Regulatory Outlook

Osborne Clarke

January 2021

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Foreword

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

Alongside our usual overview of the current issues and dates for the diary across 17 areas of regulation, we include a special focus on the EU-UK Trade and Cooperation Agreement (TCA).

The UK's new relationship with the EU changes the regulatory and compliance landscape for businesses trading across the two markets. This Regulatory Outlook is intended to be a starting point for you to understand what this means for your business, whether you are a UK or EU company trading with the other market or an international business with operations in both territories.

There are four main factors giving rise to these changes:

1. A direct consequence of the UK falling outside of the EU Single Market Customs Union is the resurrection of non-tariff barriers for goods and services crossing borders. For example, businesses importing across the GB-EU border will need to comply with the Border Operating Model, the border checks required under the customs and other regulations and the 'Rules of Origin' provisions that will determine whether their goods can be traded tariff-free.

2. The internal UK and EU regulatory regimes will inevitably diverge, even where that is not a specific policy goal. With the UK having imported the body of EU law as at 31 December 2020 onto the domestic statute books, the new UK / EU relationship began from a position of regulatory alignment. But the systems have already begun to move apart, as incoming EU laws come into force in the EU but not the UK. And the UK starts to take unilateral actions on issues such as sanctions. For example, a new EU regulation on organic foods came into force on 1 January 2021, which does not form part of retained EU law in the UK. However, the UK has agreed that it will seek to ensure that its future regulation of organic food will at least be equivalent, if not identical, to EU law.

3. Other areas of regulatory difference will be more deliberate. When it comes to areas such as digital regulation or consumer protection, the UK will need to decide whether it wishes to follow the direction the EU is taking (with new laws such as the Digital Markets Act, Digital Services Act and Omnibus Directive), maintain the current position or adopt its own approach to regulation in these areas. The establishment of a competition Digital Markets Unit, and the incoming Online Harms Bill are examples of where the UK is looking to be a leader in regulation in its own right. The extent to which the 'level playing field' provisions in the TCA, designed to prevent regulatory divergence that leads to competitive advantage, affect the UK's (or the EU's) ability to diverge will then need to be considered as part of that policy debate.

4. Finally, even where the regulatory positions remain largely or entirely aligned, businesses will in many areas need to deal with separate regulators in each territory. International businesses, for example, will no longer be able to nominate the Information Commissioner's Office in the UK to be its lead supervisory authority across the UK and the EU under the GDPR's one-stop-shop mechanism. Businesses may look to a new lead supervisory authority in the EU but will still need to be mindful of guidance from the ICO and may face dual-reporting and even facing double enforcement proceedings where there has been an incident that engages the legislation in multiple jurisdictions.

As we examine in the individual sections of this Regulatory Outlook, some of these changes have an immediate impact and may require businesses to take action now, while in other areas businesses will need to assess whether any organisational or compliance changes are needed to reflect the evolving position. The UK's reputation for predictable, competent and relatively business-friendly regulation means that it will remain an attractive market for overseas businesses, but it will be important to ensure that your legal and compliance functions are geared up to make sense of the shifting requirements, risks and regulatory scrutiny wherever you trade.

Osborne Clarke's Global Compliance team is helping our clients to understand and adapt to the challenges and opportunities that the new UK-EU relationship brings. If you would like to discuss what this means for your business, please get in touch with the expert for the relevant area or your usual Osborne Clarke contact.

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Anti-bribery, Corruption and Financial Crime

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Current issues

Covid-19 fraud investigations increasing

There has been much press relating to the potential abuse of government support such as the Coronavirus Job Retention Scheme for workforces and financial support such as the Coronavirus Business Interruption Loan Scheme (CJRS). HMRC is paying particular attention to employers who have made claims under the CJRS.

Where frauds have been perpetrated, this could give rise to indirect risk to businesses in terms of anti-money laundering offences if funds received from third parties are known or reasonably suspected of being tainted, and the failure to prevent the facilitation of tax evasion if persons associated with the business are committing tax fraud.

Businesses should therefore take the opportunity to ensure they have complied with all rules and guidance in relation to government support schemes, and to implement or update any relevant risk assessments and put in place necessary mitigation measures in relation to third parties.

Updated resource guide on US foreign corruption practices

The US Department of Justice and Securities and Exchange Commission has **updated** its 2012 guide on the Foreign Corrupt Practices Act.

Whilst US-specific, it includes a section on the hallmarks of an effective compliance programme.

This is more detailed than the guidance published by UK authorities, so although not binding in the UK, the US document could provide a useful reference point to businesses drafting or updating internal compliance policies.

Further, if a business is investigated for failing to prevent bribery, being able to reference a system framed having regard to the US guidance, might assist in establishing that adequate procedure to prevent bribery were in place.

Ransomware: to pay or not to pay?

Ransom attacks have become big business for cyber criminals. The sums now being demanded, and often paid, are getting higher and the threats more alarming. The criminals don't just encrypt systems and offer the keys back in exchange for a ransom; they now typically steal personal data and confidential information and then publish it if the ransom is not paid.

Those faced with a ransom attack are often faced with a moral, legal and reputational dilemma. Unless there are clear grounds to suspect that the ransom payment would be used to fuel terrorist activity, it is unlikely that a company that pays a ransom would face criminal prosecution. But a company in this position will have to weigh difficult considerations in deciding what action to take. For more, see our Insight **here**.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Corporate criminal liability remains a risk to all sectors, and businesses need to have in place procedures to protect themselves from harm, whether direct or through liability under relevant national legislation. For example, “adequate procedures” are needed to establish the defence to the UK corporate offences of failing to prevent bribery and similarly “reasonable procedures” are needed to establish the statutory defence to the UK corporate offence of failing to prevent the facilitation of tax evasion. As these offence are provided for under domestic legislation, it is not directly affected by Brexit.

Previous European evidence gathering processes, ceased to be applicable on 1 January 2021 although the EU-UK Trade and Cooperation Agreement contains provisions intended to support continued cooperation in relation to law enforcement and judicial cooperation in criminal matters.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

As above, Brexit will not have a direct immediate impact in relation to corporate criminal offences. However, note should be taken of the extra-territorial relevance of certain existing UK corporate crime offences, such as the failure to prevent bribery.

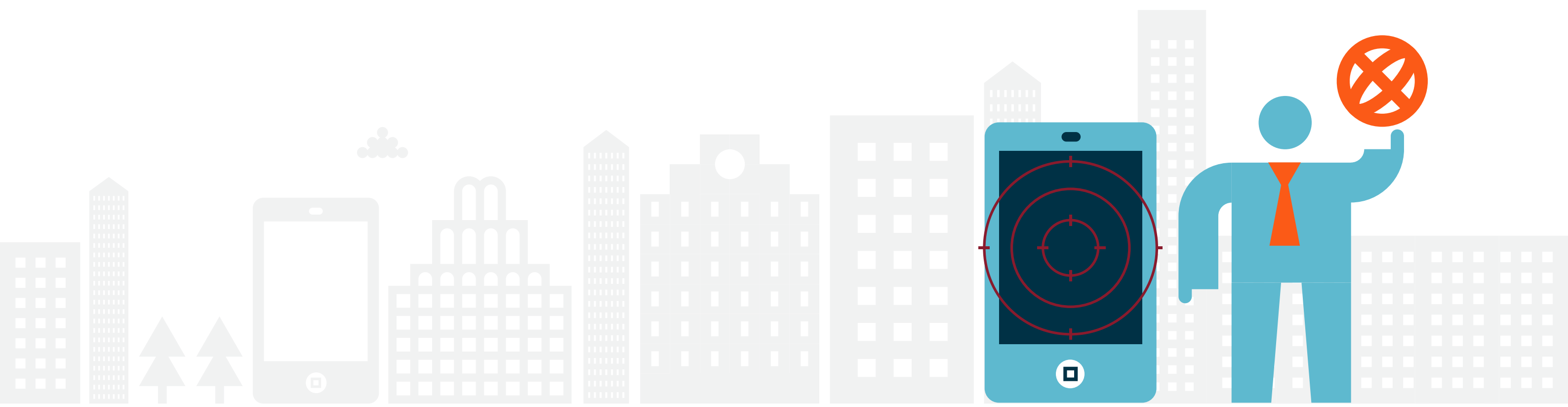
Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The EU Whistleblowing Directive came into law in December 2019, with Member States required to implement the directive by December 2021. The Directive did not, therefore, form part of retained EU law in the UK and the UK has indicated it will not be implementing it.

Those with operations in the EU, or seeking to develop a global approach to whistleblowing across a footprint that includes the EU, should consider the requirements of the directive and look out for relevant national legislation implementing the directive in relevant EU Member States.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

Key legislation in relation to corporate criminal liability, such as the failure to prevent the facilitation of tax evasion offences discussed above, is national rather than EU-derived. Any divergence in this area is therefore not expected to be a result of Brexit.



Dates for the diary

Q1 2021

Judgment expected in the Supreme Court case of in R (KBR) v Director of the Serious Fraud Office. The decision will provide an important ruling on the extent a corporate can be compelled to produce documents held out of the jurisdiction.

Broadcast and Digital Regulation

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Current issues

Online Harms Bill

The UK government has **confirmed** that an Online Harms Bill will be introduced in 2021. This follows proposals first outlined in an April 2019 white paper and subsequent initial consultation response. The bill will set out a strict new regime to tackle the removal of illegal content online, including terrorist material, child sex abuse, suicide promotion and cyberbullying.

The new rules will apply worldwide to any platform that hosts online user interactions or user-generated content that is accessible by people in the UK. A statutory duty of care will be imposed on these companies to protect users from illegal material and to implement measures to report and remove harmful content published on their platform.

Ofcom, the media and communications regulator, will be responsible for enforcing the rules and will have the power to impose fines for non-compliance of up to 10% of a company's annual turnover or £18 million (whichever is higher). The regulator will also be able to block offending services from being accessed in the UK.

EU Digital Services Act

The **Digital Services Act** (DSA) aims to address digital: (i) safety; (ii) regulation; (iii) freedom of expression; and (iv) liability. Whilst focusing on online platforms (particularly larger players or "gatekeepers"), the DSA's broad scope means all digital services providers and rights-holders should be aware of the potential impact.

The DSA provides a framework setting out clear responsibilities and accountability for providers of intermediary services, and in particular online platforms, such as social media and marketplaces. New obligations include: more detailed procedures aimed at tackling illegal content online, a duty on very large online platforms to mitigate certain systemic risks and know your-client obligations for B2C traders using platforms, along with transparency, reporting and data-sharing requirements. The DSA also contains new frameworks governing the supervision and cooperation of organisations that are within its scope.

The new rules require approval from EU legislators and could then take up to two years to become law so will not apply within the UK. Nevertheless, given the potential impact, those that are likely to fall within the scope of the DSA should be considering how this will affect their operations.

Current issues

EU Digital Markets Act

The **Digital Markets Act** (DMA), which is designed to boost online competition, is aimed at online businesses that determine how other companies interact with online users. The obligations apply to "core platform service "providers" that are designated as "gatekeepers". Similar to various national initiatives, the DMA combines ex-ante regulation with traditional case-by-case ex-post competition law enforcement.

Failure to comply with the rules could lead to fines of up to 10% of global turnover, and, in the case of systematic infringements, structural remedies.

As with the DSA, the DMA requires the approval of both the European Parliament and the European Council, and the final rules are not expected until 2023 at the earliest.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Broadcasters need to assess whether additional licences or authorisations are needed in EU territories to make their linear, streaming or on-demand services available in Member States.

- Businesses should first consider whether another Member State might have jurisdiction, based on the Audiovisual Media Services Directive (AVMSD), or (if not) the structural changes required to qualify for jurisdiction.
- Many businesses have already re-located their centre of operations to an EU country, to continue benefiting from the free movement of services currently guaranteed by the AVMS country-of-origin principle.

Businesses should also take into account UK legislation, passed to 'correct' EU law coming onto the national statute book, which will result in different regulatory requirements depending on: (1) the nature of the service (whether linear or on-demand); and (2) for linear, the delivery method (terrestrial, satellite, cable or OTT) and whether the service appears in a UK-regulated electronic programme guide.

UK-based broadcasters and OTT providers will also need to prepare for changes to the existing copyright regime. In particular:

- The Portability Regulation will no longer apply in the UK, so paid OTT services need to switch off portability or check the scope of their rights agreements if they wish to continue.
- The country-of-origin principle in the SatCab Directive will no longer apply, so satellite broadcasters may need to agree copyright licences for each EEA state in which broadcasts are received.

EU works: The AVMSD requires that broadcasters reserve a majority proportion of airtime for "European works" and that on-demand services promote access to such works (for example, by ensuring prominence in a catalogue).

European works are programmes originating in Member States, or in a country which is a signatory to the European Convention on Transfrontier Television, or certain EU / non-EU co-productions.

The UK is a signatory to the Convention. As such, any qualifying video works produced in the UK after Brexit will continue to be classified as European works and will benefit from the above regime.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Changes that broadcasters operating in the UK should be aware of include the following:

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

The UK now falls outside of the scope of the Regulation, meaning that EU subscribers may not be able to watch their services in the UK (unless licences are obtained).

In Focus: Regulation after Brexit

For linear services, the UK is moving from a country-of-origin to a country-of-destination approach to regulation and licensing. In practice, this means broadcasters from outside the UK may need to obtain a licence from Ofcom if they make their services available via a UK-regulated electronic programming guide, regardless of UK jurisdiction (there is an exception for terrestrial, satellite and cable linear broadcasters who fall within the jurisdiction of a signatory to the European Convention on Transfrontier Television).

On-demand services, however, will only be regulated in the UK if they fall within UK jurisdiction (determined by the location of the provider's head office and editorial decision-making). If a VoD service operates in the UK but the provider falls outside of UK jurisdiction, there is no requirement to notify Ofcom and UK on-demand rules will not apply.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The major recent changes to broadcast and video laws are contained within the revised AVMS Directive (2018/1808). This directive has already been implemented into UK law by the Audiovisual Media Services Regulations 2020, so the baseline position in the UK will stay aligned with the EU in respect of linear, on-demand and videos-sharing platform services.

The new Directive on Copyright in the Digital Single Market (2019/790) has been adopted and has a Member State transposition deadline of 7 June 2021, so does not form part of retained EU law in the UK. This directive has come under significant criticism, not least in relation to online content-sharing platforms (Article 17) and fair remuneration protections for authors and performers (Articles 18 to 22). UK government ministers have indicated that the UK will not implement the law.

The revised SatCab Directive (2019/789), which extends elements of the existing regime to online TV services in some circumstances, also has an implementation date of 7 June 2021. There is no indication that the UK will implement this directive into UK law.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

It is not clear at this point if and to what extent UK and EU broadcast law will diverge. For example, the UK may amend any EU-derived broadcast legislation.

The UK government has made clear that the implementation of the video-sharing platform rules from the AVMSD is an interim framework, which will be replaced by the forthcoming Online Harms Bill. The online harms regime is expected to be more expansive in terms of obligations, the range of services caught and in territorial scope, as compared to the video-sharing platform rules under AVMSD.

The timing of the Online Harms Bill is uncertain, however, and recent developments indicate it may not be in force before 2023.

Dates for the diary

7 June 2021

Deadline for new EU Copyright Directive to be transposed into national law by EU Member States

7 June 2021

Deadline for revised SatCab Directive to be transposed into national law by EU Member States.

During 2021

Online Harms Bill to be introduced into UK Parliament.

Competition

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Current issues

UK merger control: mandatory notification for large mergers post-Brexit?

From 1 January 2021, UK merger control is applied alongside the EU Merger Regulation, capturing all transactions that satisfy the UK jurisdictional thresholds even if they are also being notified under the EU Merger Regulation.

The European Commission continues to be responsible for merger cases that were initiated before the end of the Brexit transition period. So, if a case had already been notified to the European Commission before the end of 2020, it will stay under the exclusive competence of the Commission. However, the Competition and Markets Authority (CMA can review transactions that were not initiated by the Commission before the end of the transition period, provided that the CMA's own threshold tests for jurisdiction are met. In practice, this means that a number of deals that were announced during the course of 2020, but have not yet been notified to the European Commission, will now fall to the CMA for review.

While the UK has decided to retain its voluntary notification system for smaller mergers, the CMA has **signalled** its intention proactively to target mergers above a certain threshold which are likely to have a material effect in the UK. Given that the CMA also intends to impose globally-applied "standstill" obligations to prevent merging companies from completing pending clearance, early engagement with the CMA will be necessary, notwithstanding the "voluntary" nature of the regime.

Foreign direct investment rules: EU and UK

On 11 October 2020, the EU's new Foreign Direct Investments (FDI) Regulation, which establishes a framework for the screening of foreign direct investments into the EU, took effect. The FDI Regulation creates a cooperation mechanism within the EU for the exchange of information in relation to foreign direct investments that may affect the security or public order of EU Member States.

The UK was poised to implement the FDI Regulation, but declined to do so after the European Commission decided that FDI Regulation should be read as excluding the UK.

Instead, the UK is introducing its own foreign direct investment legislation, which will enable the government to review foreign investments from a national security perspective.

The **National Security and Investment Bill** – published on 11 November 2020 – will introduce a mandatory notification regime for high-risk sectors; transactions caught by the regime will be unable to complete until clearance is obtained. Notably, the draft legislation also includes retrospective powers to unwind (or impose conditions on) past deals.

When the legislation comes into force, merging parties will need to consider whether their transaction could be caught, which is another reason to consider merger control at an early stage. However, with past deals being reviewable, businesses that have recently merged should take note of the legislation and of the scope of the retrospective powers.

Current issues

Competition in digital markets

In the UK, significant work has been undertaken to analyse the effectiveness of competition in digital markets. The government commissioned an independent review of the sector (the Furman review) in 2018, and the UK's competition regulator, the CMA, undertook a market study into online platforms and digital advertising, publishing its final report in July 2020. Both **noted** competition issues in digital markets, and recommended the establishment of a pro-competition regime for digital markets, with a dedicated regulator set up to manage it. Building on these findings, the government has committed to establishing and resourcing a Digital Markets Unit (DMU) from April 2021 (as we discuss in more detail in this **Insight**).

The DMU is expected to be responsible for regulating a pro-competition regime for the most powerful digital firms – those that are designated as having 'Strategic Market Status'. This will involve:

- An enforceable code of conduct which will apply to SMS players.
- Pro-competitive interventions to drive greater competition and innovation.
- A new mandatory merger regime to apply to SMS mergers.

The DMU will also be tasked with developing a modern competition and consumer regime for digital markets.

The proposals for the regime to be overseen by the DMU will be subject to consultation in early 2021, including around key aspects such as the powers of the DMU, the thresholds for SMS and the companies to be designated. These present opportunities to engage with the CMA and influence the direction of travel.

EU platform regulation

On 15 December 2020, the EU published a draft of its **Digital Markets Act**. The objective of this new legislation is to boost in digital markets, with new rules aimed at online "gatekeepers"; that is, players that determine how other companies interact with online users.

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

This is a significant new piece of legislation for players in digital markets and while the final rules are not expected until 2023 at the earliest, the rules will be under the spotlight over the next year and beyond as the DMA passes through the EU legislative process.

Penrose Review: shake up of UK competition rules?

The UK government announced in September 2020 that it had commissioned a review of the whole competition law regime, to be undertaken by John Penrose MP, with a focus on economic recovery, tackling 'consumer rip-offs' and driving a 'fresh new start outside of the EU'.

This is separate to the ongoing work in the digital economy and will have wider implications for other sectors, as the Penrose review will look to make changes to the UK competition regime more widely. The recommendations may build on the work of the outgoing CMA chairman Lord Tyrie, who last year sent a comprehensive set of proposals to BEIS, which included significant strengthening of consumer powers.

Again, businesses should keep aware of the developments and, in particular, consider whether to engage with any government consultations that may arise. With the UK seeking to set out its stall as a competition strategy leader post-Brexit, it is quite possible that we may see a potential shake-up of the existing rules, and in particular, increased powers for the CMA to tackle consumer harms.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

As the UK's competition law regime closely mirrors that of the EU, there will be little immediate change. The domestic UK competition regime remains in place: the two general prohibitions on anti-competitive agreements and abuses of dominance will remain in alignment with the EU competition regime. In addition, all EU regulations, guidance and case law up to 31 December 2020 forms part of the body of retained EU law, which is now part of domestic UK legislation.

In short, providing that businesses are in compliance with the competition rules before the 31 December 2020, they will continue to be in compliance, and no specific immediate action is required.

The primary changes relate to enforcement. For anti-trust enforcement, the UK will no longer have jurisdiction over infringements of EU competition law (and must drop the EU elements of any ongoing investigations). The EU will no longer have jurisdiction to carry out dawn raids in the UK, but will be able to open investigations where it is suspected a UK business's conduct has anti-competitive effects in the EU.

For merger control, the one-stop-shop principle will no longer apply, so qualifying mergers may now need to be notified to the CMA as well as to the European Commission.

The Commission and the CMA have set out procedures for jurisdiction in merger control and antitrust investigations that were commenced prior to the end of the Brexit transition period – any business under investigation, or which has notified or intend to notify a merger prior to 31 December 2020 should seek advice to ensure they understand how the investigation may be affected by the end of the transition period.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

As for UK business, there are no immediate changes that non-UK businesses need to make from a competition perspective following the end of the transition period.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

New regulation for digital platforms, designed to address perceived competition imbalances, is one of the key areas of focus for competition regulators. As a result, the UK is not alone in considering regulation of digital platforms and how to make sure that competition policy and rules are fit for the modern economy; as set out above, the European Commission has now published the Digital Markets Act which includes a set of rules for "gatekeepers".

While we have less clarity on which digital firms would be caught by the UK proposals compared to at the EU level – and what behaviour would be prohibited/ required by the code – there are clearly strong similarities with the EU proposals, and it would be surprising if there was not a significant amount of consistency with the EU approach set out in the Digital Markets Act as the details of the UK regime develop.

However, the UK is clearly setting its stall out as a world-leader in competition post-Brexit – and while it is likely to be influenced by the EU proposals, we may see some divergences. For one thing, the CMA is seeking to implement the new rules quicker than will be possible in the EU. In terms of substance, one key point of difference is that the UK rules appear to be suggesting a tailored SMS regime for each major platform, while the EU is suggesting a standard set of 'dos and don'ts' as a starting point, potentially offering less flexibility.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The CMA has been explicit in its intent to be a world leader in developing competition law strategy following Brexit. The CMA's Chief Executive, Andrea Coscelli, has talked of the upside of taking back control of the decisions, highlighting as an example, the UK's ability to crack down on tech mergers that flew under the radar of the EU.

The work to date by the CMA in developing a digital markets strategy has indeed caught the attention of regulators in other countries, and as set out above, although we would expect to see alignment, the UK may wish to forge its own path in this area.

More generally, the Penrose review potentially points to broader changes to the competition regime in the UK. This is unlikely to alter the core competition rules but may result in greater enforcement powers for the CMA.

UK courts will also no longer be bound by EU decisions and courts including the Court of Appeal and the Supreme Court will be able to depart from existing EU case law, which may lead to differences developing over time.

At this stage, business should keep track of these important developments, and look for opportunities to engage with those that are shaping competition law, including new platform regulation rules, in the UK. In the future, businesses that operate in the UK and the EU will need to be sure to comply with any divergences as each territory pushes forward its own competition strategy post-Brexit.

Dates for the diary

Early 2021

Consultations on UK proposals to regulate digital markets.

April 2021

Digital Markets Unit to be established and resourced.

During 2021

Penrose review response to be published.

Consumer Finance

04

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Current issues

FCA guidance on cancellations and refunds

As a result of the impact of Covid-19, customers have seen events and trips cancelled.

On 2 October 2020, the Financial Conduct Authority (FCA published **guidance** on cancellations and refunds. The guidance, which applies to insurance, credit card and debit card providers, is effective until 2 April 2021.

The FCA generally expects that the quickest and easiest route to a refund will be via the retailer or other guarantee scheme (such as ABTA or ATOL for travel).

However, where customers decide to claim their money back via a 'chargeback' or by making an insurance claim, the FCA expects firms to:

- Treat their customers fairly.
- Handle claims and enquiries fairly and in a reasonable period of time.
- Provide clear explanations to customers (on declines and other options which might be available to them).

Changes to default notices

Lenders are required to serve a default notice on a borrower before the lender is entitled, in the event the borrower is in breach of the agreement, to (among other things) terminate the agreement or demand earlier payment of any sums under it.

The **Consumer Credit (Enforcement, Default and Termination Notices) (Coronavirus) (Amendment) Regulations 2020 came into force on 2 December 2020** and make changes to form and content requirements relating to default notices.

The key changes require lenders to:

- No longer use block capital in order to achieve required prominence of certain words. Instead lenders must use lowercase and may use bold formatting or underlining (but not both).
- Alter the prescribed wording and ordering of the notices to become more consumer friendly.
- Provide clearer explanations of any legal jargon or words that are not easily understood, for example, by including prescribed wording explaining what is meant by 'a surety', if applicable.
- Update sources of support identified in the FCA's information sheet and the government's Money Advice Service.

Lenders must ensure that their default notices comply with the new Regulations by 2 June 2021. Failure to do so will require a lender to serve a compliant default notice on a borrower before they are entitled to take any of the actions set out in section 87.

Current issues

Interim funding for APP scam victim compensation extended

On 9 December 2020, UK Finance issued a **press release** stating that a group of seven signatories to the voluntary Authorised Push Payment (APP) Contingent Reimbursement Code have agreed to extend until 30 June 2021 the interim funding to compensate eligible victims of APP scams where the customer, sending and recipient banks have met the standards expected of them under the Code.

The extension is intended to ensure that customer reimbursement takes place whilst regulators and the government deliver a long-term, sustainable funding arrangement, and steps can be taken to place the voluntary Code on a statutory footing.

FCA consults on guidance on Bounce Back Loan scheme and PAYG options

On 4 December 2020, the FCA **issued** a guidance consultation for firms collecting payments under a Bounce Back Loan (BBL) where the collection of that debt is a regulated activity.

The BBL scheme is a government initiative that enables smaller businesses to access finance more quickly during the coronavirus pandemic. On 24 September 2020, the Chancellor announced the introduction of pay as you grow (PAYG) – a system providing flexibility for repaying a BBL. The FCA is consulting on proposed guidance for firms that will be providing PAYG options.

The FCA explains that chapter 7 of the Consumer Credit sourcebook (CONC) applies to firms when they carry out regulated debt collection under the BBL scheme. Collecting debts under the BBL scheme may be a regulated activity where the borrower is a sole trader or small partnership, so CONC 7 and Principle 6 can apply to these types of borrowers. The proposed guidance aims to detail how firms can:

- Use and offer PAYG options in a manner compliant with CONC 7.
- Recognise vulnerability and respond to the needs of vulnerable customers.
- Assist borrowers who need debt advice.

Feedback from the FCA is expected in early 2021.

FCA portfolio letter to firms in the mainstream consumer credit lenders portfolio

On 2 December 2020, the FCA published a '**Dear Board of Directors**' letter aimed at mainstream consumer credit lenders (MCCLs). The MCCL portfolio is made up of firms providing Consumer Credit Act regulated unsecured overdrafts, loans or credit cards and contains firms with a range of business models and funding sources.

In the letter the FCA:

- Sets out its view of the risks MCCLs may pose to their consumers or the markets in which they operate. Firms are asked to consider the degree to which they present such risks and their strategies for mitigating them.
- Outlines its expectation of MCCLs, including how firms should be mitigating these risks.
- Describes its supervisory strategy and programme of work to ensure that firms are meeting its expectations, and harms are being remedied.

The FCA focusses on five key areas: affordability, treatment of customers in arrears, embedding of regulatory changes, transparency of pricing and features, and Brexit.

MCCLs should reflect on the issues highlighted in this letter to ensure they are operating to minimise risk of consumer and market harm. Where the FCA identifies harm, it will intervene.

Support for consumer credit customers impacted by Covid-19

On 19 November 2020, the FCA **confirmed** updated guidance to firms setting out enhanced support that should be available to consumer credit customers experiencing payment difficulties as a result of the coronavirus pandemic. The guidance came into force on 25 November 2020.

The guidance covers users of personal loans, credit cards, store cards, catalogue credit, rent to own, buy now pay later, pawn broking, motor finance and high-cost short-term credit.

Consumers have until 31 March 2021 to apply for an initial or a further payment deferral. After that date, they will be able to extend existing deferrals to 31 July 2021, provided these extensions cover consecutive payments, and subject to the maximum six months allowed. If borrowers who have not yet taken a deferral think they need the full six months, they should apply in good time before their February 2021 payment (to cover a full six months of payments, from February to July inclusive).

Current issues

Support for mortgage borrowers impacted by Covid-19

On 17 November 2020, the FCA updated its guidance to firms setting out enhanced support that should be available to mortgage borrowers experiencing payment difficulties as a result of the coronavirus pandemic.

The FCA has published:

- Finalised guidance: Mortgages and Coronavirus: Payment Deferral Guidance.
- Finalised guidance: Mortgages and Coronavirus: Tailored Support Guidance.

Consumers will have until 31 March 2021 to apply for an initial or a further payment deferral. After that date, they will be able to extend existing deferrals to 31 July 2021, provided these extensions cover consecutive payments, and subject to the maximum six months allowed. Borrowers who have not yet taken a deferral, and who think they need the full six months should apply in good time before their February 2021 payment is due.

In October 2020, the FCA issued separate guidance for borrowers with interest only or part-and-part mortgages whose capital repayment plans were affected by the crisis. This means that borrowers whose mortgages matured from 20 March 2020 can delay the repayment of the capital on their mortgage until 31 October 2021.

Review of the unregulated lending market

On 16 September 2020, the FCA **announced** that Christopher Woolard will chair its review of the future regulation of the unsecured credit market.

The review will concentrate on how regulation can better support a healthy unsecured lending market, taking into account:

- The impact of the coronavirus on employment security and credit scores.
- Changes in business models and new developments in unsecured lending, including the growth of unregulated products in retail and the workplace.

Mr Woolard will be assisted by an advisory group and will make recommendations to the FCA Board in early 2021.

Firms should expect regulatory changes to follow if the FCA accepts Mr Woolard's recommendations.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Section 55 of the Consumer Credit Act 1974 requires a lender to provide a borrower with pre-contract information in a prescribed manner. Currently, this is provided via the Standard European Consumer Credit Information (SECCI) document.

On 30 December 2020, the Financial Services and Economic and Monetary Policy (Consequential amendments) (EU Exit) Regulations 2020 came into force. These regulations require firms to remove references to SECCI (for loans) and European Consumer Credit Information (for overdrafts) by 30 May 2021. These headings do not have to be replaced with alternatives, it is just a case of deleting them.

Failing to update pre-contract credit information documents by the deadline could mean that credit agreements are unenforceable against borrowers with a court order.

Firms should therefore review the wording on the forms / templates they use to ensure this change is reflected by the deadline.

Changes to the Regulated Activities Order 2001 mean that where loan contracts entered into after the end of the transition period are secured on land in the EEA, they will not be regulated mortgage contracts (though existing regulated mortgage contracts secured on land in the EEA before the end of the transition period will remain as such). These post-transition period contracts may instead be regulated credit agreements, in which case firms will need to comply with consumer credit provisions.

Where firms have decided to stop servicing customers in the EEA after the transition period, they should communicate the decision to customers early, consider what would be a fair timeframe for winding down or transferring business and support customers while they find alternative providers.

From 1 January 2021, businesses and consumers are no longer able to use the Online Dispute Resolution (ODR) platform. The ODR platform is an EU website that links consumers with alternative dispute resolution providers in the EU. If they have not already done so, firms should remove links and references to the ODR platform from their website and any terms and conditions.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

EEA firms carrying on consumer credit lending who notified the FCA to enter the Temporary Permissions Regime (TPR) will be issued with a 'landing slot' by the FCA, during which period they will be required to apply for UK authorisation. It is expected the TPR will operate for three years with the last landing slot allocated in early 2021.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

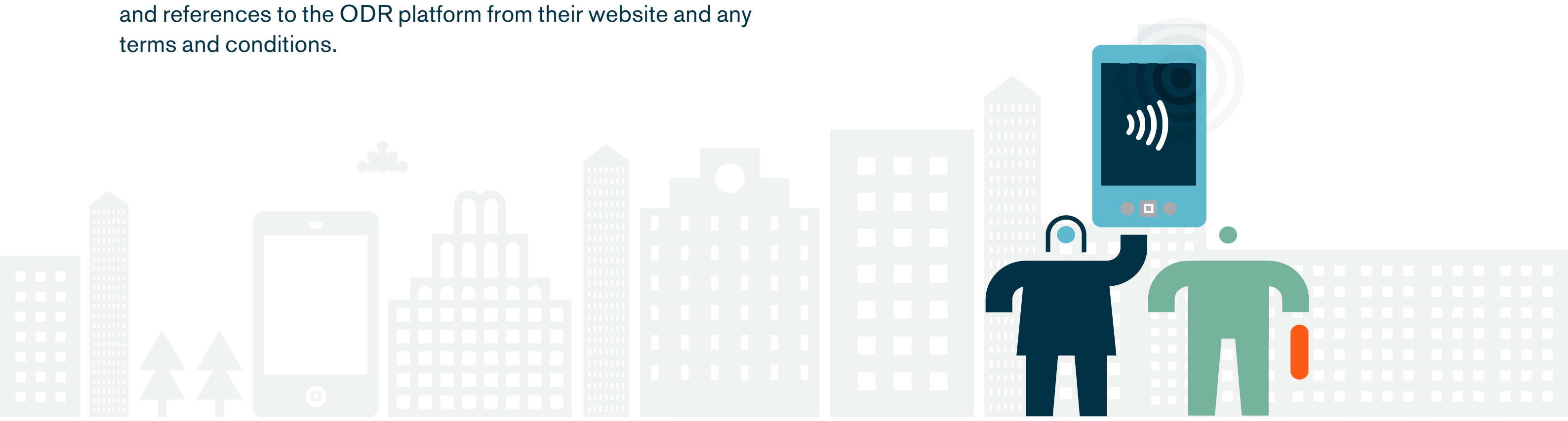
Generally speaking, the consumer credit regime is governed by legislation which emanates from the UK and is therefore unaffected by Brexit.

The EU has committed to improving consumer protection in a strategy referred to as the "New Deal for Consumers". As part of that strategy, the Omnibus Directive came into force on 7 January 2020.

EU Member States have until 28 November 2021 to adopt the Directive, and until 28 May 2022 to bring it into force. Since this will be after the end of the transition period, it is likely that there will be no obligation to adopt it in the UK. However, the UK government has indicated that it intends to implement similar domestic consumer protection legislation.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The regulatory regime for consumer credit lending in the UK has always been driven predominantly by domestic market and policy considerations. Accordingly, any areas of divergence that arise either in the short or long term are unlikely to be as a result of the UK's departure from the EU or European policy considerations.



Dates for the diary

Early 2021

Christopher Woolard due to make recommendations of the FCA's Board following a review of the unsecured credit market.

28 February 2021

Complaints return data must be submitted – no extension has been granted.

31 March 2021

Deadline for consumers to apply for an initial or a further payment deferral under the FCA's finalised guidance on consumer credit products. After that date, they will be able to extend existing deferrals to 31 July 2021, provided these extensions cover consecutive payments, and subject to the maximum six months allowed.

2 April 2021

FCA cancellation and refunds guidance expires.

Consumer Protection

05

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Current issues

EU New Deal for Consumers

The EU's 'New Deal for Consumers' is an overhaul of consumer law, giving it more teeth against non-compliant businesses, and bringing EU legislation (some of which was passed in the 90s) up to date for modern, digital markets.

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

The reforms will not form part of UK law but will apply to businesses selling to consumers in the EU. The strengthening of the consumer protection regime means that it is all the more important that companies look to achieve compliance by design for new products and services. Now is also a good time to start reviewing compliance for existing products and services – to avoid scrambling to achieve compliance in advance of the deadline as was often the case with GDPR.

Member States have until 28 November 2021 to adopt and publish their implementing legislation, so businesses will have more information on the exact scope of the changes by then. The laws will then come into effect on 28 May 2022.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Consumer-facing businesses need to understand the changes that are coming into effect and make sure they comply with them. This will mean continuing to follow and comply with EU consumer protection regulations, such as the New Deal for Consumers discussed above, as well as UK law.

This includes changes in UK law such as the following:

- The loss of the country-of-origin regime from the E-Commerce Directive and the UK implementation, the E-Commerce Regulations as implemented by the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019. This means that UK-based online businesses will need to comply with the laws in each 'country of destination' in relation to their online activities in the fields of law covered by the legislation.

- The Geo-blocking Regulation (Revocation) (EU Exit) Regulations 2019. These Regulations revoke the EU Geo-Blocking Regulation, allowing a UK business to geo-block EU customers when operating in the UK. However, the EU Geo-Blocking Regulation will still apply to UK businesses when supplying goods and services into the EU, meaning in that scenario UK businesses would not be able to geo-block / discriminate between customers from different Member States.

- The Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 which amongst other things will end the operation in the UK of the EU Online Dispute Resolution Regulation. This means UK-based businesses will no longer be obliged to offer access to cross-border alternative dispute resolution procedures, nor link to the EU's online dispute resolution platform.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Businesses not located in the UK will need to keep a close eye on local legislation, such as that discussed above, to determine whether there are any changes which impact their dealings with the UK.

In addition, they should also note the changes to the Geoblocking Regulation which effectively allows EU-based companies to prevent UK citizens accessing their website.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

As discussed above, the New Deal for Consumers represents a major overhaul of EU consumer protection, bringing in GDPR-level fines for breaches of consumer protection. The Injunctions Directive will also make it easier for consumer groups to bring class action-style claims for compensation.

As consumer protection is not one of the 'level playing field' areas set out under the EU-UK Trade and Cooperation Agreement, the UK is under no obligation to maintain regulatory alignment with the EU in this area. While previous UK governments have stressed that the UK would maintain high consumer protection standards, it remains to be seen whether the current government will seek to implement similar reforms to the EU New Deal for Consumers.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

Much of the UK's consumer law is derived from EU legislation. While that legislation remains part of UK law, as 'retained EU law,' the UK is free to amend those rules to reflect changing consumer behaviours and government policy priorities.

It is not clear at this point to what extent the UK will choose to do so, and thereby to diverge from EU rules. What is clear is that businesses serving consumers in both the UK and EU markets will need to ensure they remain compliant with both consumer protection regimes.

Dates for the diary

28 November 2021

Deadline for EU Member States to implement Omnibus Directive.

Data Protection and Cyber Security

06

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Current issues

Cross-border data transfers

Following a complaint lodged to the Data Protection Commissioner in Ireland by privacy-activist Max Schrems, the Court of Justice of the EU (CJEU) issued a judgment which invalidated the EU-US Privacy Shield, the mechanism used by UK, EU and US businesses to transfer personal data legitimately to the US.

Businesses will need to determine quickly the extent to which they (or their processors) transfer personal data to the US on the basis of the EU-US Privacy shield, and look at what alternative measures can be put in place to ensure cross-border transfers remain compliant. In the short term, businesses will need to explore other bases of transferring data to the US, including using the standard contractual clauses – which allow data to be transferred outside the UK/EU – or by obtaining consent from the data subjects, however difficult that may be.

Solutions that simply avoid all transfers of data to the US can also be considered but this will likely come at considerable cost.

Businesses should expect their response to the decision to be scrutinised. Schrems's non-profit privacy organisation has already sent queries to numerous high-profile data controllers (and published their responses).

As we discuss in more detail below, transfers of personal data between the UK and the EU are currently still allowed, but businesses will need to monitor the situation, with alternative solutions for EU to UK data transfers potentially required after April or June 2021.

European Data Protection Board guidelines

Following the outcomes of recent CJEU cases, the European Data Protection Board (EDPB) has published **guidelines** on the definition and obligations of controllers and processors under the GDPR. The EDPB noted that a clear definition of "controller" and "processor" is vital to determine who is responsible for complying with specific data protection rules under the GDPR. The concept of "joint controllership" – whereby two or more controllers "jointly determine" the purposes and the means of processing the data – was interpreted broadly and was taken to include parties that make complementary decisions necessary for the processing to take place in the manner envisaged in the purpose of the processing.

Data controllers will need to ensure that their contracts clarify how elements of the GDPR will be implemented, rather than simply repeating the GDPR provisions in their contracts. Details surrounding security, assistance duties and mechanisms for agreeing changes should be included.

The guidelines document is not yet in its final form as the EDPB invited businesses to comment on the guidelines.

ICO fining methodology for personal data breaches

The UK Information Commissioner's Office (ICO) initiated a public **consultation** of its draft statutory guidance, which explains the powers available to the ICO as well as how it calculates fines.

Current issues

This consultation closed in mid-November 2020 and the guidance will be published early in 2021. Until the new guidance is finalised, the applicable fining methodology remains the ICO's **Regulatory Action Policy**.

ICO's approach in light of the COVID-19 pandemic

The ICO has written to businesses setting out the support available to them as the Covid-19 pandemic continues.

In an **open letter** to businesses, the ICO Commissioner, Elizabeth Denham, expressed sympathy for businesses struggling to comply with data protection and freedom of information rules. The regulator has supported organisations by providing answers to new data protection questions that have arising out of the pandemic as well as creating an information **hub** dedicated to assisting small and medium-sized enterprises during this crisis.

Businesses will need to ensure that they do not become complacent in their compliance with data protection rules, as the regulator has warned that it will take action against businesses that take advantage of this uncertain period by breaching data protection rules.

Age-appropriate design: Code of Practice

In February 2020 the ICO published its **final version** of the Age Appropriate Design Code of Practice for Online Services.

The code of practice sets privacy standards for designing "information society services" (websites, apps and connected devices) which are more likely to be used by children. The code outlines that businesses should consider the age ranges of their users as this assessment will have a knock-on effect as to how data should be collected, retained and processed.

The code came into force in September 2020 with a 12 month transition period. During this period, businesses will need to give thought about how best to comply. For new services, businesses will need to undertake an age-appropriate assessment at the earliest stage of the design process.

ICO monetary penalty notices

In October and November 2020, the ICO issued its long-awaited monetary penalty notices against **British Airways** (£20 million), **Marriott** (£18.4 million), and **Ticketmaster**(£1.25 million).

These decisions provide insight into the ICO's approach to personal data breaches and, in particular, how the ICO will determine whether appropriate technical and organisational measures have been taken. As such, these decisions are of interest to all data controllers and processors.

New guidance on data subject access requests

The ICO has published **guidance** on data subject access requests, which provides welcome relief for data controllers in the form of an ability to "stop the clock" on the one-month deadline in certain circumstances.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

As at 1 January 2021, the EU GDPR ceased to apply directly to the UK, but effectively became part of UK domestic law. All EU-derived UK domestic legislation (such as Privacy and Electronic Communications Regulations) continues to apply.

Therefore, there is now a 'UK GDPR' but many UK businesses will also be subject to, and need to comply with, the EU GDPR.

To ensure that the UK GDPR works in a solely UK context, various changes from the EU GDPR were required. These were made by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. The changes aim to ensure the UK GDPR makes sense and is directly applicable in the UK on a standalone basis – for example, references to "the Union" become "the United Kingdom".

For UK businesses, there are a number of changes that may need to be made in order to ensure compliance with the UK GDPR and / or the EU GDPR:

- **Make changes to records of processing** – records will need to cover UK-EEA transfers (and vice versa) – data mapping is time consuming, so start now.
- **Make changes to template contracts** to update relevant data transfer wording and appropriate referencing to the UK GDPR and EU GDPR.
- **Consider changes to existing contracts** if necessary to update relevant data transfer wording and appropriate referencing to the UK GDPR and EU GDPR.
- **Update privacy policies** to describe clearly data flows between the UK and the EEA and to cover the relevant requirements of the UK GDPR.

In Focus: Regulation after Brexit

- **Subject to the EU GDPR?** Consider whether your business is still directly subject to the EU GDPR. This can be a complex question to assess, depending upon the extent to which a business is deemed to be "established" in the UK, whether you are monitoring the behaviour of EEA data subjects, or are offering goods or services to them.
- **EU representative?** Given that UK businesses may also be caught by the EU GDPR, consider whether you need to appoint an EEA representative.
- **Lead supervisory authority?** If your business operates across the EEA it will need to consider whether it can establish a lead supervisory authority in the EEA. In an EEA cross-border data breach scenario, a lead supervisory authority may need to be notified under the EU GDPR (as well as compliance with the ICO notification requirements under the UK GDPR). If there is no lead supervisory authority, the business may need to prepare to deal with multiple data protection authorities across the EEA.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

The UK GDPR, like the EU GDPR, has extra-territorial effect. This means that businesses based in the EEA, or in other countries outside the EEA, may also be caught by the UK GDPR.

Organisations with operations in both the UK and other EEA countries are likely to have to comply with two separate, but similar, legislative regimes, with the consequential risk of dual enforcement action (by EEA Data Protection Authorities in the EEA and the ICO in the UK) in the event of breaches or complaints.

In the short-term, businesses will need to consider at least the issues set out above. In the longer term you will need to monitor and keep on top of UK developments.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The e-Privacy Regulation will focus on modernising and harmonising the law around privacy in communications, cookies and direct marketing. The Regulation has not yet been finalised, and we don't know when it will be.

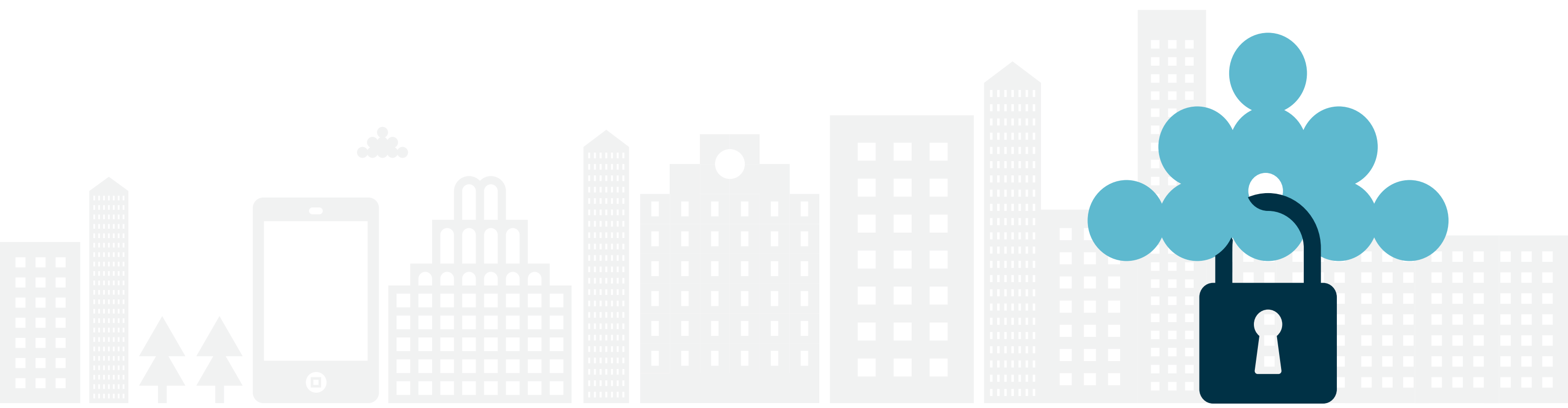
Will something similar be implemented in the UK? Realistically, yes, but we suspect there will be scope for the UK version to differ in certain respects. In general, the UK may aim to be more business friendly in its reforms.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

Post-transition period, there is certainly scope for UK laws on data protection to diverge from the EEA. The UK has already confirmed that, on a transitional basis, it deems the EEA member states to be adequate to allow for data flows to them from the UK without additional protective mechanisms. However, divergence threatens adequacy and how much the UK diverges will affect whether it receives (and maintains) an adequacy decision from the European Commission.

While an adequacy decision is not included in the EU-UK Trade and Cooperation Agreement (TCA), the TCA puts in place an interim solution that buys the EU more time to conclude its assessment. Under this temporary arrangement, transfers from the EEA to the UK will be treated as if they were still transfers within the EEA – so no other transfer mechanisms are required for those transfers for the moment.

Businesses should continue to monitor this situation, as the interim solution is for a limited period of up to four months (extendable to six months). If no adequacy decision is forthcoming for the UK, it is likely that other measures (such as EU approved standard contractual clauses) will need to be entered into for EEA-UK data transfers from April or June 2021.



Dates for the diary

Q1-Q2 2021

Statutory guidance expected on how the ICO exercises its data protection regulatory functions likely to be published.

Q3 2021

The Age Appropriate Design Code comes into practice.

Employment and Contingent Workforce

07

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Current issues

Covid-19 challenges for employers

Employers continue to face evolving challenges in relation to Covid-19. The Coronavirus Job Retention Scheme has been **extended** on its current terms until 30 April 2021 in response to the latest national lockdown. As with previous changes in the government support schemes, businesses need to consider their workforce requirements when the scheme ends.

Other issues that employers are having to grapple with include identifying and supporting employees with mental health issues, understanding their options in relation to vaccinations and ensuring that managers are able to cope with the challenges that Covid-19 poses to employees.

Statutory sick pay entitlement

Employers should bear in mind that statutory **sick pay** is payable to employees who are self-isolating, as well as those who are off sick, due to coronavirus. Eligible employees include those self-isolating because someone they live with has symptoms; they have been told by the NHS or public health authorities to isolate; someone in their support bubble but not in their household has symptoms or tested positive; or they have been told to isolate by a healthcare professional before going into hospital for surgery. Employers with fewer than 250 employees may be able to **reclaim** some payments through the Coronavirus Statutory Sick Pay Rebate Scheme.

At present, all those who are "clinically extremely vulnerable" are required to stay at home and are eligible for statutory sick pay (although other options include furlough or company sick pay).

Remote and in-person tribunal hearings

Delays in Employment Tribunal (ET) hearings have been compounded by Covid-19, and the number of cases awaiting a hearing has increased. ETs are unable to operate at capacity due to social distancing and staffing issues, so to tackle the backlog and plethora of new claims, **new measures** provide for greater flexibility in remote hearings.

Diversity and inclusion

There remains an increasing trend towards greater transparency and action on diversity issues, particularly around creating a diverse workforce and issues such as pay and career progression. Covid-19 and the Black Lives Matter movement have pushed this up the business agenda. This renewed emphasis on racial equality is also likely to give rise to an increase in the number of racial discrimination complaints, so businesses are urged to act now to prevent and tackle race discrimination and ensure that BAME employees are supported in the workplace.

Current issues

Gender pay reporting still on the cards for 2021

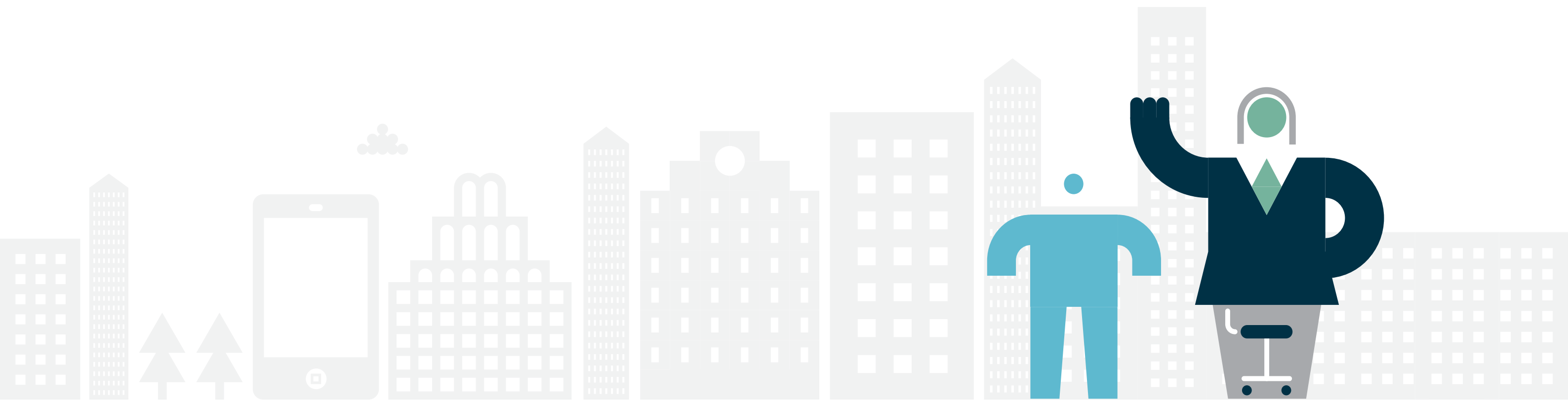
The statutory obligation to report on gender pay data (for employers with 250 plus employees) for reporting year 2019/2020 by 4 April 2020 was suspended due to Covid-19. However, government guidance has been issued for employers for reporting year 2020/2021 given that staff may have been furloughed at the relevant point in time. Employers should therefore at present proceed on the basis that they will need to report on gender pay data for reporting year 2020/2021 which must be reported on by 4 April 2021.

Impact of Brexit on workforce solutions and consultancy businesses

The EU-UK Trade and Co-operation Agreement (TCA) includes a number of provisions that have the potential to affect consultancies, recruiters, staffing companies, managed service providers, payroll companies, and training companies. There are particularly important new rules about deploying UK contractors and consultants into EU countries, and other possible new restrictions on how UK workforce solutions companies can operate across the EU.

While short-term, visa-free business trips are permitted for some specific, listed purposes such as attending meetings, this is subject to national 'reservations' or exceptions, which vary by EU Member State. Workforce solutions businesses and employers will therefore need to consult the detail of the TCA, to check for any restrictions or requirements in relation to planned trips for work purposes.

We discuss the impact on workforce solutions and consultancy businesses in more detail in **this insight**.



In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

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 any progress which is now made on the Employment Bill announced back in December 2019. 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.

As we discuss above, the new relationship between the UK and the EU also poses particular challenges in relation to contingent workforces and consultancy businesses.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Free movement has ended, which will affect business travel, working overseas and recruitment. Short term, visa-free business trips are permitted for some specific listed purposes, including attending meetings. There are national "reservations" or exceptions, such as where a named Member State imposes requirements or limits access – these will need to be checked carefully. Trips are limited to a maximum of 90 days in any 180 day period.

Where workers are based overseas, employers will need to ensure that they understand and apply the new position on social security contributions which apply in each jurisdiction.

We are not anticipating any significant changes in employment law, but employers may see more immediate impact in ET disputes with parties taking different positions on the continued relevance of the Court of Justice of the European Union (CJEU) case law. ETs will continue to have to follow pre-2021 CJEU case law, although the Court of Appeal and the Supreme Court will not be able to depart from those decisions. ETs do have to follow new CJEU case law, but it is likely that this case law will still be used to support a party's interpretation of the legal position where it relates to retained EU law.

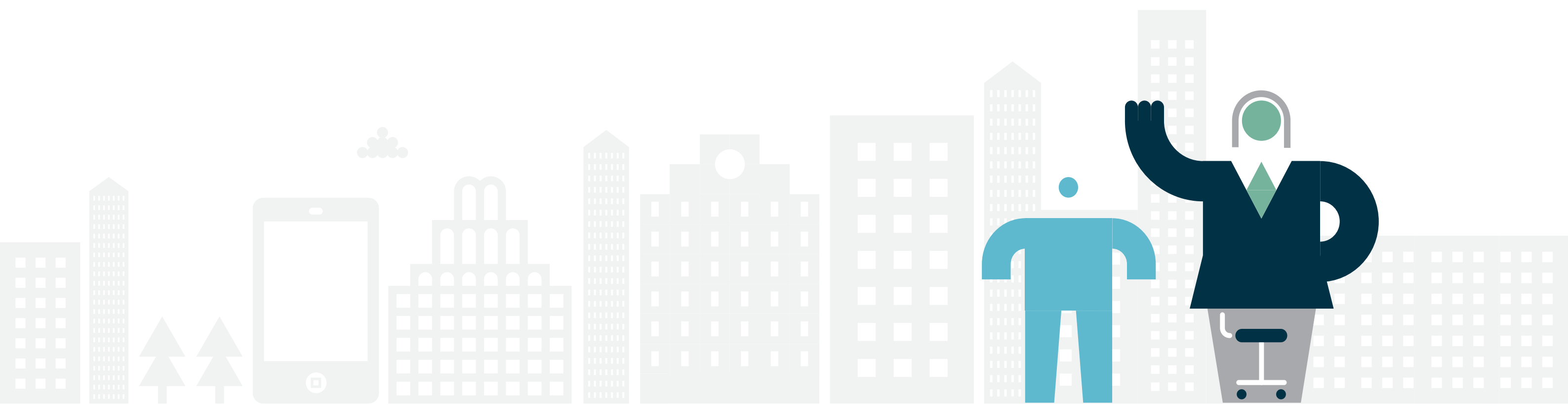
Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

As part of the EU-UK Trade and Cooperation Agreement, the UK has agreed that it shall "not weaken or reduce, in a manner affecting trade or investment between the parties, its labour and social levels of protection below the levels in place at the end of the transition period".

The parties have committed to "strive to increase their respective labour and social levels of protection" and there is a continued commitment to the rights set out in the European Convention on Human Rights. Although the UK is not under any obligation to implement any new EU directives, this statement perhaps reflects the fact that we are not anticipating any significant divergence between the future path of UK and EU laws.

It is unlikely, therefore, that existing TUPE provisions, for example, would be repealed or modified significantly. However, it does leave some room for movement around issues such as calculating holiday pay, where diverging in part from the EU position may not itself impact on trade and investment.

We may also see the UK government pushing ahead with its plans for a single enforcement body announced back in 2019 to enforce current UK protections: the TCA captures not only rights which have been weakened or reduced by changes made but also those that have developed through a lack of effective enforcement.



Dates for the diary

4 April 2021

Gender pay reporting: This is the final date for the third round of gender pay reporting for employers with 250+ employees. The statutory gender pay reporting obligation was suspended for April 2020 in light of the Covid-19 pandemic.

4 April 2021

Statutory family pay: From this date statutory family leave (maternity pay, paternity pay, shared parental pay, adoption pay and parental bereavement pay) will be £151.97 (currently £151.20).

6 April 2021

IR35: Users and suppliers of contractors/consultants working through personal service companies (PSCs), in both private and public sector situations must prepare for IR35 reforms that were delayed in April 2020 and are set to come into force on 6 April 2021.

6 April 2021

The government has announced new statutory national minimum wage rates rom 6 April 2021. From this date, those aged 23 or over will become entitled to the statutory national living wage rate. The new rates will be as follows:

- Age 23 or over: £8.91 (currently £8.72)
- Age 21 to 22: £8.36 (currently £8.20)
- Age 18 to 20: £6.56 (currently £6.45)
- Age 16 to 17: £4.62 (currently £4.55)
- Apprentice rate: £4.30 (currently £4.15)

The government has also announced that from 6 April 2021 it is proposed that statutory sick pay will be £96.35 (currently £95.85).

2021

Flexible working: Plans to make flexible working the default position unless employers have a good reason otherwise were introduced to Parliament in July 2019. The government is still due to consult on this, but in light of Covid-19, this may move up the government's agenda.

2021

Ethnicity pay reporting: The government has previously consulted on a new ethnicity pay gap reporting obligation. We are still awaiting the outcome of that consultation. However, Covid-19 and BLM have pushed this up the agenda and a recent petition means that this will now be debated in parliament (no date has yet been fixed). Some employers are taking steps in the meantime to voluntarily publish their ethnicity pay data and the CBI along with other leading businesses are launching a campaign encouraging businesses to take action to close the ethnicity pay gap.

2021

Neonatal leave: The government has committed to introduce leave and pay for parents of babies in neonatal care.
The consultation closed on 3 August, and no date has been given for the introduction of the new entitlements, but the government's costings suggest that the changes will not be implemented until 2023.

2021

Extending redundancy protections: The government has committed to improve redundancy protections to prevent pregnancy and maternity discrimination. Following a consultation, we are awaiting further developments – a Private Members' Bill is also progressing through parliament, but given its nature, may not ultimately progress.

2021

Carers leave: The government ran a consultation on its proposal to give employees who are also unpaid carers one week's unpaid leave per year for the purposes of caring for individuals with physical or mental health problems, disability or issues related to old age. No suggested timeframe for introducing the new right has been given, but the consultation closed on 3 August.

2021

Non-disclosure agreement: Following a consultation, in July 2019 the government announced that it would introduce new legislation to tackle the misuse of non-disclosure agreements (including confidentiality clauses) in employment documentation. Although a full response to the consultation was published on 29 October 2019, there is no draft legislation yet and the implementation date is unknown.

2021

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

Environment

08

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Current issues

Environmental aspects of UK-EU Trade and Cooperation Agreement

The UK-EU Trade and Cooperation Agreement (TCA), signed on 30 December 2020, sets the framework for future collaboration between the UK and the EU in a number of key areas, including the environment.

Some of the key environmental aspects of the TCA are as follows:

- The UK and EU have committed not to lower the overall level of environmental protection and climate protection in a way that impacts trade or investment.
- There are specific commitments in terms of greenhouse gas reductions and maintaining a system of carbon pricing.
- Either party can impose duties on the other if it believes any changes by the other party have led to an unfair competitive advantage.
- A "rebalancing mechanism" allows either party to change the baseline standards it commits to over time; if the other party fails to follow suit, it can impose tariffs in order to avoid "significant divergences" in the level playing field that impact trade or investment.
- The rebalancing mechanism is subject to review after four years, at which point if a party considers there have been too many or prolonged breaches of the mechanism then that party can instigate a review of the whole trade pillar of the TCA, which could potentially lead to suspension of elements of the agreed position.
- Any duties or tariffs mentioned above will be subject to review by an arbitration panel.

While the impact of these provisions may not lead to significant change for businesses in the short term, the UK government's commitments under the TCA will influence legislative policy in relation to the environment in the medium to long term.

Environment Bill

The Environment Bill (EB) is currently going through the parliamentary process and is expected to receive Royal Assent in mid-2021. The EB is due to have its report stage and third reading in the House of Commons, although at the time of writing no date has been set.

The EB contains a number of provisions which will, if enacted in their current form, affect regulated businesses. For example, the EB requires the introduction of long-term targets for the government in each of the priority areas of air quality, water, biodiversity, and resource efficiency and waste reduction. The progress of the EB should therefore be closely monitored to ensure continued compliance.

In Focus: Regulation after Brexit

Office for Environmental Protection

The EB will introduce the Office for Environmental Protection (OEP). This independent body will oversee environmental governance in the UK. The OEP's powers will include being able to take action against public authorities in relation to breaches of environmental law and to scrutinise and advise on changes to environmental law proposed by government.

As the EB was not enacted before the end of the Brexit transition period on 1 January 2021, an Interim Environmental Governance Secretariat is in place. The role of the secretariat is to undertake preparatory work for the OEP, for example starting to develop the OEP's strategy and working framework. In addition, any complaints submitted by citizens regarding failures by public authorities to comply with environmental law from 1 January 2021 will be assessed by the secretariat.

Biodiversity net gain

The EB also creates a new general planning condition which requires a biodiversity net gain of at least 10% to be evidenced as part of the development's planning application. One way of meeting this is through conservation covenants, also introduced by the EB. These are agreements between a landowner and a "responsible body" (such as a conservation organisation or public body) to do or not do something on their land for a conservation purpose. A British standard for implementing biodiversity net gain has also been **published**, which may help businesses in achieving the required biodiversity net gain.

Emissions Trading

Following the end of the Brexit transition period, a new UK Emissions Trading Scheme (UK ETS) was **launched** on 1 January 2021. The transitional arrangements mean that the UK continues to participate in the EU Emissions Trading System (EU ETS) until 30 April 2021, meaning UK operators are required to submit verified annual emissions reports for 2020 by 31 March 2021 and to surrender allowances for 2020 emissions by 30 April 2021.

Access to the Union Registry should remain for those who need to comply with the EU ETS for their 2020 emissions, although others, for example holders of trading accounts, will no longer have access. The UK government aims to have a new system in place in spring 2021 which will enable account holders to hold and trade Certified Emission Reductions and Emission Reduction Units.

New guidance published on legal definition of waste

As a result of changes made by the EU's 2020 Circular Economy Package, operators will need to use the "**harmonised end of waste test**" as well as applicable case law when considering the end of waste criteria set out in Article 6 of the Waste Framework Directive.

This approach will require the same conditions to be met as before to satisfy the end of waste criteria, but operators will also need to take into account the provisions of Article 6(2); specifically, the limit values for pollutants and any possible adverse environmental and human health impacts of using the waste-derived material.

Draft Ecodesign and Energy Labelling Regulations 2021

The UK government has published a **consultation** on the draft Ecodesign and Energy Labelling Regulations 2021. This proposes updates to UK ecodesign requirements for electric motors, household washing machines/washer dryers, household dishwashers, household refrigeration and electronic displays. It also sets out how ecodesign requirements for welding equipment and commercial refrigeration will be introduced along with the introduction of energy labelling requirements for commercial refrigeration.

Businesses should also be aware of updated government guidance published on 1 January 2021, on both **eco-design of energy-consuming products** and on energy labelling of **energy-related products**.

Minimum energy efficiency standards

The UK government has launched a **consultation** on raising the minimum energy performance standards for privately rented homes. Of particular note are the proposals to increase the minimum EPC energy efficiency rating to a C and for this change to be brought in for new tenancies from 2025 and for all tenancies from 2028. The consultation also seeks views on strengthening enforcement options and amending the current exemptions.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Operators of stationary installations who participate in the EU ETS should consider the changes brought about as a result of the introduction of the UK ETS on 1 January 2021. Although operators who participate in the EU ETS are required to continue to do so for the 2020 compliance year, they should also start to prepare for the requirements of the UK ETS, for example to consider the new permit they will receive.

Operators should also be aware of the allocation of free allowances, due to be announced shortly, and of the requirement to submit verified Activity Level Reports by 30 June 2021.

All businesses in the UK should also be aware of the progress and content of the EB. Highlights of the bill are:

- The introduction of long-term targets in each of the priority areas of air quality, water, biodiversity, and resource efficiency and waste reduction.
- Creating the Office for Environmental Protection, an independent environmental watchdog.
- Introducing a general planning permission requirement for at least 10% biodiversity net gain.
- Creating a system of conservation covenants in order to facilitate meeting the general planning permission requirement described above.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Non-UK businesses trading in the UK should equally be mindful of the changes brought about by the new UK ETS as well as of the measures introduced by the new Environment Bill to ensure they remain compliant.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

Pursuant to the TCA, the EU and the UK have agreed certain measures to preserve some degree of equivalence in terms of environmental laws and standards following the end of the transition period. An integral part of this are the provisions introduced to seek to maintain a level playing field between the parties, with the ability for either party to impose sanctions in the form of tariffs or duties in the event of non-compliance. The mechanism includes the ability to require a review of the TCA should either party consistently breach these provisions.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The provisions of the TCA which seek to preserve a level playing field between the parties in certain areas, including environmental protection and fighting climate change, have been criticised as narrow given that a party seeking to rely on them will need to show an impact on trade or investment. While both the UK and the EU recognise climate change as being an essential element of the agreed deal, it will remain to be seen how these provisions work in practice and how they might impact on businesses.

It is worth noting that the UK prime minister has already contacted a number of businesses asking for input as to rules and regulations they would like to see revised now that the transition period has come to an end.

Dates for the diary

Mid-2021

Royal Assent of the Environment Bill expected, heralding the establishment of the Office for Environmental Protection.

Spring 2021

UK government expected to publish Net Zero Review report and an industrial decarbonisation strategy.

31 March 2021

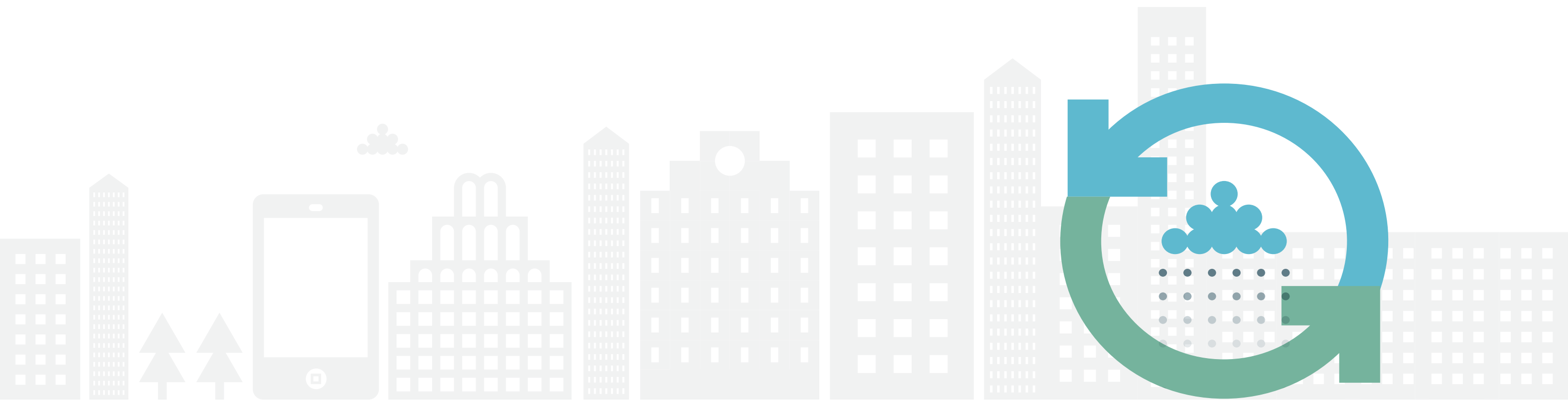
Deadline for operators in the EU ETS to submit verified annual emissions reports for the 12 months of 2020.

30 April 2021

Deadline for operators to surrender EU ETS allowances for 2020 emissions.

30 June 2021

Deadline for operators within the UK ETS to submit verified Activity Level Reports.



Export Control

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Current issues

Regulator response to Covid-19

The UK export control regulator, the Export Control Joint Unit (ECJU), has relaxed its requirements for processing licence applications until further notice. These **interim arrangements** include: a longer lead time on exporters obtaining supporting documentation to respond to requests for further information (RFIs); and the removal of the need to obtain original 'wet signature' copies of end user undertakings – the ECJU is now accepting electronic signatures on these documents.
The ECJU has also announced that site audits will no longer take place and that the regulator has moved to remote audits.

Legality of the sale of arms to Saudi Arabia

The UK government's decision making in relation to licences for the sale of arms and military equipment to Saudi Arabia continues to be a point of legal contention.

This follows a June 2019 Court of Appeal **decision**, overturning an earlier High Court decision, which ruled that part of the UK government's decision-making process for determining if export licences for the sale or transfer of arms or military equipment to Saudi Arabia was wrong in law. The decision prevented the UK government from granting any new licences for the export of arms or military equipment to Saudi Arabia for possible use in Yemen until that issue had been re-considered by the UK government in a lawful way.

In July 2020 the Secretary of State for International Trade, Liz Truss, informed the UK Parliament in a written statement that she had retaken her decisions regarding those licences in accordance with the earlier judgment and the UK government was able to clear the backlog of licences by early November.

The Campaign Against Arms Trade (CAAT) has since confirmed that it had filed a new judicial review application against the latest decision by the Secretary of State.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

The overall UK framework of dual-use export controls from 1 January 2021 largely mirrors what existed prior to the end of the transition period. However, UK-based businesses involved in the export of controlled dual-use items will be subject to changes to licensing requirements and so should take the following steps:

1. Actively map any exports of items (within the scope of the UK Strategic Export Control Lists) from:

- The UK to the EU.
- The UK to a non-EU country.

2. In respect of **exports from the UK to the EU**, apply for a new export licence to legitimise those exports. To this end the ECJU has published an Open General Export Licence (OGEL) for the exports of dual-use items to EU countries (including the Channel Islands).

3. In respect of **exports from the UK to a non-EU** country, existing licences issued by the UK (OGELs and General Export Authorisations) will remain valid as UK licences. However, licences issued by a EU Member State will no longer be valid and businesses in this situation will need to apply for a new licence in the UK.

UK-businesses with dual-use export operations within the EU, should also consider the actions outlined below.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Following the end of the transition period non-UK businesses will:

1. Require an export control licence when exporting controlled products from the EU to the UK (save that intra-EU transfer licences (Union General Export Authorisation EU001) issued before the end of the transition period will remain valid).

2. No longer be able to rely on licences granted by the UK for shipments from the EU to a third country.

3. No longer be able to rely on licences issued by a relevant licensing authority in an EU Member State for the export of items located in the UK to another non-EU third country (as outlined above).

Non-UK businesses should therefore be:

1. Actively mapping any exports (within the scope of the EU's dual use controls) from:

- The EU to the UK.
- The EU to a non-EU third country (where that export relies on an export licence issued in the UK).
- The UK to a third country (where that licence is issued by an EU Member State).

2. In respect of **EU to UK exports**, identifying whether they: (a) need to register for a new authorisation in an EU Member State to justify exports to the UK; or (b) are able to rely on an existing intra-EU licence (EU001) to justify those exports.

3. In respect of **EU to non-EU third country exports** (previously relying on a UK issued licence), registering for a new authorisation in the relevant EU Member State.

4. In respect of **UK to Non-EU third country exports** (previously relying on a Member State issued licence), registering for new export licences in the UK (as outlined above).

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The European Commission has been proposing for some time to amend and re-cast 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.

In 2019 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, it has made material changes to key sections, including to the new human security element discussed in further detail below. On 9 November 2020, the European Parliament and the European Council reached a provisional political agreement on the revised re-cast regulation.

Regardless of how quickly the legislation moves through the EU legislative process during 2021, in our view alignment with these changes is unlikely to be a legislative priority for the UK government and is an early example of divergence between the UK and EU dual-use export control regimes.

In Focus: Regulation after Brexit

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

In the short term, the UK has developed a robust dual-use export control regime which is independent, but inextricably tied to the EU's export control framework and overarching international conventions on human rights and non-proliferation (including The Wassenaar Arrangement (dealing with conventional weapons and dual use items) and the Missile Technology Control Regime). For these reasons, in the short term Brexit is unlikely to raise any barriers to the flow of dual-use goods between the UK and other EU Member States and the types of controlled items and technology is expected to remain broadly similar.

In the medium to long term, while any major departures from existing dual-use practices remain highly unlikely, at least for as long as the UK's strategic foreign policy and defensive interests remain broadly similar to those of EU Members States, some level of divergence could creep in over time.

For example, absent of any official statements from the UK authorities, it is unlikely that the UK will prioritise alignment of UK legislation with any re-cast version of the EU Dual Use Regulation, as outlined above. Similarly, in recent years the UK government has demonstrated a strong desire to use the UK defence industry to strengthen the UK economy.

These distinctions could be perpetuated in the medium to longer term by the UK's shifting foreign policy interests, such as its desire to use the UK defence industry to strengthen the UK economy in light of Brexit and the terms of any further free trade agreements that the UK finalises.

Dates for the diary

July 2021

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

Financial Regulation

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Current issues

New UK prudential regime for MiFID firms

On 14 December 2020, the Financial Conduct Authority (FCA) published **Consultation Paper 20/24: A new UK prudential regime for MiFID investment firms**. This follows the FCA's June 2020 discussion paper: Prudential Requirements for MiFID Investment Firms.

The FCA is seeking views on the first tranche of its proposed rules to introduce the UK Investment Firm Prudential Regime (IFPR), a new prudential regime for UK firms authorised under the Markets in Financial Instruments Directive II (MiFID II). This is the first in a programme of Consultation Papers and Policy Statements that the FCA will issue to introduce the regime, subject to progress and amendments to the Financial Services Bill 2019-21, on 1 January 2022. The deadline for comments on CP20/24 is 5 February 2021.

The proposed reforms represent a major change for investment firms and the FCA has stated that it is critical that firms adequately prepare for the regime. Following industry feedback, the target implementation date of the IFPR is 1 January 2022.

FCA updates its expectations on SM&CR and APR

The Senior Managers & Certification Regime (SM&CR) applies to almost every solo-regulated firm under the Financial Services and Markets Act 2000, from very small firms (including sole traders and limited permission consumer credit firms) to some of the largest global firms. It also applies to branches of non-UK firms with permission to carry out regulated activities.

The FCA has updated its webpages (**here** and **here**) concerning the SM&CR for solo-regulated firms by:

- Confirming that the deadline for solo-regulated firms to have undertaken the first assessment of the fitness and propriety of their Certified Persons will be delayed until 31 March 2021.
- Adding tables on good and poor practice in the areas of fitness and propriety and conduct rules. Firms are reminded that they should demonstrate that they are making regular, thorough and consistent assessments of the fitness and propriety of senior managers and certification staff. Firms should also familiarise themselves with the FCA's expectations in respect of training staff on conduct rules.
- Confirming that since firms will have now adapted to the impact of the pandemic over the past few months, the FCA's expectation is that firms' application of the SM&CR rules returns to normal. Firms should be aware that some of the previously available provisions ended on 7 January 2021 and that the relevant modifications by consent will end after 30 April 2021.

In addition the FCA has issued an **update** setting out its expectations with respect to how firms using Appointed Representative arrangements apply the Approved Persons Regime (APR) during the coronavirus pandemic.

Firms should review these updates to ensure they are acting in accordance with the FCA's expectations.

Current issues

FCA bans the sale of crypto-derivatives to retail consumers

On 6 October 2020, the FCA published **Policy Statement 20/10**: Prohibiting the sale to retail clients of investment products that reference cryptoassets (PS20/10).

Firms who carry out marketing, distribution or selling activities in, or from, the UK of the relevant products to retail clients must now comply with these rules. The FCA's supervision in this area will focus on:

- Attempts to avoid the effect of the new Handbook rules by: (i) inappropriately opting up retail clients to become elective professional clients; and (ii) moving retail consumers to associated non-UK entities.
- The conduct of inward passporting firms operating under the temporary permissions regime.

FCA focusses on firms' client assets arrangements

In August 2020, the FCA **published** a 'Dear CEO' letter to firms that provide non-discretionary investment services to clients. The letter was issued in response of a number firms that hold client money having reporting an increase (in some cases a significant increase) in client money balances in the half year to June 2020.

The FCA will continue to review client money balances through regulatory returns and will follow-up individually with firms that report significantly increased balances. Firms should be prepared for discussions with the FCA on what action they have taken in response to this letter and how their actions are in clients' best interests.

The FCA published a **further** 'Dear CEO' letter on 30 September 2020 highlighting areas that are particularly important to maintaining adequate client assets arrangements in the current environment. The letter also reminded firms of their obligations to continue to oversee those arrangements and notify the FCA if they identify any material concerns.

New AML guidance to support source of wealth and source of funds due diligence

The Wolfsberg Group has **published** new guidance for private banking and wealth management divisions within financial institutions to support source of wealth and source of funds due diligence.

The guidance covers the types of information that is useful for each type of due diligence, when and how to corroborate information that has been provided, and how to approach due diligence for customers outside the firm's usual customer segment.

In order to meet their AML obligations, firms will need to consider their policies and procedures; staff training; engagement of senior management; AML transaction monitoring; and subjecting due diligence arrangements to regular audit and independent review.

HM Treasury consults on regulatory approach to cryptossets and stablecoins

On 7 January 2021, HM Treasury **published** a consultation paper on the regulatory approach to cryptoassets and stablecoins.

This represents the first stage in HM Treasury's consultative process on the broader regulatory approach to cryptoassets and stablecoins. It wants to ensure the UK regulatory framework is equipped to harness the benefits of new technologies, supporting innovation and competition, while mitigating risks to consumers and to financial stability.

The consultation paper notes, in particular, that the use of currently unregulated tokens and associated activities primarily for speculative investment purposes, such as Bitcoin, could initially remain outside the perimeter for conduct and prudential purposes. Utility tokens (those used to access a service) could also remain outside the authorisation perimeter. In the longer term, HM Treasury will consider the case for bringing a broader set of cryptoasset market actors or tokens within the scope of regulation.

If the proposals are adopted, further consultations and guidance will be issued by HM Treasury and relevant regulators on implementation, including specific firm requirements. The deadline for comments on the consultation is 21 March 2021.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Firms should be clear whether the services they provide to EEA-based customers are regulated by EU law and local law, and how their ability to service those customers might now change since the end of the transition period.

Firms should have a clear understanding of their dependencies on outsourcing or third-party service providers and assess whether they will be able to continue providing their services now that the transition period has ended.

Firms that deposit client money and/or custody assets with any institution in the EEA should review their due diligence to ensure that client assets will not be subject to increased risk due to any changes arising from the end of the transition period, and manage any risks accordingly.

Where firms have decided to stop servicing customers in the EEA after the end of the transition period, they should communicate the decision to customers as early as possible, consider what would be a fair timeframe for winding down or transferring business and support customers while they find alternative providers.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

EEA firms that notified the FCA to enter the Temporary Permissions Regime (TPR) will be issued with a 'landing slot' by the FCA, during which period they will be required to apply for UK authorisation. It is expected the TPR will operate for three years with the last landing slot allocated in early 2021.

The FCA expects firms to have carried out significant preparation for authorisation; and will engage with the firms to ensure that the process goes smoothly.

The FCA has consulted on the approach it will take to authorisation of EEA firms (including the types of factors the FCA will take into account when it is considering an authorisation application). EEA firms planning on authorisation should familiarise themselves with this consultation paper (CP20/20) and the final policy statement once it is published early this year.

EEA firms within the TPR must also carefully consider which UK rules and regulatory guidance apply to them and ensure that they are operating in full compliance.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

Investment firms and competent authorities in EU Member States must comply with the Investment Firms Directive (IFD) and the Investment Firms Regulation (IFR) from 26 June 2021.

As the new EU regime only applies after the end of the transition period, the UK is not bound by it. However, a new UK prudential regime for MiFID firms (IFPR) has been included in the UK's Financial Services Bill, and is based on the IFD and IFR The new rules are subject to ongoing consultation. Nevertheless, HM Treasury, the Prudential Regulation Authority and the FCA have confirmed that they are targeting an implementation date of 1 January 2022.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

On 23 June 2020, HM Treasury announced details of the UK's continued commitment to high regulatory standards for the financial services sector post-EU withdrawal, in respect of prudential and markets regulation.

There are certain areas where the UK has demonstrated a willingness to deviate from the EU rules to account for the specificities of the relevant UK sector.

These include reforms to update UK prudential requirements, to maintain the soundness of UK capital markets, and to manage future risks. In particular, the UK government has announced how it intends to legislate for updated prudential rules to reflect international Basel standards and a new regime for investment firms (see above). The government has also undertaken a consultation on the transposition of the Bank Recovery and Resolution Directive II, and is conducting a review to improve the prudential rules for insurers.

See also section on '**Investment Funds**' with respect to proposals to improve the functioning of the PRIIPs regime in the UK to address potential risks of consumer harm.

Dates for the diary

1 February 2021

FCA COBS rules on switching between investment platforms enter into force.

5 February 2021

Deadline for comments on FCA's Consultation Paper 20/24: A new UK prudential regime for MiFID investment firms.

21 March 2021

Deadline for comments on HM Treasury's consultation paper: UK regulatory approach to cryptoassets and stablecoins.

31 March 2021

Deadline for FCA solo-regulated firms to complete fitness and propriety assessments and certify relevant employees, and train non-senior managers and certification regime staff on the conduct rules.

31 March 2021

Deadline for all FCA solo-regulated firms to upload information into the FCA's new financial services directory.

30 April 2021

End of modification by consent relating to Covid-19, which extends the maximum period FCA solo-regulated firms and appointed representatives can arrange cover for a senior manager without being approved, from 12 weeks to 36 weeks, in a consecutive 12-month period.

26 June 2021

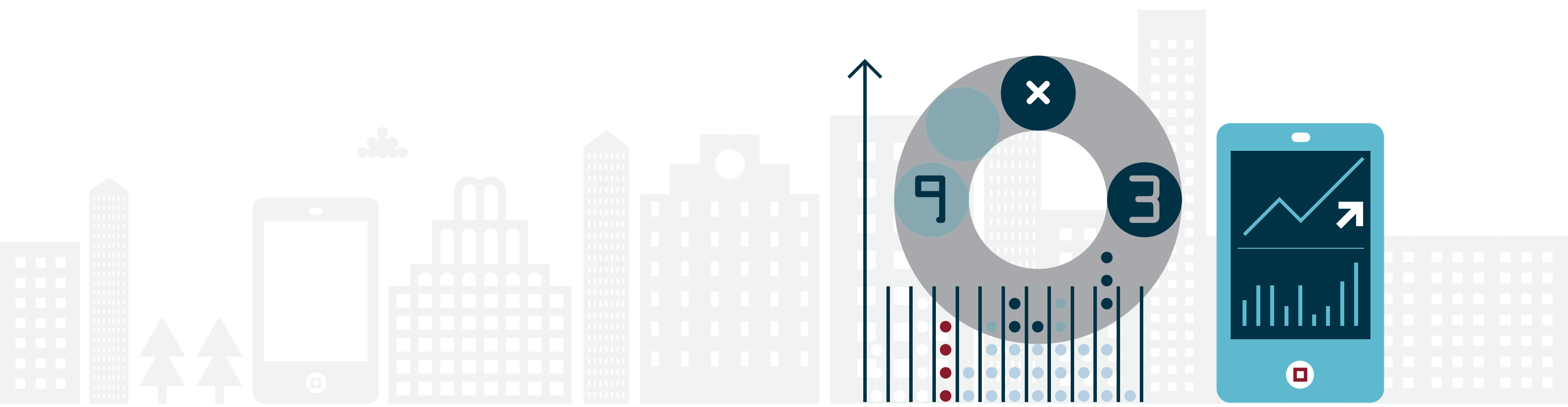
Date of application for the IFR. Date on which member states are expected to apply legislation and regulation implementing the IFD.

9 July 2021

End of the FCA's temporary registration period for existing cryptoasset firms (those who were carrying on cryptoasset business immediately before 10 January 2020) whose applications are pending determination (the date for submission of such applications closed on 15 December 2020).

1 January 2022

Target implementation date for UK Investment Firms Prudential Regime.



Food Law

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Current issues

FSA publishes guidance on new allergen labelling rules

The Food Standards Agency (FSA) published **guidance** in June 2020 on new allergen labelling laws on food that is prepacked for direct sale (PPDS) at outlets such as coffee shops. The change in allergen rules, known as "Natasha's Law" after the death of Natasha Ednan-Laperouse, will come into effect from 1 October 2021.

Although the guidance is not binding, it will inform enforcement authorities as to how to apply the new laws and determine which products qualify as PPDS. The guidance should therefore inform food business operators as they prepare for the new rules.

Single use plastics: straws, stirrers and cotton buds banned in England

The UK government continues to introduce new measures as part of its "war on plastic". From 1 October 2020 supplying single-use plastic straws, stirrers and cotton buds became prohibited in England, save for certain exemptions. The ban applies to all businesses that supply these products, including manufacturers and retailers. Continued supply of these products could result in a fine by the relevant local authority.

Exemptions to the ban **include** the use of single-use plastic straws in the context of medical devices or for medical purposes, as well as use in prisons, care homes and schools. Registered pharmacies and catering establishments are allowed to supply single-use plastic straws on demand but cannot display or advertise them.

Food and Covid-19: new guidance for food businesses

The Covid-19 pandemic has brought about many changes in how food businesses conduct their operations. Since 10 September 2020, hospitality venues in England such as pubs and restaurants must keep a record of people on their premises to support the track-and-trace effort. Failure to adhere to these obligations may result in a fine. **Guidance** was last updated in December 2020 and will continue to evolve throughout the pandemic.

The Department of Environment, Food and Rural Affairs has also published **guidance** for food businesses on adapting their operations to the pandemic. The UK government is likely to continue to update current Covid-19 guidance and bring in new measures that will affect food businesses and others in the supply chain.

The Advertising Standards Authority also published **guidance** in July 2020 that 'completely prohibits' both explicit and implicit references to Covid-19 in food advertising on the basis that these are unlawful medical claims. The regulator has taken a tough stance, with the prohibition on implicit references extending to phrases that suggest a food product can help consumers remain healthy during the pandemic.

European Commission launches IT tool on food labelling

The **new tool** covers 87 different categories of food and helps food business operators (FBOs) identify the mandatory labelling requirements in 23 EU languages.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

The end of the transition period has brought about changes in labelling of food products, including on country of origin (Great Britain is no longer in the EU and has its own **UK GI Scheme**), GB **health and identification marks**, and the use of organic logos (see more on this below).

There are also changes to the food information that must printed on pre-packaged food labels. From 1 January 2021, all pre-packaged food placed on the EU market from the UK must have an EU or Northern Ireland (NI) address for the food business operator (FBO) or an EU or NI importer on the food label to ensure continued compliance with EU Regulation (EC) 1169/2011 on food information to consumers. This means that UK-based businesses looking to place their products on the EU market will need to think carefully about how this will affect their corporate structure; for example, whether they will establish an EU subsidiary or whether a third party will be named as the importer.

UK businesses will need to come to terms with the **Border Operating Model** published by the UK government in July 2020, which outlines the controls placed on goods exported from GB to the EU and vice versa. The rules around trade between NI, the EU and GB is set out in the **Northern Ireland Protocol** and its supporting documents and guidance.

Businesses will also have to familiarise themselves with the EU-UK Trade and Cooperation Agreement. Specifically, how sanitary and phystosanitary border controls will impact trade, as agri-food traders will incur extra costs and paperwork (such as health certificates) on GB–EU trade.

Perhaps more importantly, traders will need to determine whether their goods meet the **Rules of Origin** and can therefore be traded tariff free. This will depend on the type of food product, its origin and whether it was "processed" in the EU or UK. For example, basmati rice imported from India and milled in the UK will not qualify for access to the EU tariff-free, and meat products must contain only meat from animals born and raised in the UK or the EU.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

According to UK **government guidance**, food businesses can continue to use an EU, GB or NI address for the FBO on pre-packaged food sold in GB until 30 September 2022. However, from 1 October 2022 pre-packaged food sold in GB must include a UK address for the FBO. If the FBO is not in the UK, the label must include the address of a UK-based importer.

As mentioned above, non-UK businesses trading in the UK and either importing or exporting goods across the GB-EU border will need to understand and follow the new customs rules set out in the Trade and Cooperation Agreement, the GB Border Operating Model and the Northern Ireland Protocol.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

Regulation (EU) 2018/848 on organic production and labelling of organic products comes into force on 1 January 2021 and essentially strengthens EU rules on organic production and the labelling or organic products.
The Regulation applies to products placed on the EU market after 1 January 2022.

As the regulation came into force after the end of the transition period, it does not form part of 'retained EU law' in the UK and does not apply to products placed on the UK market. However, under the Trade and Cooperation Agreement, the EU and UK have agreed a reciprocal recognition of equivalence of the current EU and UK organic legislation and control system for all categories of organic products. This means that organic products complying with EU law and certified by control bodies recognised by the EU can be placed on the UK market and vice-versa. In view of new EU rules for organic products applying as of 1 January 2022 as set out above, it has been agreed that equivalence will be reassessed by end of 2023.

In Focus: Regulation after Brexit

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

There has been much debate over whether and how GB food standards will remain as high and comparable to EU food standards post-Brexit. It is possible that food standards between the UK and the EU could diverge over time. A House of Lords amendment to the **Agriculture Bill**, which was designed to prevent future trade deals allowing imports of food produced to lower standards than those currently permitted in the UK, was roundly rejected by MPs in October 2020.

Whether or not the standards diverge, just like agri-food exporters from every other non-EU country, UK agri-food exporters will still have to meet all EU sanitary and phytosanitary import requirements and be subject to official controls carried out by Member States' authorities at border control posts. Where required, these controls include the verification of health certificates.

If food standards diverge, businesses will need to ensure that they are up to date and comply with applicable standards in both the EU and the UK. This will add to the already notable administrative burden placed on food business operators selling goods that cross the GB/EU border.

Other areas where we could see divergence include possible approval of cannabidiol (CBD) as a novel food which would allow the CBD market to grow in the UK. The UK may also not adopt the amendments proposed to the CMO Regulation, which could allow greater freedom in the UK for plant-based foods to use dairy and meat designations. Finally, it is possible that the UK will take a different view to the EU on approving certain health claims.

Dates for the diary

31 March 2021

Deadline for businesses that wish to sell CBD products to submit an application for novel food approval to the FSA. Only those products that are covered by a fully validated application can be sold after 31 March 2021.

1 April 2021

The plastic carrier bag charge in England will be increased to 10p and extended to all retailers from 1 April 2021. See here for more information.

1 October 2021

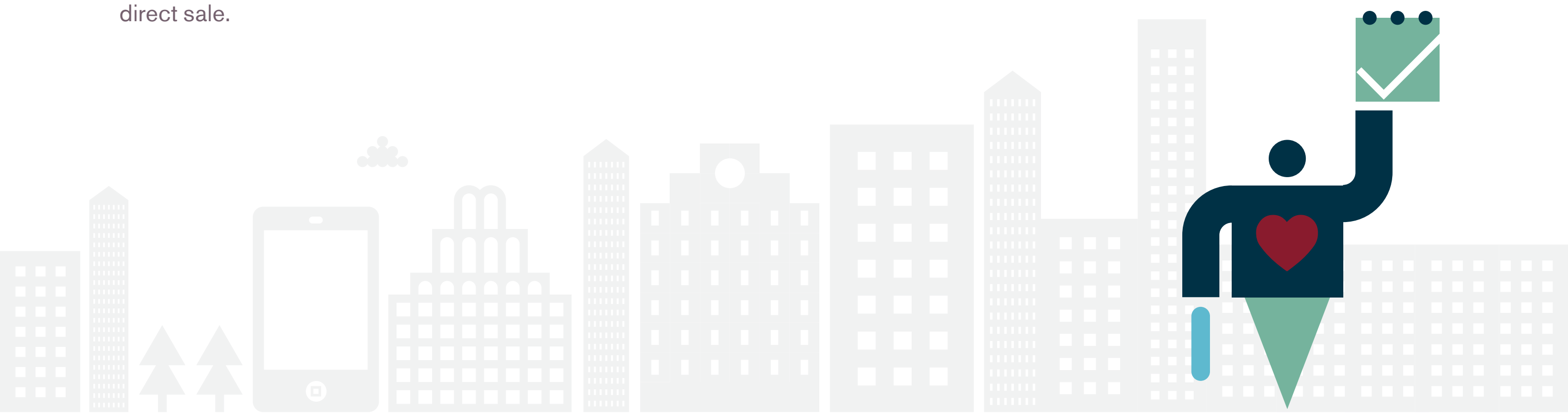
New allergen labelling rules apply to food pre-packaged for direct sale.

1 October 2021

Importers of food from the EU into GB will need to ensure the product label has the name and address of a food business operator established in GB.

31 December 2021

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



Health and Safety

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Current issues

Fire Safety Bill: changes to scope of responsibility

The Fire Safety Bill amends the Regulatory Reform (Fire Safety) Order 2005 (FSO), to make explicit that it applies to a building's structure, external walls (cladding and balconies) and individual flat entrance doors in multi-occupied residential buildings.

The Bill follows issues highlighted in the first phase of the Grenfell inquiry and seeks to close an area of ambiguity as to the scope of the FSO to these common parts. It also provides a platform for secondary legislation to implement recommendations from that inquiry.

This will have immediate implications for the Responsible Person under the FSO – usually the building owner being the party with control over fire safety. These will include an increase in the scope of building fire risk assessments as these will now have to include these common parts and any issues identified will have to be addressed. This clarification will also make it easier for Fire Authorities to bring enforcement action for non-compliance as they will be able to cite defects with these specific parts rather than relying on more general provisions regarding the fire safety of a building overall.

The Fire Safety Bill overlaps with the very detailed Building Safety Bill (see below) and marks a change to increase accountability, imposing statutory duties with clear criminal sanctions for non-compliance.

For more detail on the Fire Safety Bill and the other current issues set out in this section, see our Insight **here**.

Employer's duty considerations for a home working workforce

As the pandemic continues, many businesses are looking at what they legally need to do to support their homeworking population so that their people remain healthy, comfortable and productive at work, and that claims risks are minimised. This is being done with one eye on the longer term, as businesses listen to increasing requests from their people to continue working from home after the pandemic restrictions end.

Employers have the same health and safety responsibilities for home workers as for any other workers although the lack of control over the working environment (as opposed to an office, for instance) can pose challenges and employers may look to existing guidance around lone working risk for more assistance.

Key risk areas are likely to be home office set up, lone working and mental ill-health. Employers will be expected to carry out a risk assessment to identify the risks for their specific homeworking population (and how they will be managed).

Management of mental ill-health risks and lone working will also need to be considered for a business's homeworkers, including:

- Communication and supervision.
- Whether they are able to work safely including the support to make informed, safe decisions.

Current issues

- Monitoring of mental health, in particular the feelings of isolation and increased stress that a long term home working may create.

Businesses will find guidance around legal duties for employer mental health, risk assessment and guidance at HSE's **guidance** on managing stress risks.

Building Safety Bill: New obligations for those with an interest in 'high-risk' residential properties

The Building Safety Bill will bring comprehensive change to the legislative framework for building safety. The government introduced the Bill as a "new era of accountability" providing clarity of responsibility for managing safety risks through the stages of planning and design, construction and occupation of buildings which fall within the scope of the legislation.

As a fundamental reform of the building safety system, the Bill seeks to address the systematic issues identified in the review around building safety and regulation led by Dame Judith Hackitt following the Grenfell Tower fire. In particular, the Bill proposes a more stringent regulatory regime for higher-risk buildings (currently defined as residential high rise premises over six floors or 18 metres in height).

Whilst the progress of the Bill is at an early stage and will also require secondary legislation to provide much of the detailed interpretation it is important that those with an interest in property begin to adapt their processes to more closely reflect what will become mandatory.

A significant amount of the detail remains to be determined, but it is very clear that there will be significantly more onerous obligations placed on those with an interest in residential property. As such keeping a close eye on the progress of this legislation and the associated guidance will be essential to avoid being caught on the back foot.

All inquest conclusions now determined on the balance of probabilities

Following a ruling in the UK Supreme Court (**Maughan**) the standard of proof required to reach the conclusion of "unlawful killing" in an inquest has changed. The civil standard of proof (on the balance of probabilities) will be applied to determine an inquest conclusion of "unlawful killing" instead of the criminal standard of proof – beyond reasonable doubt, which had existed up until now.

We consider that this change will mean that more inquests will now consider the elements of gross negligence or corporate manslaughter, in particular where the death occurred in the workplace.

Inquests should always be a matter of the utmost seriousness for employers where the death is linked to its workplace activities, but this shift in standard makes it even more important to engage early and seek legal advice. It is unfortunate that the effect of this ruling will be to lengthen and complicate some inquests, which goes against the overriding objective in recent years to make the process more efficient and cost effective.

UK safety statistics: fall in workplace fatalities, but still cause for concern

The overall UK fatality statistics produced by the HSE reflect a thankfully low and reducing number of workplace deaths (the number has almost halved in the last 20 years). However, some industry sectors relative to their size and the all industry statistics are still recording a high number of fatalities. These statistics, as well as serving as sage reminder to duty holders to ensure safety, also direct the HSE as to where it places its investigative and enforcement resource.

The causes of fatalities have remained broadly the same for some time; falls from a height, being struck by a moving vehicle and being struck by a moving, including flying or falling, object continue as the three main causes of fatal injury, accounting for over half of all fatal injuries each year since at least 2001/02.

With the advance of technology incidents should be reducing, in particular where there are now useable alternatives to working at height and enhanced safety systems to ensure people and vehicles/moving parts are kept apart.

It is particularly important in these higher risk sectors that safety measures are continually briefed and enforced and not just left as a dormant reference in a policy or procedure.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

The fundamental health and safety legislative framework within which business currently operate will not change. Employers must continue to focus on assessing and adequately controlling risk created by their activities.

There are some specific changes in areas such as product safety and the safety management of chemicals.

For example, UK REACH and the EU REACH regulations will now operate independently from each other. This means that whether supplying or purchasing relevant chemicals to and from the EU/EEA and the UK, businesses will need to ensure that the relevant duties are met under both pieces of legislation.

More generally businesses may no longer be able to rely on the body of EU standards to assess safety, they must see how these will be transposed domestically.

In the short term at least Brexit in may delay the entry of some products. Businesses must build sufficient supply chain resilience to cope so that safety is not compromised or operations need to be stopped altogether as because a safety measure, such as PPE is not available.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

As the seamless transfer of goods from the EU to the UK ends, businesses will need to look closely at any customs declarations for their products. In addition to declarations some products will need accompanying safety data or a special licence (for example for waste and hazardous chemicals). The HSE has issued some chemical industry specific guidance as this is the area of most significant change.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

Businesses must review their roles in the EU and UK REACH systems, and their current supply chains. They will need to take certain actions to access the EU/EEA and UK markets.

The existing REACH legislation is complex and the UK-EU divergence only adds to that complexity. However, at least in the short term it is not the requirements of the legislation that will change in terms of the categorisation of chemicals, but the registration process. The government has launched an online service **Comply with UK REACH**.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The separate legal systems mean scope for different safety standards over time. It will be much more complicated to keep on top of changes in two trading jurisdictions. This may result in additional staffing and professional advice costs, as well as extra time and effort to keep on top of the requirements under both systems.

Where UK businesses trade with the EU it is essential that advice is taken at an early stage to ensure that as part of a service or product development any specific additional EU requirements have been considered. Where the standing assumption, at least in the short term, may be that standards and guidance remain the same, business will face significant wasted costs and potential liability exposure if such assumptions are not carefully checked.

It is difficult to predict whether the UK's 'gold standard' of health and safety will become diluted or indeed whether in comparison to the EU it may forge ahead. We anticipate it may vary by industry. For instance, the UK may set the safety agenda in offshore renewables but potentially lag behind the EU in terms of pharmaceuticals. However what is clear is that the scope of compliance for UK companies trading in Europe is only likely to grow over time.

Dates for the diary

Q2 2021

Fire Safety Bill expected to be enacted.

Q2 2021

Government consultation on review of Regulatory Reform (Fire Safety) Order 2005 to be published.

Investment Funds

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Current issues

Securing a sustainable and competitive UK asset management sector after Brexit

The chancellor, in a **statement** delivered on 9 November 2020, set out proposals to bolster the dynamism, openness and competitiveness of the UK's financial services post-Brexit, including:

- **TCFD disclosures:** The government proposes to make disclosures that are in line with the Task Force on Climate-related Financial Disclosures (TCFD) fully mandatory. Pursuant to the government's **interim report and roadmap**, the aim is to apply these disclosures to UK-authorised asset managers in two phases - asset managers with assets under management in excess of £50Bn from 2022 and other managers from 2023 with a possible exclusion for 'very small firms' subject to consultation.

- **Green taxonomy:** The UK plans to implement a green taxonomy – a common framework for determining which activities can be defined as environmentally sustainable. The UK taxonomy will adopt the scientific metrics in the EU Taxonomy Regulation as its basis and a UK Green Technical Advisory Group will be established to review these metrics to ensure they are right for the UK market. The UK also intends to join the International Platform on Sustainable Finance to support and benefit from the development of common international standards on taxonomies.

Sustainable Finance Disclosure Regulation

On 30 October 2020, the European Commission **confirmed** that the Level 1 obligations set out in the Sustainable Finance Disclosure Regulation (SFDR) will take effect from 10 March 2021 so financial market participants and financial advisers within scope will need to comply with its high level and principle based requirements from that time.

Publication of the accompanying Regulatory Technical Standards (RTS) has, however, been delayed. At a **speech** delivered on 19 November 2020, the European Securities and Markets Authority stated that it hoped to be able to communicate 'shortly' on the exact date of the application of the RTS and on what the supervisory expectations would be in the interim period. We can also expect a final report by the European Supervisory Authorities on the RTS and disclosure templates by the end of January 2021 (with the expectation that the RTS will start to apply at the end of this year).

The UK has not on-shored the SFDR. Nevertheless, certain provisions (which are currently unclear, but likely to be limited to the SFDR product-level requirements) may still apply non-EU Alternative Investment Funds Managers (AIFMs) (which will include UK AIFMs as of 1 January 2021), which have registered one or more funds for marketing in the EU, under the national private placement regimes in the Alternative Investment Funds Managers Directive (AIFMD).

Current issues

Both the Alternative Investment Management Association and the Investment Association have published Q&As on the SFDR, which provide valuable insight into the current industry views on the various 'grey areas' of the SFDR.

ESMA highlights priority areas for improving AIFMD

In August 2020, ESMA published a **letter** it sent to the European Commission highlighting improvements that could be made under the Commission's review of the AIFMD. ESMA's letter brings regulatory substance and the issue of delegation to the forefront, and addresses a number of issues that are crucial to the asset management industry.

In a **speech** delivered at the AIMA Global Policy & Regulatory Forum on 19 November 2020, ESMA noted that the AIFMD requires that the delegation of investment management functions shall "not exceed by a substantial margin" the functions retained by the authorised fund manager. It will be up to the Commission to inform the industry, when it releases its proposed amendments to AIFMD later this year, how "substantial margin" should be interpreted.

Global asset managers should familiarise themselves with the proposals when they become available.

Improving the PRIIPs regime for the UK

The **Financial Services Bill 2019-21** is currently progressing through Parliament.

In the long term, the UK government intends to undertake a wholesale review of the disclosure regime for UK retail investors, but in the meantime, the bill makes targeted amendments to the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation (as transposed into UK law). The changes are intended to avoid consumer harm and provide the appropriate certainty to industry, by:

- Addressing significant uncertainty among industry as to the precise scope of PRIIPs, without changing the definition of a PRIIP.
- Removing the obligation for PRIIPs manufacturers to produce performance scenarios, the methodology for which has been criticised for producing misleading predictions.
- Providing UCITS (Undertakings for the Collective Investment in Transferable Securities) retail schemes with an extended transitional period to comply with the Regulation, up to a maximum of five years.

Cooperation and exchange of information with EU regulators

On 4 January 2021, the FCA published a **statement** confirming that the various Memoranda of Understanding (MoUs) agreed with ESMA and EU regulators covering cooperation and exchange of information came into effect at the end of the transition period.

This included a multilateral MoU with EU and EEA National Competent Authorities covering supervisory cooperation, enforcement and information exchange. Among other things, this MoU allows fund manager outsourcing and delegation to continue to be carried out by UK-based entities on behalf of counterparties based in the EEA, in addition to private placement under Article 42 AIFMD.

New guidelines on funds' marketing communications

On 9 November 2020, ESMA issued a **consultation paper** concerning guidelines on marketing communications under Regulation 2019/1156 on facilitating cross-border distribution of collective investment undertakings. The regulation, which comes into force on 2 August 2021, will amend the AIFMD by introducing new rules relating to the marketing of Alternative Investment Funds (AIFs) in the EEA.

Only fund managers are subject to the guidelines. As proposed, the guidelines would apply to all communications for UCITS funds and AIFs, including European venture capital, social entrepreneurship and long-term investment funds as well as money market funds that have a marketing purpose.

The deadline for comments on the draft Guidelines is 8 February 2021 with final guidelines expected by 2 August 2021.

Find out about these changes and the new rules on marketing and pre-marketing alternative funds in Europe due to come into effect on 2 August 2021 in our technical guide **here**.

FCA focuses on purpose and governance in the asset management sector

On 21 September 2020, the Financial Conduct Authority (FCA) published a **speech** by Marc Teasdale, Director of Wholesale Supervision, emphasising the importance of culture and the role of purpose and governance in the asset management sector.

Asset management firms should assess their business model, governance structures (including processes for managing conflicts of interest) and diversity and inclusion, to ensure their culture is producing beneficial outcomes for consumers and markets.

Current issues

Firms should explain clearly to staff and customers about the value their basic business proposition provides, and assess the extent to which it delivers that value in practice. Where there is mismatch, the FCA expects firms to take action to improve the proposition they are offering to customers.

2021 marks the beginning of the end of DAC6 in the UK

On 31 December 2020, HMRC announced that reporting under the EU directive known as 'DAC6' would only be required for arrangements that meet hallmarks under Category D. Category D broadly deals with undermining reporting obligations and obscuring beneficial ownership and shares substantial common ground with the Mandatory Disclosure Rules developed by the Organisation for Economic Co-operation and Development (OECD). Reporting requirements under Hallmarks A, B, C and E have been repealed.

Given the DAC6 reporting requirements were particularly onerous, this will be welcome news for many "intermediaries" (including law firms, accountants and tax advisors) who fell within the scope of the EU directive.

In the coming year, the UK government is expected to consult on and implement the OECD's Mandatory Disclosure Rules as soon as practicable, to replace DAC6 and transition from European to international rules.

For more information, see our Insight **here**.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

The options available to UK AIFMs who wish to continue to market into the EU, and were previously relying on passporting rights to do so, will be driven by a number of factors. These include: their existing structure (and whether they have an EU presence already), the make-up of their investor base (do EU investors constitute a large percentage of the fund's capital?) and where those investors are located (are they concentrated in a small number of EU Member States?). In addition, some investors under local laws may have a problem investing in non-EU managed structures, and so managers will need to conduct their impact analysis on an investor by investor level.

Some AIFM managers and advisers are using an existing entity to market without using the AIFMD national private placement regime or are using host solutions. Some have set up funds in EU Member States – Luxembourg and Ireland being the popular choices. Whilst others are using principal or parallel vehicles to invest alongside UK or non-EU vehicles.

The approach taken by EU regulators to certain issues arising from Brexit (such as delegation, substance, the use of secondments or third party host solutions) is likely to develop over time and may vary from Member State to Member State. Whether UK fund managers can afford to 'wait for the dust to settle' will in large part depend on where they are in their fundraising cycle.

UK firms and funds that were previously relying on the passport for marketing or management of funds in the EU and who intend to continue to operate cross-border with the EU should engage with local EEA regulators and lawyers.

It is important that UK fund managers stay abreast of any announcements from the EU regulators as their approach to the various issues outlined above evolves.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

EEA AIFs that notified the FCA to enter the Temporary Marketing Permissions Regime (TMPR) prior to the end of the transition period will be able to be marketed in the UK for a temporary period on the same basis as they were before exit.

Fund managers will be issued with a 'landing slot' by the FCA, during which period they will be required to apply for UK authorisation/recognition. It is expected that the TMPR will operate for three years, with the last landing slots allocated in early 2021.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

New rules relating to the marketing of AIFs in the EEA are coming into force in Europe on 2 August 2021 and proposals for an 'AIFMD II' are expected from the European Commission in Q1/Q2 2021. Fund managers aiming to raise capital from professional or retail investors in the EU from summer 2021 onwards should be aware of these changes and their potential impact on cross-border marketing activities.

The majority of the new marketing rules do not apply to non-EU AIFMs marketing funds in Europe under the AIFMD private placement regime. Accordingly, managers from the US and the UK may continue to approach European investors in accordance with the existing private placement rules – or else rely on 'reverse solicitation'.

In Focus: Regulation after Brexit

In the context of the European Commission's review of AIFMD, it seems likely that some of the new marketing rules will then be applied to non-EU AIFMs who market their funds into the EU under the AIFMD private placement regime.

In addition, the substantive provisions of the SFDR will start to apply from 10 March 2021. Whilst the UK has not on-shored the SRDR, certain provisions (which are currently unclear, but are likely to be limited to the SFDR product-level requirements) may still apply to UK AIFMs which have registered one or more funds for marketing in the EU, under the national private placement regimes.

The FCA has confirmed that it is working closely with the UK government and other regulators to consider how the UK might implement the SFDR in the future.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The PRIIPs Regulation has faced intense criticism due to its requirement that providers publish future performance projections in different market conditions, which, if overly optimistic, could mislead consumers.

The UK government is seeking to make certain improvements to the Regulation (as transposed into UK law) through the amendments set out in the Financial Services Bill 2019-21 (see above). It also intends to conduct a wholesale review of the regime in the longer term. While EU trade bodies have called upon the European Commission to review the regime as it applies in the EU for fear that the UK could obtain a competitive advantage, at the time of writing the Commission has not committed to this. Accordingly, this is one area where we may, at least in the short term, see some divergence.

Dates for the diary

January 2021

Final report expected from the ESAs on the RTS and disclosure templates under SFDR.

Q1/Q2 2021

European Commission due to consult on AIFMD following its report on the application and scope of the legislation.

19 January 2021

European Commission consultation on review of the Regulation on European long-term investment funds ((EU) 2015/760) closes to feedback.

29 January 2021

The European Commission's consultation on the AIFMD review closes to comments.

8 February 2021

ESMA's consultation on guidelines for marketing communications under the Cross-Border Distribution Regulation (CBDR) closes to comments.

10 March 2021

The substantive provisions in the Sustainable Finance Disclosure Regulation start to apply.

2 August 2021

New rules on the marketing of AIFs in the EEA under the CBDR and the Cross-Border Distribution Directive start to apply.

2 August 2021

Deadline for ESMA to develop marketing guidelines under this new framework.

2 August 2021

The European Commission is required to report on reverse solicitation under the framework.

Payments

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Current issues

Market review into the supply of card acquiring services

On 15 September 2020, the Payment Systems Regulator (PSR) **published** its interim report on the supply of card acquiring services. The report shows that merchants could make savings by shopping around and either switching or negotiating with their current provider – but many small and medium-sized ones don't.

The aim of the review is to examine whether the supply of card-acquiring services is working well for merchants, and ultimately consumers. This includes how competition is working, looking at the fees merchants pay for card-acquiring services and the quality of service they receive. The report includes several potential remedies to make it easier to search and switch for a new provider or better deal, for example, by requiring all contracts for card-acquiring services to have an end date, providing a prompt for merchants to shop around.

A final report is expected this year.

FCA's six priority areas for preventing customer harm

The FCA has set out, via a **"Dear CEO"** letter, the actions it expects payment services firms and e-money issuers to take to prevent harm to their customers by ensuring compliance with regulatory obligations in six key areas:

1. Safeguarding.
2. Prudential risk management.
3. Financial crime.
4. Financial promotions and consumer communications.
5. Governance and oversight.
6. Records management and reporting.

Directors of firms should be considering what further actions should be taken to ensure their firm meets the FCA's requirements.

FCA additional safeguarding guidance

Firms should be considering the Financial Conduct Authority's (FCA's) additional **guidance** for payments and e-money firms to strengthen their prudential risk management and arrangements for safeguarding customers' funds.

The guidance provides additional direction for firms to meet their safeguarding requirements and outlines the FCA's expectation of firms to put in place more robust plans for winding down, so that customer funds can be returned in a timely manner.

This guidance is expected to be reflected in amendments to the FCA's Approach Document when it is updated this year – this is expected imminently.

Current issues

New industry guidance on Strong Customer Authentication

On 17 December 2020 UK Finance (supported by Osborne Clarke) published updated guidance on Strong Customer Authentication (SCA) to assist the payments industry in implementing the requirements under the revised Payment Services Directive (PSD2), along with the accompanying Regulatory Technical Standards on strong customer authentication and common and secure communication (RTS), which have been in place since 14 September 2019.

The guidance has been updated to reflect, among other things, the revised SCA enforcement date and includes updated information on the implementation of the exemptions from SCA in Article 18, transaction risk analysis (TRA) and Article 16, low value remote payments.

All players in the e-commerce industry are encouraged to review the guidance. UK Finance expects to update this guidance further to include additional sections, for example, dealing in detail with GDPR considerations of behavioral biometrics at a future date.

In addition, on the same day, **UK Finance published published UK Finance T&H SCA communication requirements**. UK Finance formed a travel and hospitality (T&H) sales Special Interest Group to identify challenges for the sector with respect to the application of SCA and to recommend solutions.

One area identified was "Indirect Channel Sales" due the number of participants in the sector, the geographic distribution and the varying levels of understanding SCA implications. Historically, third party providers operating in this sector have only had to pass booking information and in some instances limited payment information. As a result of these new rules, all participants in the sector will need to be capable of transmitting authentication data down the chain as well as receiving authorisation data upstream.

The communication requirements set out what is expected of participants to upgrade their systems to enable this flow of data. Affected participants will need to upgrade their systems accordingly.

New special administration regime for payment institutions and electronic money institutions

On 3 December 2020, HM Treasury launched a **consultation** proposing a new bespoke special administration regime for payment institutions and electronic money institutions. On 17 December 2020, a summary of the draft rules to accompany the regulations was also published.

The principal aim of the proposed special administration regime is to protect consumers if an institution becomes insolvent. It is broadly modelled on the equivalent provisions in the existing special administration regime for investment banks.

Responses specifically on the proposals for the draft rules can be submitted up to midnight on 28 January 2021.

New guidelines on the interplay of PSD2 and the GDPR

On 15 December 2020, the European Data Protection Board (EDPB) published **guidelines** on the interplay between PSD2 and the General Data Protection Regulation (GDPR).

The main focus of the guidelines is on the processing of personal data by account information service providers (AISPs) and payment initiation service providers (PISPs). As such, the guidelines address the conditions for granting access to payment account information by account servicing payment services providers (ASPSPs) and for the processing of personal data by PISPs and AISPs. The guidance also deals with the different notions of explicit consent under the PSD2 and the GDPR.

These guidelines will be of interest to AISPs, PISPs and ASPSPs in respect of their compliance with the data protection and security requirements under PSD2.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

UK firms that have customers in the EEA need to decide on their approach to servicing existing contracts, if they have not already done so. Firms should take the steps available to ensure they act in accordance with local law and national regulators' expectations.

Firms should have a clear understanding of their dependencies on outsourcing or third-party service providers and assess whether they are able to continue providing their services now that the transition period has ended.

UK authorised payment institutions (APIs) and electronic money institutions (EMIs) may hold safeguarding accounts with 'an approved foreign credit institution' following the end of the transition period. This new concept of an approved foreign credit institution is defined as either a credit institution supervised by an OECD state, or alternatively a credit institution based elsewhere in the world provided certain conditions are met. UK APIs and EMIs who currently hold safeguarding accounts with an EEA credit institution (or intend to do so) will need to ensure it fulfils the relevant criteria and keep this assessment under periodic review.

Since the end of the transition period, banks and payment service providers are required to provide the name and address of the originator/debtor when making payments between the UK and the EEA. Firms should ensure they are ready to provide the relevant customer information when making payments, including in relation to direct debit transactions.

The FCA's temporary transitional power will permit UK firms to continue to comply with the existing requirements of the Wire Transfer Regulation and process payments initiated by EU PSPs, even if the EU PSP hasn't provided the full name and address details, until 31 March 2022. After that time, UK firms acting as recipient PSPs can credit a payment with missing information or make the funds available to the payee, on a risk-sensitive basis. If any payments are disrupted, the FCA expects firms to communicate promptly with any affected customers.

UK card issuers should be prepared to change their behaviour towards EEA-acquired transactions in line with their own approach towards UK-acquired transactions after the end of the transition period. This may include applying soft declines and requiring SCA as part of their own ramp-up plans. See above regarding new UK Finance SCA Guidance.

The UK Regulatory Technical Standards on strong customer authentication and common and secure methods of communication (as amended) (UK-RTS) which came into force at the end of the transition period permit UK-based third-party providers (TPPs) to use an alternative to eIDAS certificates to access customer account information from account providers, or to initiate payments. Account providers (for example, banks) will likely need to make technical changes to their systems to enable TPPs to continue accessing customer account information, by accepting an alternative certificate and informing TPPs as soon as possible which certificate(s) they will accept.

The FCA has provided a transition period until 30 June 2021, during which it will allow ASPSPs to accept a certificate obtained from a provider of an API programme that does not meet the requirements of Article 34 UK-RTS, subject to certain conditions set out in the FCA's PS 20/13.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

EEA-based EMIs, payment institutions and registered account information service providers (RAISPs) that have notified the FCA to enter the Temporary Permissions Regime must send the FCA a "notice of intention" within one year of the end of the transition period. In this notice, the firm must state whether it or a UK subsidiary (whichever is applicable) intends to apply for authorisation or, in the case of a RAISP, whether it intends to apply for registration or whether it is intending to cease providing payment services in the UK.

EEA firms within the Temporary Permissions Regime must also carefully consider which UK rules and regulatory guidance apply to them and ensure that they are operating in full compliance.

In Focus: Regulation after Brexit

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

Certain provisions in the Cross Border Payments Regulation 2 relating to post-transaction disclosure for card-based transactions will apply from 19 April 2021. However, since these provisions did not become part of EU retained law at the end of the transition period and are therefore not part of UK law, UK-based payment service providers will not need to comply with them.

Although the UK government has opted out of transposing the EU Sixth Money Laundering Directive into UK law, any regulated UK businesses in the financial sector that operate within the EU jurisdiction will nevertheless need to comply with changes set out in the directive when it comes into force across the individual Member States.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

In the short term, there are expected to be very few instances of divergence, given the very high level of harmonisation achieved to date.

However, the UK Finance SCA Guidance referred to above notes areas of potential divergence, including in the context of dynamic linking, where in certain cases and subject to certain conditions, UK card issuers may process e-commerce card transactions for which the final amount is higher than the amount authenticated by the customer.

Areas of divergence in the longer term may be highlighted as part of HM Treasury's Payments Landscape Review, in relation to which new plans to support the UK payments sector are expected to be published shortly.

Dates for the diary

428 January 2021

Deadline for comments to the draft rules in relation to HM Treasury's proposed special administration regime for payment institutions and electronic money institutions.

19 April 2021

Remaining provisions in CBPR2 applicable from this date do not come into effect in the UK (as they do not part of retained EU law).

1 June 2021

SCA ramp-up in the UK begins, so UK issuers will start checking randomly if e-commerce card transactions are SCA compliant (non-compliant transactions will be soft-declined), to avoid a cliff-edge implementation by the enforcement date.

30 June 2021

End of transition period during which the FCA allows ASPSPs to accept alternative certificates from providers of API programmes used by TPPs.

9 July 2021

End of FCA's temporary registration period for existing cryptoasset firms (those who were carrying on MLRs cryptoasset business immediately before 10 January 2020) whose applications are pending determination. The date for submission of such applications closed on 15 December 2020.

14 September 2021

UK enforcement date (following FCA's agreement to the UK industry's managed roll-out plan) for applying SCA to e-commerce card transactions under PSD2.

31 December 2021

Deadline for an EEA firm relying upon the FCA's Temporary Permissions Regime to send the FCA a "notice of intention" state whether it or a UK subsidiary (whichever is applicable) intends to apply for authorisation or registration, or whether it is intending to cease providing payment services in the UK.

31 March 2022

End of transition period during which the FCA allows UK recipient PSPs to continue crediting payments initiated by EU PSPs with missing information notwithstanding the Wire Transfer Regulation.

Product Regulation

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Current issues

EU General Product Safety Directive review

A **public consultation** on the General Product Safety Directive (GPSD) closed on 6 October 2020. The GPSD is intended to protect consumers by ensuring that only safe goods are sold on the EU market. The GPSD is nearly 20 years old, and does not reflect the developments in products and markets, particularly from a technology perspective.

The revision of the GPSD is intended to:

- Respond to issues related to new technology, and online sales.
- Ensure better enforcement of the rules, and more efficient market surveillance.
- Simplify the standardisation process for products.
- Improve the recall of dangerous products which are in the hands of consumers.

Businesses can expect to see European Commission adoption of the recommendations of the review in the second quarter of 2021. These may range from retaining the status quo, targeted revisions of the directive, or even a full revision of the directive.

A revised GPSD is likely to:

- Extend the definition of "products" to capture standalone software.
- Include new provisions to contemplate the extended online supply chains which exist in the modern market.
- Establish mandatory requirements for product recalls.
- Improve enforcement powers for breaches and divergence from product safety requirements.
- Consider a ban of the marketing and sale of all food imitating products in the EU market.

The reforms will not apply to the UK but UK businesses exporting to the EU will need to ensure they continue to comply with the EU product regulation regime.

UK Conformity Assessed Marking

The new UK Conformity Assessed (UKCA) marking will need to be used for goods placed on the market in Great Britain from 1 January 2022, although businesses are **encouraged** to start doing so now for new products. This will apply to most goods which previously required the CE mark.

The CE mark, in most cases, will remain acceptable until 2022, and will remain valid in areas where GB and EU rules remain the same. If either jurisdiction changes their rules, the CE mark will no longer be acceptable on the GB market.

Current issues

The UKCA mark will not be recognised on the EU market, and products which currently require CE marking for sale in the EU will continue to do so.

Certain goods being placed on the **Northern Irish market** will need to carry the "UK(NI)" mark alongside the CE mark where the business uses a UK notified body to carry out the conformity assessment. In these circumstances, the goods cannot be placed on the EU market but will be valid for the UK market.

There is a transition period for medical devices in which the CE mark will continue to be recognised for devices in Great Britain until 30 June 2023. This will apply to devices placed on the Great Britain market that have been CE marked under and fully conform with applicable EU devices legislation.

Product recalls

The UK Office for Products Safety and Standards (OPSS) has published two product safety reports looking at: (i) product recall effectiveness and (ii) consumer attitudes to product safety.

In relation to recall effectiveness, OPSS has made the following recommendations to businesses:

- Product safety notices should not include the word 'voluntary'.
- The steps customers need to take should be set out in bullet points.
- Manufacturers and retailers should collect and analyse information on their recall and corrective action campaigns and share this to learn best practice.

OPSS notes in its consumer attitudes report that consumers are disengaged from product safety and dismissive of recall notices, which leads to low recall response rates. OPSS found that "few consumers habitually registered products which limited the extent to which product owners can be contacted directly with safety or recall information"; those that had done so were motivated by validating or extending a warranty.

Businesses should review the reports and product recall procedures in light of these findings and consider whether they need to make any changes to how they engage consumers on these safety issues. It is important to take these recommendations into account as is likely that this report will inform Trading Standards departments' views on how businesses should carry out recalls.

EU steps up action against hazardous chemicals in clothing, textiles and footwear

From 1 November 2020, a further restriction to chemicals in clothing footwear and textiles was implemented. The stated aim is to protect EU consumers from hazardous substances in frequent contact with human skin, which are known to cause cancer and reproductive health problems. The restriction which is based on REACH regulations targets 33 carcinogenic, mutagenic or toxic substances setting maximum concentration limits for their use for both products manufactured in and imported in to the EU.

As the change came into force before the end of the Brexit transition period, the restriction will also apply in relation to products manufactured in and imported into the UK.

The restriction captures the use of the substances in the final products as well as the environmental emissions of these substances during the manufacturing process.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

Products being placed on the EU market by UK businesses will need to include an EU address on the label to ensure compliance with the obligations on importers under European product liability regulations.

For cosmetics, UK businesses will need to appoint a responsible person based in the EU, to allow a point of contact for regulatory authorities and EU residents. This will need to be reflected on product labels.

For cosmetic products in particular, before they can be placed on the EU market, a notification must be made to the Cosmetic Product Notification Portal (CPNP). From 1 January 2021, UK-based responsible persons no longer have access to the CPNP and manufacturers will need to instead nominate EU-based responsible persons.

Similar requirements apply to certain CE marked products imported into the EU from the UK, with businesses now required to appoint an EU-based importer or authorised representative.

UK Approved Bodies can no longer carry out conformity assessments for products being CE marked and placed on the EU market. Such products must be subject to assessment by an EU Notified Body.

Businesses that move goods between Great Britain and Northern Ireland/the EU need to meet the new requirements under the Border Operating Model, as well as specific requirements that apply to different classes of goods.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

Non-UK businesses need to ensure that products imported into the UK are labelled with a UK address, to provide a contact point for UK regulators in the event of product safety issues. For most products, until the end of 2022, these details may be provided on accompanying documentation rather than the products themselves.

Businesses should consider whether existing distributors in the UK will, possibly inadvertently, become “importers” under product law and will therefore take on legal responsibility that the product meets UK compliance requirements.

EU businesses will also need to appoint a UK-based authorised representative or responsible person where applicable. EU based authorised representatives and responsible persons are no longer recognised in GB.

Products placed on the Northern Irish market should continue to be CE marked, if conformity assessed by an EU Notified Body. If conformity assessment is carried out by a UK-based body, products placed on the NI market should be marked with both the CE and UKNI markings.

Businesses should prepare now to use the UKCA marking for products placed on the market in GB, in order to meet the deadline of 31 December 2021. Products carrying the UKCA mark cannot be placed on the EU market, unless they also carry a valid CE mark.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The EU Medical Devices Regulations (MDR and IVDR) will fully apply to Member States in May 2022. The provisions of these regulations do not form part of the UK’s retained EU law, and will therefore not be directly transposed or implemented into UK law.

Instead, the Medicines and Medical Devices Bill, once implemented, will provide for medical device regulation in the UK.

As discussed above, the EU is looking to reform the General Product Safety Directive. Any revisions would not apply to the UK. It remains to be seen whether the UK will decide to reform the existing laws (which now form part of UK law as retained EU law) and if so, whether those reforms will take a similar form to the EU approach.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

There are no known UK plans to diverge from EU product requirements at this time. However, if either jurisdiction changes its rules, conformity assessment requirements will also diverge, leading to more procedural requirements to ensure products are suitable for sale in both markets.

It is important that businesses placing products on the market in both the UK and EU markets consider separately the product regulation regimes in each territory and are able to keep up-to-date with changes in each regime.

Dates for the diary

Q4 2020

ePrivacy Regulation expected to be passed by European Parliament.

1 January 2022

Goods placed on the GB market must carry a UKCA mark.

31 December 2022

UK-based address and contact details must be placed directly on products imported from the EU/EEA.

30 June 2023

Medical devices no longer need to conform to the EU MDR or EU IVDR in order to be registered with the MHRA.

Regulated Procurement

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Current issues

Planned reforms to post-Brexit procurement law

The government's long-awaited green paper on 'Transforming Public Procurement' was published on 15 December 2020. The government's aim is to *"overhaul our outdated public procurement regime"* in order to *"create a regulatory framework that delivers the best commercial outcomes with the least burden on our businesses and the public sector".*

The green paper sets out proposals for a new regime (all subject to consultation), including the following major changes:

- Replacing the four existing sets of procurement regulations with a single piece of legislation.
- Amending current processes to leave only three procurement procedures which can be used by a contracting authority or utility.
- Allowing contracting authorities to include social value criteria beyond the subject matter of the contract.
- Requiring contracting authorities to publish basic disclosure information alongside the contract award.
- Requiring contracting authorities to record and publish key performance information on contracts.
- Introducing new Civil Procedural Rules for procurement challenges.
- Amending the legal test to lift automatic suspensions.
- Capping damages which can be awarded for breaches of rules, to legal fees plus1.5x bid costs.
- Removing the requirement for standstill letters, and replacing it with an extensive disclosure obligation on contract award.
- Applying a standstill period of 10 days for contract amendments.

For more, see our Insight on the green paper and other recent developments in regulated procurement, **here**.

'Reserving' low-value contracts

Public Procurement Notice (PPN) 11/20, which applies from 1 January 2021, introduces new provisions that allow contracting authorities to 'reserve' below-threshold contracts to (a) suppliers based and operating in specific geographical locations (for example a county or the UK), and/or (b) small and medium sized enterprises/ voluntary, community and social enterprises (SMEs/VCSEs. The PPN is aligned with broader policy changes in the green paper, intending to "level up" the UK economy by enabling contracting authorities to make it easier for SMEs/VCSEs to win public sector contracts, as well as optionally limiting contract suppliers to certain geographic areas.

Our recent **Insight** sets out more detail on this PPN.

Current issues

Major changes for social value in public procurement

As of 1 January 2021, all procurements run by central government bodies (and their executive agencies and non-departmental public bodies – including the NHS) must include a "social value" award criterion, weighted at a minimum of 10% of the overall score. The aim is for social value to have a heavy enough weighting to be a differentiating factor in bid evaluation and accordingly which bidders wins the contract.

The government guidance in **Public Procurement Note 06/20** sets out a list of "areas of priority focus" for social value improvements. The Cabinet Office has created a model that commercial teams should use to measure and evaluate social value in procurements. This includes standard award criteria, delivery objectives that describe 'what good looks like', and metrics for contract management and reporting. Central government bodies are required to select objectives from the model that are relevant and proportionate to their procurement from the list of priority focus areas. These include:

- Covid-19 recovery.
- Tackling economic inequality.
- Fighting climate change.
- Equal opportunity.
- Wellbeing.

The announcement of this requirement by the Cabinet Office in September came amidst a wave of other social value initiatives in public procurement, including the NHS's new sustainable development strategy. Our two-part Insight series gives an **overview** of the policy development and looks at **what bidders can do** to score highly on new evaluation criteria.

Covid-19: litigating the pandemic

In March 2020, the Cabinet Office published guidance around public procurement options available to public bodies to manage contract awards and extend existing contracts. In June, the government published a PPN focussing on the "new normal", and encouraging public bodies to start to plan how to exit the relief measures and transition to "new sustainable operating models" reflecting "strategic and reprioritisation needs".

We are now starting to see the first waves of cases in the High Court arising out of government procurement decisions made in the early days of the pandemic. We think this trend is set to continue, as any contracting authorities still relying on Regulation 72(1)(c) PCR 2015 to extend existing contracts will find it increasingly difficult to reasonably argue that Covid-19 is still an unforeseen circumstance warranting an urgent modification to a contract. Similarly, it will become more difficult for a contracting authority to justify a direct award of a new contract under Regulation 32(2)(c), as this exemption only applies where necessary "for reasons of extreme urgency brought about by unforeseen events" (and yet we are continuing to see examples of direct awards of public contracts).

Williams Rail Review

The delayed Williams Rail Review will set out recommendations for how contracts for the UK's rail passenger routes will be structured and procured in future. With the end of the Brexit transition period, it is open for the UK government to depart from the key EU legislation governing the procurement of rail passenger services (Regulation (EC) 1370/2007). The review had been expected to be published before the end of 2020 so could be released imminently.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

A UK-established company will have a right to bid for EU Member State public procurements via the UK's new individual membership of the World Trade Organisation's Agreement on Government Procurement (GPA).

Whether an EU Member State public sector contract is caught by the GPA is set out in the Schedule to the UK's accession to the GPA. In addition, the EU-UK Trade and Cooperation Agreement (TCA) increases the range of contracts covered so that it is more in line with the existing arrangement within the single market (meaning that certain utilities excluded under the GPA remain covered in the bilateral trade agreement with the EU).

UK businesses should obtain specific advice to confirm whether defence contracts they wish to continue to bid for will be covered by the GPA, and if a significant volume are excluded, should consider establishing a European-based office in order to continue to be able to bid for such contracts with the same rights as businesses registered in an EU Member State.

Opportunities to bid for contracts in EU Member States will continue to be published in the official journal of the EU (OJEU). However, UK public sector contracting opportunities will no longer be advertised in OJEU Instead, contracting opportunities with UK contracting authorities will be advertised on the UK only electronic portal called "Find a Tender". Businesses will need to sign up to receive alerts from this new portal. The requirement for contracting authorities to publish on Contracts Finder remains unchanged.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

EU established businesses should review whether they are heavily reliant on supplying under UK public sector contracts that are not covered by the GPA schedules.

Business from non-EU, GPA-member countries will not be affected as regards bidding for public contracts in the UK, given that the UK has become a member of the GPA in its own right.

Businesses from countries who are not GPA members should consider the Department for International Trade (DIT)'s periodically updated page which shows which Trade Agreements the UK has signed to replace those it benefitted from by virtue of its membership of the EU, to take effect on 1 January 2021. If the DIT page does not show that an agreement in respect of its country has been signed, bidders should seek legal advice before seeking to bid for a public contract in the UK.

Also, as discussed above, businesses should be aware that UK public sector contracting opportunities will be advertised on the UK-only Find a Tender portal, rather than on the OJEU.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

There are currently no proposed EU legislative amendments to the procurement directives to come into force after the end of the transition period.

The TCA does not make any major changes to the current regulated procurement rules in the UK. Its principal effect is to widen the scope of UK-EU cross-border procurements that are covered by the rules beyond the GPA base line, particularly in the utilities sector, so that it is more in line with the status quo prior to Brexit.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

The UK procurement rules have been amended from 1 January 2021 to correct deficiencies that result from the UK's departure from the EU. Key changes include:

- The publication of notices in the new UK e-notification service, Find a Tender (rather than OJEU).
- Transferring functions previously exercised in relation to the regulations by the EU Commission (including for example, revising the minimum thresholds) 'back' to the Minister for the Cabinet Office.
- Removing the requirement to demonstrate compliance with the EU state aid regime in the case of an abnormally low tender.
- Removing of requirement for UK contracting authorities to have recourse to the EU online procurement certificate database e-Certis.

In the longer term, as discussed above, the government's green paper demonstrates an intent to introduce sweeping reforms to UK procurement rules, on the basis that they no longer need to meet the standards in the EU Procurement Directives and EU Remedies Directive. The government will also need to take into account its commitments under the TCA in pursuing its agenda, although it appears that the plans outlined in the green paper already largely take into account the TCA.

Procurement law in the UK will still need to meet the GPA rules, which include many similar (but less stringent) requirements to the EU directives, such as the need to advertise a contract, apply published criteria and abide by general transparency and fairness principles.

Dates for the diary

10 March 2021

Consultation on UK government green paper (discussed above) closes.

Telecoms

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Current issues

Implementation of the EECC

The **European Electronic Implementation Code** (EECC) replaces the existing European telecoms regulatory framework and aims to harmonise the EU regulatory framework for electronic communications.

The EECC extends end-user rights, requiring service providers to review their contracting processes and also extends the definition of electronic communication services to include over-the-top services. This means OTT providers will now have to understand and comply with telecoms regulation.

Member States were required to implement the EECC by 21 December 2020. In the UK implementation is by way of updates to the Communications Act 2003 and General Conditions of Entitlement as well as the Wireless Telegraphy Act 2006 .

Due to the change of definition of electronic communications services, certain provisions of PECR will apply to the OTT providers for the first time.

5G Action Plan

The EU's **5G Action Plan** intends to achieve uninterrupted 5G coverage by 2025. With the EECC also supporting the deployment of 5G networks, huge investment will be required for network operators to buy spectrum, upgrade core network software and install millions of small cells. Ofcom has also confirmed that it will auction radio spectrum in the 700MHz and 3.6-3.8GHz bands early in 2021 to support the roll-out of 5G.

The UK Electronic Communications Code sets out the rules by which telecoms operators can access land to install equipment. The code is supposed to help speed up the growth of the networks required to deliver 5G but a proliferation of litigation between land-owners and telecoms operators means that it seems to be having the opposite effect.

Call for change in traditional services

As cloud-based technology, instant messaging and Voice over Internet Protocol (VoIP) services develop, the demand for traditional communication services is decreasing and Ofcom is reviewing the retirement of traditional copper networks. The Covid-19 pandemic has put additional pressure on telecoms services to upgrade capacity and network resilience. As a result, businesses may need to start considering evolving their service packages to include cloud-based technology.

2G and 3G switch off

As mobile evolution develops, the spectrum resource used for 2G and 3G networks is going to begin to be repurposed for 5G. Network operators may start sunsetting 3G networks in the UK in 2021. With thousands of devices, including many IoT solutions such as smart meters, connected to 2G and 3G (and not being technically capable of using 4G or 5G services), mobile operators and businesses will need to assess what impact this will have on their business, contracts and internal processes.

In Focus: Regulation after Brexit

What do UK businesses trading in the EU need to do now that the Brexit transition period has ended?

The main considerations that businesses will need to take into account in deciding what they need to do now are as follows:

End of roam-like-at-home provisions: The UK is now a third country for the purposes of the Roaming Regulation. This regulation, which caps what the domestic EU operator can charge the foreign EU operators for connecting the foreign operator's customers and prohibits the charge being passed onto the consumer, will no longer apply to UK operators. However, the UK government's EU Exit Regulations require mobile operators to: (i) inform customers travelling abroad when they have reached 80% and 100% of their data allowance; (ii) provide a financial limit on data usage abroad of £45; and (iii) inform customers how to avoid inadvertent roaming near the borders.

Mobile operators may need to review their roaming agreements and reach commercial agreement on the rates that will apply in the absence of regulated wholesale rates and consider whether any additional costs are passed on to the end-customer. They will have to take reasonable steps to protect consumers from paying excessive roaming charges. Businesses may find that their mobile charges when travelling on business could rise following the transition period.

Free movement of services will continue: The TCA preserves the previous general authorisation regime for UK communications service providers who provide electronic communications networks and services in EU Member States. This means that UK communications services providers will not be required to obtain prior authorisation from an EU Member State prior to providing the services in that Member State, although prior notification of the provision of communications services may still be required depending on the rules in each Member State.

Net Neutrality will continue: The UK government has transposed the Open Internet Regulation which enshrines the principle of network neutrality into UK law and this principle has been retained under the TCA. Nevertheless, the UK government will have some freedom to adopt measures which may cut across the broad principle of net neutrality where the aim of such measure is to protect the public safety of users online, such as the existing parental controls permitted under the Digital Economy Act.

What do non-UK businesses trading in the UK need to do now that the transition period has ended?

No additional steps are required for non-UK businesses to provide electronic communications services in the UK as the UK operates under a general authorisation regime; meaning that there are no notification or express licence requirements (other than for spectrum licences) and no requirement to have an establishment in the UK to provide electronic communication services in the UK.

Which incoming EU laws should UK businesses be aware of, and is the UK likely to implement similar rules?

The EECC was required to be implemented by 21 December 2020. However, Ofcom has confirmed a staggered approach with between 12 and 24 months for service providers to implement the changes. **Although DCMS has announced** that some EECC requirements will not be fully implemented by the EECC deadline, DCMS has stated that it is aligned with the principles of the EECC and would be bringing the substantive provisions into UK law irrespective of Brexit.

The ePrivacy Regulation will replace the ePrivacy Directive (which is implemented in the UK under the Privacy and Electronic Communications Regulations 2003), however it has been a challenge for European legislators to reach agreement on the text. We may see agreement reached in 2021, but as this will be after the end of the transition period, this will not apply in the UK.

Businesses that operate on a pan-European basis will need to follow the new ePrivacy Regulation in respect of their EU operations but in the UK, the 2003 regulations will continue to apply unless and until the UK brings in its own reforms.

Are there any other areas where the UK regime might start to diverge from that of the EU? If so, what should businesses do to ensure they are prepared?

It is unlikely that the UK telecoms regime will diverge significantly from existing EU law as the UK has been a driver of European telecoms legislation. Roaming charges is the most likely area where a divergent approach may occur as, in the absence of cross-border agreement, will be determined by commercial factors.

The question for the UK will be whether it changes current law to follow planned and future EU reforms such as the ePrivacy Regulation, as well as and future EU regulation in relation to new telecoms technologies.

Dates for the diary

January 2021

5G spectrum auction.

During 2021

ePrivacy Regulation expected to be passed by European Parliament.

January 2021
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