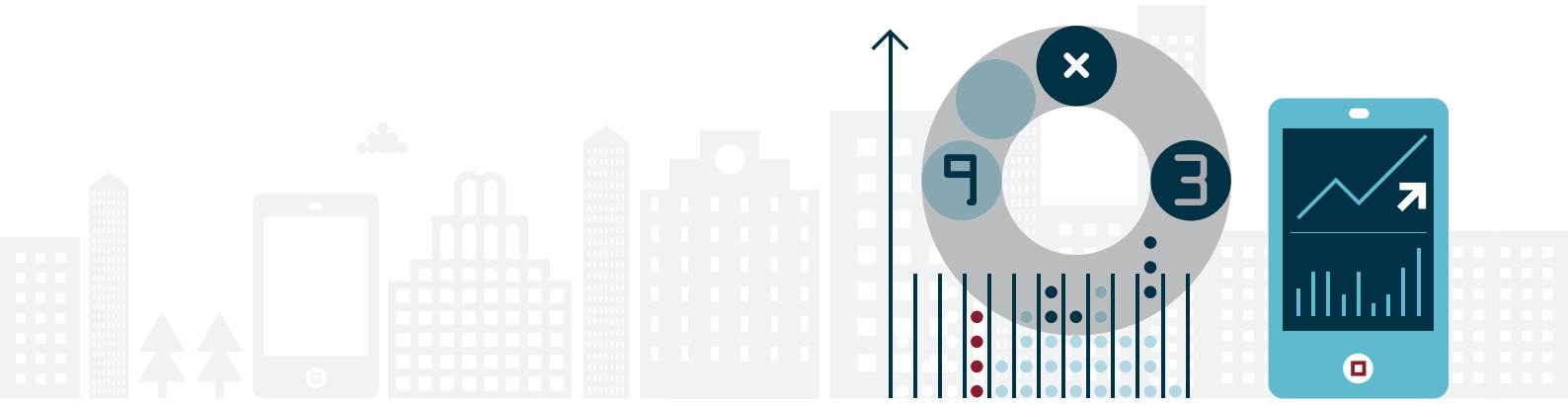
The PRA intends to publish its final policy on outsourcing and third party risk management in the second half of 2020, in line with the final policy on operational resilience.

Autumn 2020

Findings from the FCA's Financial Advice Market Review and Retail Distribution Review (aimed to improve consumer outcomes from financial advice and guidance) are due to be published.

December 2020

The FCA's directory will apply to FCA solo-regulated firms.



Health and Safety

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Current Issues

Building Safety | Far reaching and rapid reform?

The publication of a new Ministry of Housing, Communities and Local Government consolidated **Advice Note** provides further clarity to owners of high-rise residential buildings. This advice covers the use of aluminium composite material cladding, high-pressure laminate panels, external wall systems and fire doors, and makes it clear that owners of residential buildings below 18 metres need to do more to address building safety and take appropriate action where necessary.

In a clear signal that the government wants to speed up progress, the Health and Safety Executive (HSE) has been asked to set up a building safety regulator in shadow form immediately, ahead of it being fully established by legislation. The new regulator will oversee the introduction of a more stringent regime for ensuring safety in the design, construction and occupation of high-risk buildings.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Health and safety regulation at its core is about social responsibility – in particular, the responsibilities that a business owes to protect the health and safety of its workers and others affected by its operations.

In recent years, there has been an increased emphasis by the HSE and by employers on broader concepts of health and wellbeing, alongside more traditional physical safety risks. The HSE has identified work-related stress as one of the top three causes of work-related ill health and it is an issue that is likely to have a growing influence on the regulator's agenda.

We are also seeing an increasing focus on the need to demonstrate transparency and accountability, as a key part of being a responsible business. Regardless of the industry sector you operate in, what your business says about how it values and approaches health and safety is always going to be important. However, considering what information will be made public, when and how requires a careful risk balancing exercise from a responsibility but also a legal risk standpoint.

The most recent example of the legal difficulties between transparency and the right against self-incrimination has been demonstrated recently in the Grenfell public inquiry, where interested organisations requested reassurance that evidence provided in that forum would be incapable of use in a prosecution against them.

In Focus: Regulatory Powers and Trends

The clear direction of travel on what the public expects from businesses is towards full disclosure. The first to face legal requirements around this are likely to be public bodies or those dealing with public contracts. Opposition MPs had previously introduced a Public Authority and Accountability Bill (or "Hillsborough law"), aimed at placing legal obligations around public accountability on public bodies in defined scenarios. There have been calls to re-introduce the Bill, although this is not part of the government's current legislative agenda.

In the absence of legislative obligations, internal (employees) and external (consumers, investors) perceptions will be the main drivers for businesses.

Are responsible business considerations having an impact on the tools that regulators are using?

The HSE as the key regulator in this space already has significant powers within the Health and Safety at Work etc. Act 1974 to require information, These powers are regularly used. Other economic regulators are now also starting to place emphasis on health and safety management, such as OFCOM, which launched a **consultation** around protecting participants on TV shows.

We are also watching with interest the impact of research lobbying from the US Centre for Safety and Health Sustainability (CSHS) in the US around the value of "human capital" and their view that public companies listed on stock exchanges should be required to report on health and safety issues relevant to sustainability indices.

The collation and publishing of health and safety data and management approach does support a responsible business agenda and is absolutely something that all businesses should and will increasingly have to embrace as a regular part of their safety management approach going forward.

Which of the recent or upcoming developments are based on international consensus or agreements?

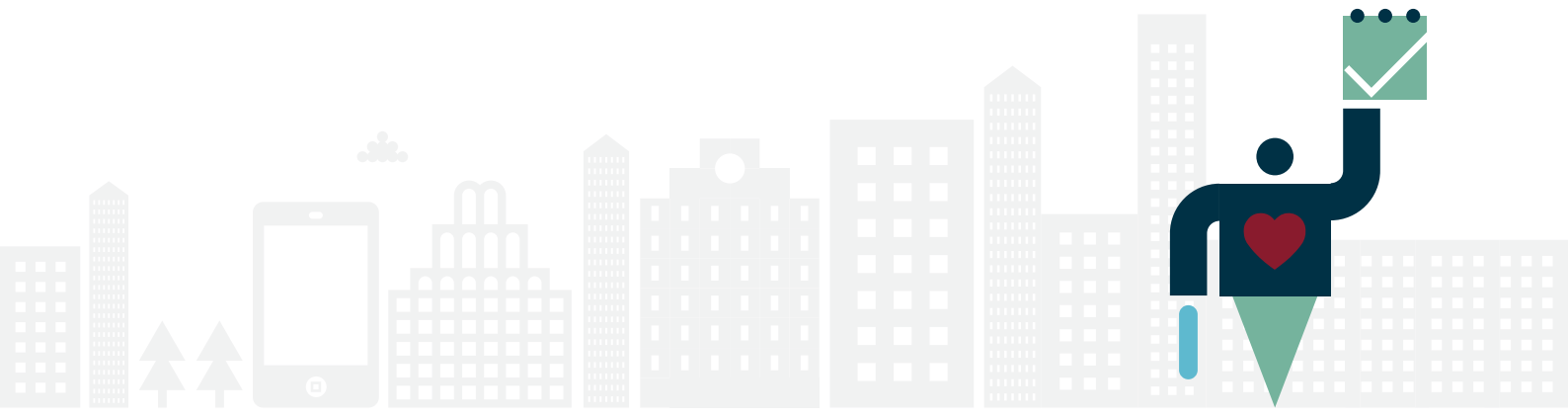
The work of the **CSHS** on human capital is being driven from the US but its focus on public companies listed on international stock exchanges means that this could have a wide ranging international impact.

As consumer and investor interest in responsible and sustainable supply chains (of which safety is a significant part) grows, the drivers are not restricted to a business's home nation.

What are the main challenges for businesses in complying with these developments?

In a climate where there is little consistency of reporting, the risk is that the perception of a business's approach to health and safety can be easily misinterpreted if data alone is relied on. In the rush to be accountable and disclose information, context and accuracy can be missed.

A responsible business will wish to comply with new legislation and trends on public reporting but will also devise its own strategy as to how it demonstrates its responsibility in this area.



Investment Funds

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Current Issues

Alternative Asset Managers under the spotlight

The Financial Conduct Authority (FCA) has written a **"Dear CEO" letter** outlining some of the risks of harm that alternative investment firms pose to their customers and the markets in which they operate. For example, the FCA has found that the appropriateness of investment products for investors is often not adequately considered, which presents a significant risk of harm where high-risk alternative investments are made available to less-sophisticated investors.

The FCA has therefore set out its regulatory expectations against six supervisory priorities. Alternative investment firms should consider whether they present the risks the FCA has identified and develop strategies for mitigating them. Firms should also be aware that they may be the subject of an FCA review and/or be asked to take part in one or more pieces of work related to these priorities in the future.

Revised and strengthened UK Stewardship Code now in force

On 1 January 2020, the Financial Reporting Council's (FRC) revision to the **UK Stewardship Code** came into effect. The new 2020 code substantially raises expectations for how money is invested on behalf of UK savers and pensioners. It establishes a clear benchmark for stewardship as the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society.

The focus of the code has been extended to include asset owners, such as pension funds and insurance companies, and service providers as well as asset managers.

New AIMA Guides published

AIMA has published new guides on responsible investment: (1) ESG Considerations at Alternative Investment Management Firms; and (2) Responsible Investment Policies for Hedge Fund Firms. This comes at a time when BlackRock, with $7 trillion assets under management, has stated that it will take a "harsh view" of companies that fail to provide hard data on the risks they face from climate change.

Responsible investment is having a significant impact on the investment management industry. Investors are using environmental, social, and governance (ESG) factors to analyse the conduct of the firms to which they allocate, and those firms are in turn using ESG factors to analyse their investment portfolio.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

The Financial Conduct Authority (FCA) considers that directing investment towards sustainable value creation generates higher returns and more positive societal outcomes, benefiting consumers both as investors and as stakeholders in wider society.

In furtherance of those objectives and as part of its work on stewardship, the FCA is considering how well its rules support and encourage asset owners and asset managers to take a long-term perspective, where this is appropriate. As part of this, the FCA is also considering how companies address climate and other ESG risks in their business, risk and investment decisions.

The FCA intends to hold an industry workshop in the first quarter of 2020 with representatives from across the institutional investment community to consider how asset owners set and communicate their stewardship objectives, and how well these are adopted by asset managers and service providers. The FCA will also continue to engage with the Financial Reporting Council (FRC) in relation to the FRC's UK Stewardship Code 2020 which came into effect on 1 January 2020.

Many public companies will come under pressure from their shareholders to disclose in line with industry-specific guidelines on ESG. For example, as discussed above, BlackRock has stated that it will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and plans underlying them.

Are responsible business considerations having an impact on the tools that regulators are using?

The FCA has acknowledged that market-led incentives are likely to be a more effective mechanism than further regulation to encourage investors to engage more actively in stewardship, complementing existing measures and the UK Stewardship Code 2020. The FCA therefore intends to engage with ongoing industry work in this area, led by the Investment Association.

In November 2019, the Investment Association published the first industry-agreed Responsible Investment Framework. The framework itself separates out distinct components for a firm-level and fund-level approach to responsible investing. It aims to categorise, define and harmonise common investment terms, as well as exploring the creation of a standardised UK retail product label to clarify to investors which funds have adopted the responsible investment approach.

Other industry-specific guidelines on ESG – such as those set by the Sustainability Accounting Standards Board and the Task Force on Climate-related Disclosures – are also gaining traction in the market. Both of these standards have recently been endorsed by BlackRock.

Which of the recent or upcoming developments are based on international consensus or agreements?

The concept of responsible investment came to prominence with the formation of the UN Principles for Responsible Investment (PRI) in 2008. The PRI is a set of six principles that provide a global standard for responsible investing as it relates to ESG factors. Subsequently, a number of international industry and regulatory initiatives have developed in this area. Most notably, the European Commission is pursuing a wide-ranging and ambitious Action Plan on Financing Sustainable Growth to put ESG considerations at the heart of the financial system. This includes:

- the Disclosure Regulation (Regulation (EU) 2019/2088) which came into force at the end of December 2019 and will apply 15 months later. This will integrate ESG considerations into the investment decision-making or advisory processes of alternative investment fund manager (AIFMs) and undertakings for the collective investment in transferable securities (UCITS) management companies;
- the Low Carbon Benchmark Regulation (Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011) which also came into force in December 2019. This will amend the Benchmarks Regulation; and
- the proposed Taxonomy Regulation (2018/0178(COD) which is expected to come into force in 2020. This will aim to establish an EU-wide classification system or taxonomy of environmentally sustainable activities.

What are the main challenges for businesses in complying with these developments?

Environmental – particularly climate change – and social factors, in addition to governance, have become material issues for investors to consider when making investment decisions and undertaking stewardship. However, the widespread adoption of ESG reporting has been variable, and many firms have either failed to report on the financial impacts of ESG risks or have reported any ESG risks inconsistently.

In Focus: Responsible Business

Investment managers that fall within scope of the Disclosure Regulation will need to consider complex issues such as how sustainability risks are integrated into the investment decision making process, what sustainability risks exist (and their impact on returns), and even how remuneration reflects sustainability risks. While most of the provisions in the Disclosure Regulation don't start to apply until March 2021, product providers and advisers should use this time to prepare and think about these significant issues within the context of investment decisions and investor disclosures.

The increasing focus on ESG by the investment community will have a wider impact in encouraging businesses to include ESG in their strategies and value creation plans. There are increasing expectations from stakeholders around transparency and accountability – from employees who expect more from their companies and employers to investors, the public, regulators and the media. ESG is increasingly becoming a differentiator for companies in terms of how they attract and retain the best talent.

Dates for the Diary

Q1 2020

The European Commission-led consumer testing exercise, which aims to assess the effectiveness of the different presentations of performance scenarios in the Key Information Document (KID), are expected to be ready in Q1 2020. These will inform the final proposals for how performance information will be presented in the KID.

December 2020

The FCA's Directory (the FCA's proposed public register that enables consumers, firms and other stakeholders to find information on key individuals working in financial services) is expected to go live in December 2020 for all other Financial Services and Markets Act 2000 regulated firms other than banks and insurers to whom it will apply from March 2020.

End of 2020

The Investment Association aims to implement the package of measures and proposals set out in its final report to the HM Treasury Asset Management Taskforce. This Report sets out specific actions in three thematic areas – innovation, optimisation and promotion – to help to strengthen the UK's position as a the leading global asset management centre.

March 2021

The main provisions of the Disclosure Regulation (Regulation (EU) 2019/2088) which will integrate ESG considerations into the investment decision-making or advisory processes of AIFMs and UCITS management companies come into effect.

31 March 2021

Firms wanting to become signatories to the new UK Stewardship Code 2020 are required to produce an annual Stewardship Report explaining how they have applied the Code. For inclusion in the initial list of signatories, firms must submit this report to the Financial Reporting Council by 31.

Product Regulation

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Current Issues

New Medical Devices Regulation

On 26 May 2020, the new **EU Regulation on Medical Devices 2017/745** (MDR) comes into force.

In December 2019, a four-year transitional period was **agreed** for certain medical devices that are currently classified as Class 1 under the Medical Devices Directive 93/42/EEC but will be upgraded to a higher risk class under the Medical Device Regulations.

To benefit from this transitional period, relevant medical devices must continue to comply with the applicable Medical Devices Directive requirements after 26 May 2020, and there must be no significant changes in the design or intended purpose of the medical devices.

Update to the Blue Guide on the implementation of product rules

Following a consultation that concluded on 15 January 2020, the European Commission is updating the Blue Guide – its guide to the implementation of certain directives relating to product regulation. The Commission has stated that the purpose of this update is to

- reflect new EU legislation and, in particular, **Regulation 2019/1020 on market surveillance**; and
- better cover the digital age and the circular economy.

Manufacturers, distributors and retailers should look out for the updated Blue Guide, as it is an invaluable source of guidance on EU product regulation.

Product regulation post-Brexit

Although the UK officially left the European Union on 31 January 2020, the UK is still bound by EU law and there are no changes to the product regulation regime until the end of the transition period on 31 December 2020 (unless extended).

Goods that are lawfully placed on the market in the EU or the UK before the end of the transition period may continue to freely circulate until they reach their end users without the need for modifications or re-labelling. When the transition period ends, unless there is an agreement to the contrary, the UK will be deemed a "third country" for the purposes of EU product regulation.

The practical effects of this will be more pronounced in certain sectors. For example, cosmetics manufacturers selling into the UK (including European manufacturers) will be required to have a responsible person who is established in the UK. This requirement is set out in pending UK legislation The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

Improving the overall sustainability of products is a prominent factor driving product regulation. The UK is looking to substantially reduce the use of single-use plastics. The supply of plastic straws, drinks stirrers and cotton buds will be banned in England (subject to certain exceptions) under the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 which is due, in the main, to take effect from 6 April 2020.

With the circular economy becoming ever prevalent, there is a push for plastic products to be produced from more recycled plastic. The UK government has proposed a plastics tax on all packaging (produced in the UK or imported) that does not include at least 30% recycled material from April 2022.

The government's approach to regulating plastics is rules-based with local authorities being given powers to issue undertakings, compliance notices or prosecute. Interestingly, local authorities will be able to issue Variable Monetary Penalties to offending organisations the total of which must not be greater than 10% of the organisation's annual turnover in England. This could end up being be significant for many businesses.

Are responsible business considerations having an impact on the tools that regulators are using?

The government's approach to regulating plastics is rules-based with local authorities being given powers to issue undertakings, compliance notices or prosecute. Interestingly, local authorities will be able to issue variable monetary penalties to offending organisations the total of which must not be greater than 10% of the organisation's annual turnover in England.

Which of the recent or upcoming developments are based on international consensus or agreements?

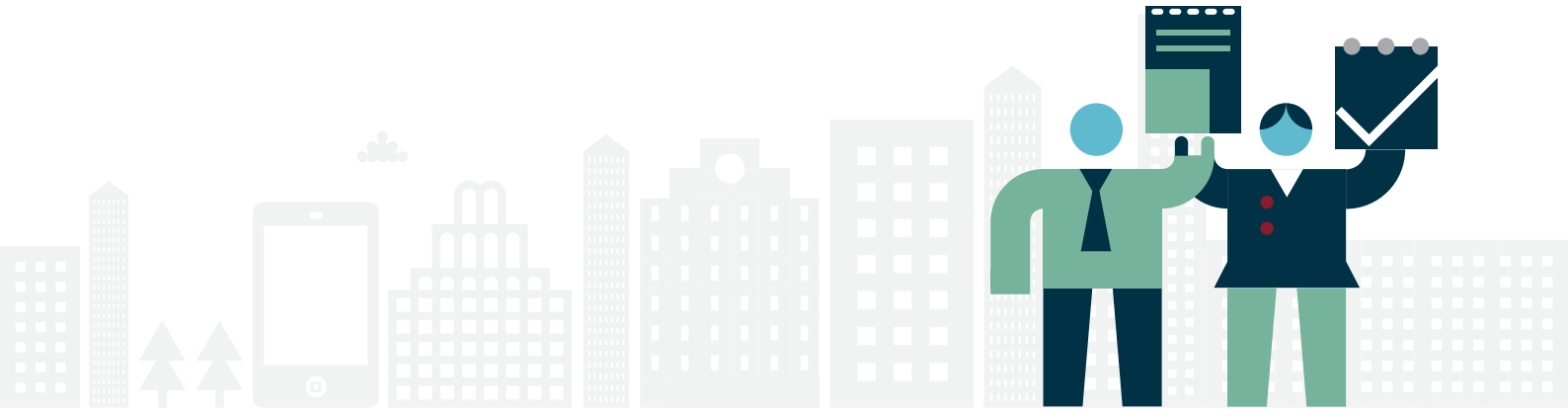
There is an overwhelming international consensus on the reduction of single use plastics and improvements in the sustainability of products. The EU has various legislative and policy-driven initiatives to address the sustainability of products, including adopting a new directive which will ban single-use plastic plates, cutlery, straws, balloon sticks and cotton buds by July 2021. This goes further than the UK legislation, casting the net over a great amount of products. The EU also has its Strategy for Plastics in a Circular Economy which sets out its vision for a circular plastics economy. Measures introduced in the UK reflect these measures, specifically the tax on packaging which does not include at least 30% recycled material.

What are the main challenges for businesses in complying with these developments?

Businesses will need to be aware of the implications that incoming legislation could have on them and consider what steps they will need to take to comply with any new requirements.

If more products are brought within the ambit of the single-use plastic ban, this could have serious impacts resulting in businesses having to re-think how they sell products.

Producing products and packaging from recycled plastic tends to be more expensive than using virgin plastic. Businesses will need to consider the cost implications that this may have as it could squeeze margins.



Dates for the Diary

26 May 2020

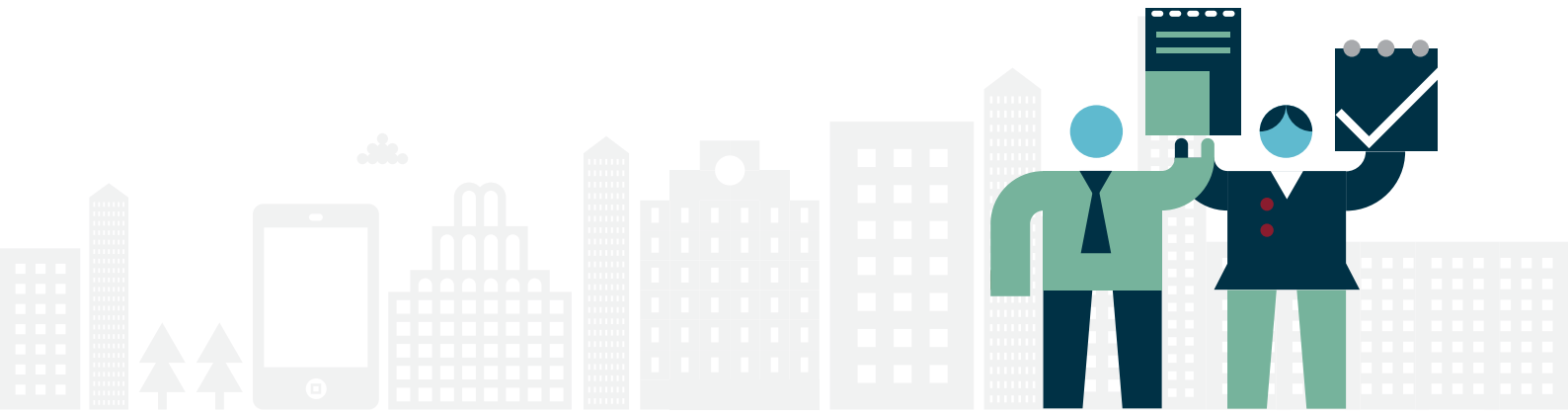
Medical Devices Regulation applies, subject to the four year transition period for certain products described above.

1 January 2021 and 16 July 2021

EU Regulation 2019/1020 on increased market surveillance across the EU for non-food products comes into effect from 16 July 2021, with the exception of certain provisions that come into effect from 1 January 2021.

26 May 2022

In Vitro Diagnostic Medical Devices Regulation fully applies.



Regulated Procurement

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Current Issues

Applications to lift automatic suspension

There have been two recent **judgments** in the High Court on applications to lift an automatic suspension – the injunction that comes into effect when a claim in the High Court is issued challenging a contract award before the contract is signed.

These cases make it clear that the courts will apply the American Cyanamid test for whether an injunction should remain in place. This test requires the court to look at:

- whether there is a serious issue to be tried,
- whether damages would be an adequate remedy for the claimant, and
- where the balance of convenience lies.

This test, when applied to challenges in a public procurement context, means it is very difficult for a commercial enterprise to maintain the automatic suspension. Only where the claimant will in effect cease to trade if it does not win the contract being challenged, or there is some other extraordinary public interest at play, will the courts order that the public body should not be allowed to proceed to enter into the contract. With the automatic suspension lifted, and the contract entered into, the claimant is left only with a remedy in damages.

Public procurement post-Brexit

During the 2019 General Election campaign, the Conservative Party pledged to replace the existing EU-based procurement regulations with new laws by the start of 2021. The government's ambition is to put in place a regime that is simpler, cheaper and geared more towards promoting British business and the local economy. However, as yet no details have been published on how this will be achieved.

The scope for change will depend on the outcome of the trade deal with the EU and is constrained in any event by the UK's adherence to the World Trade Organisation's Agreement on Government Procurement (GPA). The GPA requires its members – including the US, Canada, Japan, Australia, the EU and the UK in its own name – to award public contracts using transparent, competitive, non-discriminatory tender procedures. So a call to "buy British" is not possible under the terms of the GPA.

NHS Procurement

The **NHS Long Term Plan**, published in January 2019, sets out how the NHS plans to utilise extra funding to improve services, support staff better and "future-proof" the NHS, based on what staff and the public think the NHS needs. The Plan proposes to free the NHS from wholesale inclusion in the Public Contracts Regulations 2015 (PCR). Instead, the NHS would set out statutory guidance on procurement to be followed by all NHS entities.

Current Issue

The **Conservative manifesto** for the 2019 General Election pledged to enshrine the NHS Plan in law within the first three months of the new term of government. If this is done, any suppliers to the NHS will need to understand the new regime for NHS procurement. However, as yes, the new government has given no indication of if or when this will be implemented.

Updated Thresholds

With effect from 1 January 2020, the threshold values for contracts to fall under the PCR, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011 were updated (as they are every two years).

The new thresholds apply to procurement procedures commencing on or after 1 January 2020. The previous thresholds will continue to apply to any procurements that commenced before this date.

Please click **here** to view the new thresholds.

Supply of goods to private companies under Framework Agreements procured by public sector Central Purchasing Bodies

Under Regulation 37 of the Public Contracts Regulations 2015 (PCR), a public body can act as a Central Purchasing Body (CPB) to run a procurement for contracts for the supply of goods that can then be supplied on to other public bodies (defined as Contracting Authorities in the PCR).

We have seen a recent trend towards CPBs entering into contracts that are then used to supply goods on to entities that are not Contracting Authorities (i.e. private companies). The PCR and Directive 2014/24/EU (from which the PCR is derived) are explicit that CPBs can procure contracts in compliance with the PCR that are then used by other Contracting Authorities. Suppliers bid for contracts on that basis. Expanding the scope of such contracts for use by private entities means suppliers risk goods being purchased by a potentially undefined number of customers – and notably at prices that suppliers would often only want to offer to public sector customers. CPBs attempting to expand the remit of their purchasing powers in this way risk challenge for breach of the PCR.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

One of the objectives of the 2014 EU Procurement Directives was to drive public purchasers to make better use of public procurement to support common societal goals, including protecting the environment, energy efficiency, combating climate change and social inclusion. Public bodies can under the Directives incorporate social, ethical and environmental aspects into award criteria, specifications and contract terms. For example requirements for suppliers to be engaged in ethical trade, in particular steps to prevent modern slavery, is a requirement in a tender process to award public sector contracts. Businesses must comply with the Modern Slavery Act 2015 in order to bid for any public contract.

Contract specifications can also use "labels" as a means of proof that the deliverables under the contract meet specified environmental characteristics, such as the energy use of appliances.

The government's Prompt Payment Policy, which took effect from 1 September 2019, focusses on social responsibility. Any organisation bidding for a government contract in excess of £5 million a year may have to provide details about the percentage of supply chain invoices paid within 60 days. Failure to meet the government's standard of 95% could result in suppliers being prevented from winning government contracts.

Are responsible business considerations having an impact on the tools that regulators are using?

Public procurement in the UK harnesses public purchasing, rather than a prescriptive compliance regime, to encourage businesses to behave in a responsible way. There is no independent regulator but there is a set of regulations which provide a framework for public bodies to follow, and which provide a legally enforceable regime so that contractors know what to expect.

Contracting authorities are encouraged to use evaluation criteria to reward suppliers that meet certain standards that drive the responsible business agenda. For example, evaluation criteria for a contract to supply printers may include the costs of ink, electricity consumption, cost of recycling, plus factors for levels of noise emission, use of recyclable materials for the production of printers, and the involvement of persons from disadvantaged groups in the production process.

Contracting authorities can also use evaluation criteria to purchase goods that are produced with, for example, environmentally friendly processes, or in a manner that meets recognised ethical standard (for example, Fair Trade or equivalent to this standard). Bidders that can evidence compliance will score more highly and are therefore more likely to be awarded the contract being procured.

In Focus: Responsible Business

A more specific requirement for responsible business being driven by the NHS is a requirement for bidders for certain procurements to have achieved Level 1 accreditation with the Labour Standards Assurance System, which relates to labour standards in a supply chain, within six months of commencing a new contract.

Which of the recent or upcoming developments are based on international consensus or agreements?

Much of the drive for green and sustainable procurement in the UK has come from the policies of the European Commission. The European Commission's handbook "Buying Green!" is the EU's guidance document to help Contracting authorities in all Member States procure contracts that are sustainable, with the lowest environmental impact. The handbook recommends that a green public procurement process is adopted. Contracting authorities are encouraged to use design procurements to award contract to suppliers with environmentally friendly goods and that perform services and works in a way that is sustainable and with low negative environment impact.

"Procuring the Future" is a UK government action plan that has recommendations for sustainable procurement. It encourages contracting authorities to buy sustainably in a way that benefits society whilst minimising the damage to the environment.

The Government Buying Standards are a set of specifications for public procurers which are aligned to the EU's Green Public Procurement programme.

What are the main challenges for businesses in complying with these developments?

The challenge for businesses that want to contract with the public sector is to balance the requirements for responsible business practices within profitability. Businesses need to keep track of how the government is using the tools within the procurement regulations to drive its sustainable business agenda, which is not always easy.

While some responsible business requirements are mandatory if a business wants to contract within the public sector (such as not having convictions for corruption or compliance with the Modern Slavery Act), other requirements will be part of the evaluation criteria, which will differ for each procurement. There is no single information source that lists the types of "responsible business" requirement that the UK Contracting Authorities might evaluate, although the Crown Commercial Service (part of the Cabinet Office) does publish Procurement Policy Notes that provided some guidance.

Dates for the Diary

1 January 2020

New procurement thresholds came into force.

State Aid

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Current Issues

Post-Brexit State aid in the UK

The EU State aid rules place restrictions on the extent to which Member States can give support to private businesses. This includes tax reliefs, grants, below-market-rate loans and the sale of public assets at an undervalue.

Prime Minister Boris Johnson has pledged that the UK will break free of EU State aid rules after Brexit. While the focus is on supporting ailing industries, abandonment of State aid rules could open the door to increased support for wide-ranging sectors and industries, including focusing on regional development and green initiatives.

Whether this pledge can be realised is debatable and will form a key part of UK's EU (and international) trade negotiations.

2020 State aid modernisation project extended

The European Commission has extended (until 2022) the application of a raft of State aid rules which would otherwise expire in 2020. This includes key exemptions utilised by businesses that wish to take advantage of government support such as subsidies and grants, avoiding the need for upfront notification of State aid to the Commission.

The Commission's work **evaluating** these exemptions continues. Business can expect to know more about the Commission's reform proposals when it publishes a working paper on this work in Q3 2020.

Tax rulings on transfer pricing continue to be interrogated in Europe throughout 2020

Rulings by national tax authorities, awarding effective tax rates of less than 1% to global companies employing transfer pricing methodologies, have been scrutinised under the State aid rules in recent times. This has given rise to concerns by multi-national businesses around the lawfulness of their tax strategies.

Last year, the General Court **upheld** the Commission's decision requiring Luxembourg to recover €23.m from Fiat (although this is currently being appealed) but decided in favour of Netherland's tax ruling relieving Starbucks of a €27m bill. In the year ahead, a plethora of tax rulings – including rulings from Ireland to Apple, Luxembourg to Amazon, the Netherlands to Nike and Belgian to more than 39 multinational companies – will continue to be investigated.

The developing case law should provide greater clarity to multinational businesses about the State aid risk associated with its transfer pricing structure options.

In Focus: Responsible Business

Which aspects of responsible business are driving the regulatory agenda?

The State aid rules generally limit the extent to which public funds can be applied selectively to give an competitive advantage to business. However, recognising that in some circumstances targeted government support is necessary to achieve wider objectives of common interest, the Commission can approve State aid that promotes responsible business. For instance, with a view to curbing CO2 emissions, it has approved of hundreds of millions of Euros of public support for the roll-out of electric vehicle charging infrastructure.

Similarly, block exemption regulations allow governments to give aid for responsible business objectives – including local infrastructure projects, regional development and R&D – without first obtaining the Commission's approval, provided certain criteria are met (including funding caps and maximum aid intensities).

As the direction of responsible business policy in the EU changes, so do the parameters of permissible State aid. Currently high on the Commission's agenda is the "twin transition to a green and digital economy". €100 billion will be made available to support regions whose economies still largely depend on fossil fuels or on industries that produce high levels of greenhouse gases. To accommodate this, the Commission is working to have new State aid rules in place by the end of 2021.

Are responsible business considerations having an impact on the tools that regulators are using?

The State aid rules tend to be prescriptive but the Commission issues a range of supplemental guidance to help businesses to navigate the State aid rules and (where desirable) benefit from the block exemptions aimed at supporting responsible business.

For example:

- the Commission's **Analytical Grids on the application of State aid rules to the financing of infrastructure projects** seek to reflect the developing rules and decisional practice applicable to specific infrastructure projects (such as broadband, airport, energy or transport);
- the **Notice on the Notion of Aid** gives guidance on when government support will fall outside of the definition of State aid altogether; and
- the **Practical guide to the GBER** comprises a compendium of FAQs on the most-relied upon block exemption regulation.

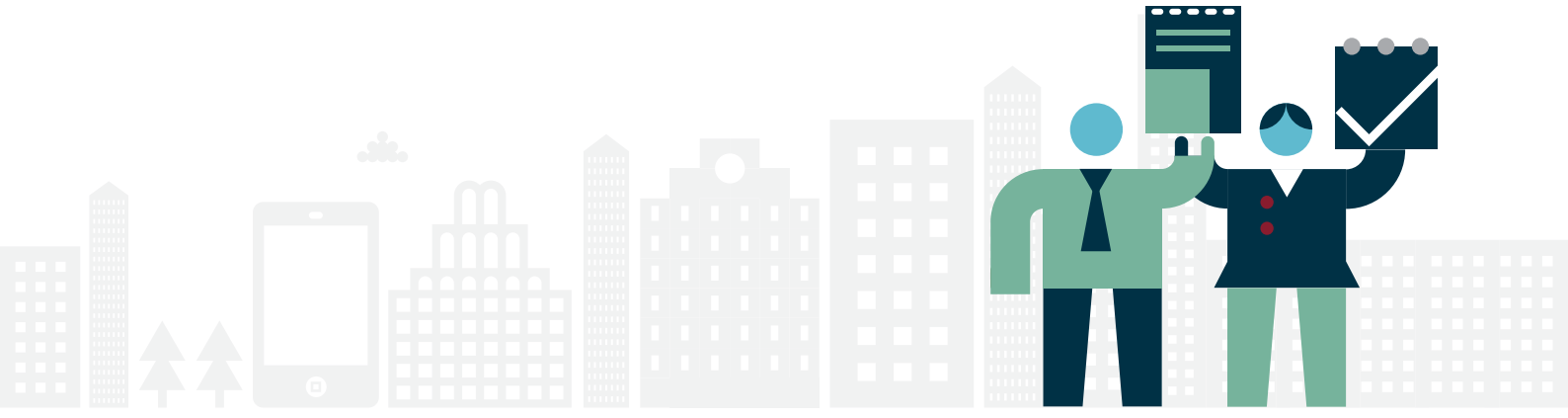
Which of the recent or upcoming developments are based on international consensus or agreements?

By their nature, as EU-derived rules with the objective of creating a level-playing field for business while supporting harmonised objectives to promote responsible business within the common market, the State aid rules require adoption by EU Member States. Accordingly, any new or revised State aid rules implemented as part of the Commission ongoing fitness check modernisation work will be adopted on a pan-EU basis.

Outside the EU, WTO rules contain much more limited anti-dumping measures. These can be built on in trade agreements: the EU-Canada free trade agreement, for example, has a notification and consultation in relation to subsidies. The EU is seeking to go further in the EU-UK post-Brexit arrangements currently being negotiated, by requiring the UK to maintain EU State aid rules. With the UK government opposed to this (as discussed above), it remains to be seen what the UK State aid regime will look like after Brexit.

What are the main challenges for businesses in complying with these developments?

By seeking early and expert support, businesses have the opportunity to frame their projects and business models to in a way that enables them to benefit from and optimise government backing. Often, this means designing those projects and models to fit within block exemption criteria, or to fall outside of the remit of the State aid regime altogether. The challenge is to be aware of these opportunities and to anticipate the direction of responsible business policy: where the EU responsible business agenda goes, the EU State aid regime will follow.



Dates for the Diary

Q3 2020

Publication of Commission's Working Papers on the evaluation of the State aid block exemption regulations as part of the State aid modernisation package.

Throughout 2020

Further decisions (and guidance) expected on the application of the State aid rules to transfer pricing and national authority tax rulings.

31 December 2020

The UK may cease to apply EU State aid rules (depending what is agreed and whether there is any extension to the transition period).

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