RPC

Regulatory radar

January 2024

HELPING YOU SCAN THE REGULATORY HORIZON

Corporate liability for economic crimes

The UK implementation of the OECD proposal

Employment, the workforce and AI

Product safety: what does the future hold?

The future of food safety assessments

Going green: the CMA publishes its Green Agreements Guidance

Welcome to the January 2024 edition of Regulatory radar

Welcome to the January 2024 edition of RPC's bi-annual Regulatory radar – a guide to the key regulatory changes worth having on your radar. We hope this will be a useful resource, helping you scan the regulatory horizon and highlight changes that could impact your business.

From the world's largest financial, corporate and professional services firms, to highly successful entrepreneurs and individuals, many turn to our specialist Regulatory team to navigate the maze. They do this because they know we don't sit on the fence, we work with our clients to ask the tough questions and challenge conventions; ensuring they continue to thrive in a rapidly evolving regulatory world.

In this edition we explore key regulatory updates and what they mean for businesses, including changes to corporate liability for economic crime, changes to UK taxation frameworks, the increasing prevalence of AI and its impact on regulation, and how the scope of due diligence is expanding to cover ESG risks.

We also reflect on trends, topics and regulatory developments such as "who regulates the regulator", the change in leadership at the Serious Fraud Office, and look at guidance on climate risk governance and greenwashing risks.

I hope you enjoy reading this new and enhanced edition of Regulatory radar, designed to help your business navigate the regulatory maze, and we hope our regulatory updates throughout the year prove to be a helpful guidance.

Please do not hesitate to contact me, or your usual RPC contact, if you would like to discuss any of the topics highlighted.

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THANKS FOR READING OUR LATEST ISSUE OF REGULATORY RADAR

If you would like to receive a hard copy of this guide, please get in touch with us at publications@rpc.co.uk or your usual RPC contact.

Regulatory radar is printed on Fedrigoni Arena, an environmentally sustainable paper made with 100% recycled FSC® fibres. It is completely biodegradable and recyclable.

Thanks go to RPC's Regulatory Knowledge Board, and Legal and Research teams for their contributions towards the Regulatory radar. The publication is curated and edited by Gosia Woods and Amie Griffin, and designed by Carmen Garcia Haro. Special thanks to Gavin Reese and Robert Waterson for overseeing the editorial board, and to CLL for their guest contribution.

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Throughout this section of Regulatory radar we consider key changes and developments in the regulatory landscape, how these changes may impact businesses, and steps that businesses should consider taking.

We cover both purely domestic aspects and some which tie closely to European Union law and, as such, may impact upon businesses' European operations.

When discussing these changes, we may not always be talking about the jurisdictions in which we advise as a firm. Therefore, whilst the following is intended to offer a helpful flag, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

Corporate liability for economic crimes: significant legal changes

What is happening?

Two significant changes have been introduced to the English law of corporate criminal liability as part of the Economic Crime and Corporate Transparency Act 2023 (the Act), which received royal assent in October. These changes will create enhanced criminal risks for companies operating in the UK and companies should now assess internal controls around fraud and other financial crime.

New offence of failure to prevent fraud

The Act has created a new corporate criminal offence of failure to prevent fraud.

Pursuant to the new offence, large organisations (and their subsidiaries regardless of size) will be criminally liable if they fail to prevent an associated person committing a specified fraud offence where that fraud is intended to benefit the organisation, or a person to whom services are provided on behalf of the organisation.

Revision to the identification doctrine for economic crime

The Act also expands the reach of the identification doctrine for a wide range of UK financial crime offences, which is the process by which criminal liability is attributed to a company. These changes will mean that the "senior managers" as well as Directors and Officers can create criminal liability for a company.

Why does it matter?

The failure to prevent fraud offence

Generally, companies do not currently view fraud risk from the perspective of the company (and its third parties) defrauding others. Where companies have fraud policies, they typically focus on protecting the company from becoming the victims of fraud.

The new offence will have a significant impact on this position. Committing the offence of failure to prevent fraud may result in an unlimited criminal fine and conviction against the company, coupled with the costs and disturbance of an external investigation, negative press and potential difficulties with debarment on larger contracts.

- **Which fraud offences are in scope?** A range of fraud offences are in scope, such as fraud by false representation, certain tax fraud offences and false accounting.
- **What is a 'large organisation'?** The offence only applies to "large organisations". These are companies or partnerships that satisfy two or more of the following in the financial year that precedes the year of the fraud offence:
  - turnover of more than £36m
  - balance sheet total of more than £18m, and/or
  - more than 250 employees.

  However, subsidiaries of large organisations will also, regardless of their size, be liable for fraud offences committed under English law by their employees.
- **Who is an associated person?** Employees, agents and subsidiaries will automatically be associated persons of the organisation under the Act. Parties providing services for or on behalf of the company will also be associated persons. This might include parties such as brokers, sales agents and professional advisers.
- **Is there a defence to this new offence?** There is a full defence to this offence where a company can demonstrate that it had in place "reasonable procedures" to prevent the fraud at the time of the offending. Guidance, which is being produced at present, is likely to follow the principles-based approach previously adopted for the failure to prevent bribery offence's guidance.

A note to auditors: While it appears unlikely that auditors will need to determine whether a company's fraud procedures are reasonable, they will seek to bear this defence in mind when conducting audits. The new offence will shape an auditor's assessment of a company's financial crime risk profile.

Revision of the identification doctrine for economic crime offences

This change could have a significant impact on the way companies train, manage and recruit individuals in management roles.

Under the new law, the actions of "senior managers" can be attributed to the corporate when determining liability for economic crimes. This applies to companies of all sizes, not just large organisations.

- **Who is a senior manager?** A senior manager is defined as an individual who plays a significant role in the decision making, management or organisation of the whole or substantial part of the activities of an organisation. This is likely to include a much wider category of individuals than those whose actions previously were attributable to corporates, especially in larger companies.
- **What offences does this test apply to?** The updated identification doctrine applies to a broad range of economic crimes, which include theft, fraud, tax offences, bribery offences and money laundering and terrorist financing offences.
- **When did this new test for corporate criminal liability come into effect?** This new test came into effect on 26 December 2023.

Key dates:

Early 2024: Failure to prevent fraud guidance expected to be published. This will be followed by a period for companies to respond to and implement reasonable procedures regarding the new offence.

Spring 2024: Failure to prevent fraud offence expected to come into force.

What actions should you take?

Organisations can take action in response to this new law by:

- assessing whether current controls around fraud are reasonable to prevent the organisation and third parties committing an offence
- taking steps to identify the senior managers in the business, in particular those with connections to the business's UK operations
- developing communication and training for senior managers starting in Q1 2024
- considering the implementation of repeat due diligence/training of employees who are about to be promoted into a senior management role
- coordinating with the investigation team to prioritise investigations of financial crime issues relating to senior managers.

For further detail on these changes and how to prepare for them, follow the link to our article here.

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Horizon scanning

Reform of insolvency practitioner regulation

What is happening?

On 12 September 2023 the government published its response to its consultation on the future of insolvency regulation. The proposed reforms to regulation in this sector are touted by the government as the biggest change to the way the insolvency profession is regulated in the last 40 years. These include:

- establishing a single register of insolvency practitioners (IPs) and firms, with details of their regulatory history to remain on the register for a period proportionate to the severity of any sanction, in order to strengthen transparency and allow the public to make informed decisions
- taking overall responsibility for the setting of the ethical and professional standards to which IPs must adhere, to ensure they remain fit for purpose and can adapt easily to changes in the insolvency and business environments
- implementing a redress and compensation scheme for those adversely impacted by IP misconduct, the details of which are still under consideration by the government
- introducing an appropriate sanctioning mechanism for firms offering IP services
- reforming the insolvency bonding regime, which protects insolvent estates and their creditors from IP misconduct in office.

In addition to a focus on transparency, accountability and public protection, several of the reforms will see an expansion of focus from the regulation of individuals to the regulation of firms. This addresses the practical reality of a situation in which IP appointments are technically personal appointments, but where firm level systems, controls, oversight and cultures can have a significant impact on the way individual IPs conduct themselves in office and provide their services.

Some of the reforms will require primary legislation, and the timeline for their implementation is therefore currently unclear, but the government has indicated its desire to push the reforms forward as soon as possible.

Why does it matter?

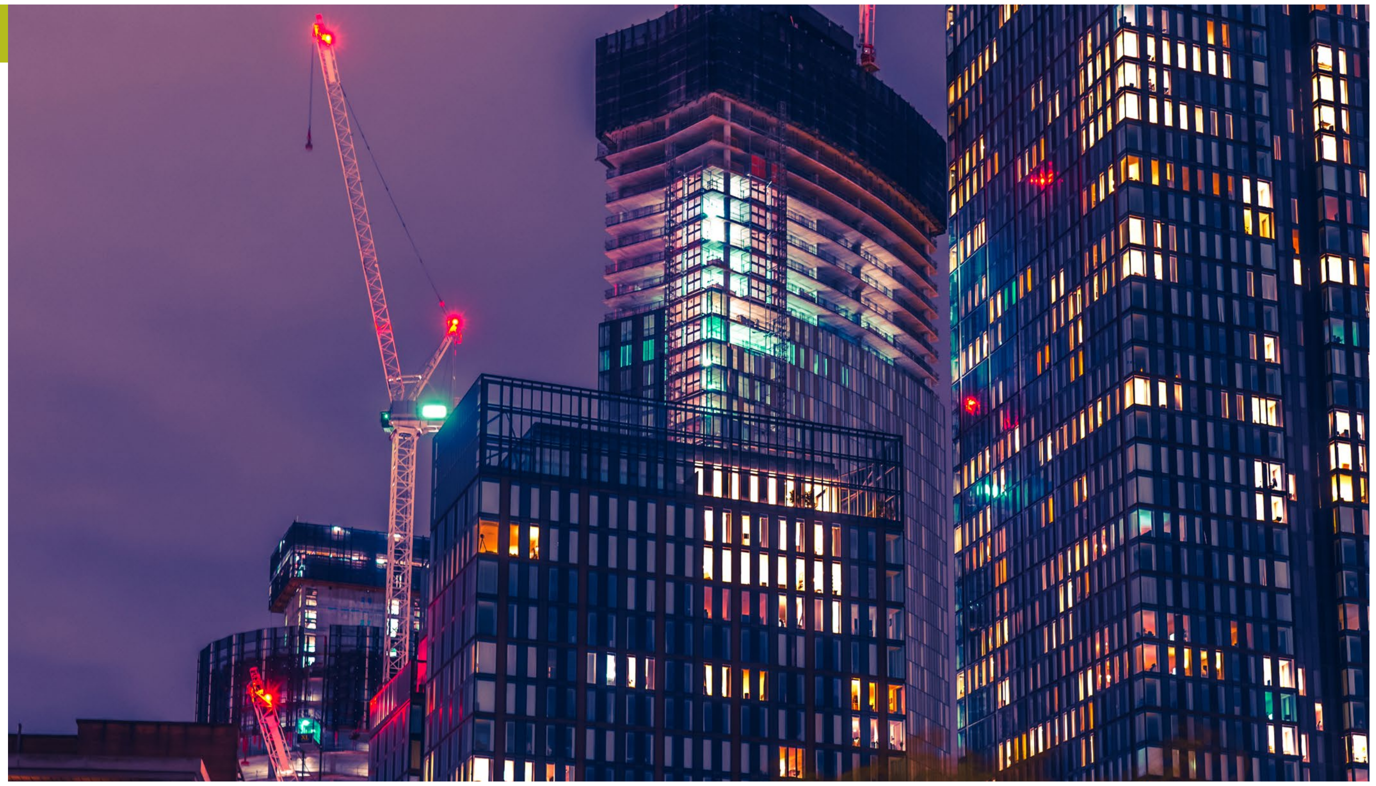
The proposals, when implemented, will introduce significant additional regulatory risks for those acting as IPs, for their firms and for their insurers.

Insolvency has arguably been an area in increasing need of focus, due to current unprecedented market conditions. After a period of artificially depressed levels of corporate insolvencies (due to various factors, including the availability of low-cost credit and government support measures for businesses during the pandemic), since around April 2021 we have seen a significant and sustained rise. Insolvency Service figures show that in Q3 2023, total company insolvencies remained at their highest level since Q2 2009, while creditors' voluntary liquidations are now at levels literally without precedent in modern times. The construction and real estate sector has been particularly hard hit, along with retailers, particularly food and drug retailers.

There have also been significant increases in the number of companies continuing to trade but experiencing significant financial distress and, with high inflation and weak consumer confidence, it appears inevitable that corporate insolvencies will remain high in the coming months and years. In these circumstances we are likely to see elevated levels of claims by IPs against professional advisers (such as auditors), and claims against IPs themselves.

In the meantime, the government has identified that there continues to be instances of poor conduct among insolvency practitioners, and that it is crucial that misconduct is dealt with promptly and that IPs are regulated in a way that is proportionate and robust. The proposed reform of the regulatory landscape is therefore timely. While the government has backed away from its earlier suggestion that the regulation of IPs should be taken out of the hands of the recognised professional bodies (RPBs) and consolidated into a single regulator, the package of reforms still on the table is significant.

It should, however, be noted that some, if not all, of the proposed reforms will require primary legislation, and that given the current stage in the political cycle, it is unclear when (and indeed whether) these reforms will ultimately be brought into effect.



What actions should you take?

Firms offering IP services will need to consider the proposed reforms carefully, and consider what systems, controls and processes they need to put in place at a firm level, to protect themselves and the IPs through which they offer their services. The reforms include proposals that firms will need to obtain formal authorisation to offer IP services, and firms will want to follow these proposals carefully, to ensure that they will meet any qualifying criteria. Similarly, firms will want to begin considering the proposed new requirement that they appoint a senior responsible person to be registered with the firms' RPB.

It will also be important for firms to consider their current PI insurance arrangements carefully, and to work with their brokers to ensure that they remain fit for purpose, given the reforms. In particular, firms will want to consider the potential for liabilities, including sanctions and costs, to attach at firm, rather than individual IP level. Similarly, insurers will no doubt wish to consider the reforms and to assess whether their underwriting criteria and policy wordings require any adaptation.

Further, IPs, RPBs and those sureties offering insolvency bonding cover, will wish to consider carefully the proposals around reform of the insolvency bonding regime, to ensure that the regime and cover available adapts to the reforms, for example in relation to the proposal to increase the minimum 'general penalty sum', from £250k to £750k. Interested parties will also wish to look out for further communications, given that the government has also indicated that it wishes to consider more fundamental changes to the regime in due course.

Finally, all of those potentially affected by the government's proposed reforms will no doubt wish to consider the government's proposed next steps, once they are published, and to follow closely the progress of the reforms, including whether and when they are afforded parliamentary time in instances where primary legislation is required.

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Horizon scanning

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UK implementation of OECD proposal for a global minimum corporate tax rate

What is happening?

On 19 July 2013, The Organisation for Economic Co-operation and Development (OECD) announced a new action plan to address the issue of large multinationals avoiding or minimising tax. The principal ways a multinational reduces their international tax bill is by reducing the level of profits in jurisdictions where the actual economic activity is happening (Base Erosion) and shifting profits from high-tax jurisdictions to low-tax jurisdictions (Profit Shifting). Since announcing its action plan, the OECD has published a series of guidance and proposals to address these issues.

On 8 October 2021, the OECD set out a Two-Pillar solution to Base Erosion and Profit Shifting which proposes significant changes to the way Multi-National Enterprises (MNEs) are taxed. 139 member jurisdictions have agreed to implement the solution.

Why does it matter?

The fast-approaching Two-Pillar solution will create significant challenges for MNEs, the solution can be broken down as follows:

Pillar One

Pillar One creates a new taxing right for jurisdictions which large MNEs operate in. Pillar One has taken a back seat to Pillar Two but it is likely to follow quickly. Essentially, the proposal is that an MNE with a global turnover above €20bn and profitability above 10% will now have to pay additional tax in jurisdictions where they earn at least €1m (or less if the jurisdiction has a GDP of lower than €40bn). Those MNEs caught will be required to pay 25% of 'residual profit' which is defined as any profit in excess of 10% of revenue.

Pillar Two

Pillar Two proposes to impose a global effective minimum corporation tax rate for large MNEs (MNEs with group revenues over €750m). This will be implemented by three rules:

1. the Income Inclusion Rule (IRR) which will require an MNE's parent entity to pay an additional 'top-up' tax to ensure that the group pays a minimum tax rate of 15% in each overseas jurisdiction it operates in. In other words, if an MNE is structured in such a way that it only pays tax at a rate of 10% in one of its jurisdictions, its parent entity will be subject to an additional tax of 5% of profits
2. the Undertaxed Payment Rule (UTPR) which acts as a backstop provision to the IRR. If an entity of an MNE pays an effective tax rate of less than 15%, the undertaxed amount can be allocated to another constituent entity
3. the Subject to Tax Rule (STTR) which allows countries with gross national income per capita below $12,535 to tax interest, royalties and certain other payments where the beneficial owner of the payment is tax resident in another country, provided the nominal corporation tax rates in that country are less than 9%. This is separate to the previous two rules and would be implemented by adding a provision to the treaty between the two countries.

What actions should you take?

Pillar Two is currently being implemented in the UK and will require significant administrative adaptation. MNEs in scope will need to: familiarise themselves and their employees with the Pillar Two rules, register with HMRC that they are in scope, and update their software and systems to be able to perform IRR and UTPR calculations. The government estimates that it will cost £13.7m initially and £8.2m annually for affected businesses to comply with these obligations. In some cases, it may be difficult to determine which entity within the MNE should be considered the parent entity to shoulder this additional burden. The implementing rules are complex and will no doubt cause disruption and lead to disputes.

MNEs in scope will need to act quickly. Finance (No. 2) Act 2023 implemented the IIR aspect of Pillar Two with effect from accounting periods beginning after 31 December 2023. On 27 September 2023, draft legislation was published for the implementation of the UTPR which is set to be included in the Finance Act 2024, with the provisions coming into effect from accounting periods beginning after 31 December 2024.

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Key dates:

31 December 2023: The IIR requiring large multinational parent entities to pay a "top-up" tax to ensure the group pays a minimum tax rate of 15% comes into force from accounting periods beginning after that date.

The UTPR, which acts as a backstop to the IIR, is scheduled to come into force from accounting periods beginning after 31 December 2024.

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Horizon scanning

Audit reform and FRC enforcement

What is happening?

The long-awaited reform of UK audit regulation, centring around the transformation of the Financial Reporting Council (FRC) into the Audit, Reporting and Governance Authority (ARGA) has been delayed, much to the frustration of many in the industry.

These reforms, a response to several high-profile corporate failures, were intended to restore public trust in the way the UK's largest companies are run. The reforms were intended to create a body to "protect and promote the interests of investors, other users of corporate reporting and the wider public interest."

After repeated slips in the timetable, a draft bill had been expected in late 2023, with the reforms expected to come into effect no earlier than April 2024. However, the exclusion of audit reform from the King's Speech on 7 November 2023 suggests that the reforms are likely to be significantly further delayed, perhaps even until 2026/27, if indeed they are ultimately enacted.

However, audit reform remains an important and topical issue, not least as a number of reforms are still being taken forward to the extent that this is possible without primary legislation. In addition, the FRC has laid down a marker that it intends to remain vigilant and proactive in enforcing high standards in the audit industry, and pursuing enforcement proceedings against those who fail to confirm to those standards.

Why does it matter?

The proposed new regulator, ARGA, was to wield significantly increased enforcement powers, and the proposed reforms were also intended to improve the quality of audit reporting, set minimum standards for audit committees, and widen the definition of Public Interest Entities (PIE), bringing around 600 more companies under the direct remit of ARGA. The reforms were also aimed at driving increased competition in PIE audits, an area currently dominated by the 'big four', and encouraging challenger firms to enter this market and grow market share.

It is still anticipated that these significant reforms will, ultimately, be brought into effect, albeit perhaps not now for several years, and it is therefore important to continue to track their progress and, over the longer term, to take steps towards preparing for them. In the interim, however, it is important to be aware that, despite the stalling of the legislative agenda required for the full implementation of the proposed reforms, there have been a number of changes and developments in this area already, and there are therefore new and expanded areas of risk that firms and their insurers need to consider.

Some of reforms set out in the government's May 2022 final proposals on audit reform are already underway, or have been put in place. For example, the FRC has now taken over PIE auditor registration from the recognised professional bodies, and it is in the process of making (admittedly watered-down) amendments to the UK Corporate Governance Code. Further, the FRC has started to take steps towards encouraging greater competition in the PIE audit market, for example in creating a "regulatory scalebox" and support systems to assist smaller PIE audit firms looking to expand their market share, and new firms looking to break into this area.

In addition, it is noteworthy that the FRC has effectively doubled in size over the last four years, as it has recruited heavily in anticipation of the ARGA transition. The FRC therefore currently has significant resource available to pursue investigation and enforcement actions. The FRC has, over the last few years, imposed record fines on accounting firms for poor quality audit work, and it appears keen to use its existing remit and powers to their full effect. The FRC has highlighted areas including professional scepticism, insufficient audit procedures, lack of professional judgement and lack of audit evidence as key areas of focus, and has also noted a topical focus on sustainability and ESG reporting assurance.

Therefore, even in the absence of wider reforms and primary legislation, audit firms continue to face unprecedented levels of regulatory scrutiny and potential sanctions, and the FRC currently appears to have both the resources and the motivation to push forward significant enforcement actions.

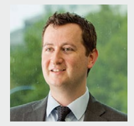
What actions should you take?

In the shorter term, it will be important for entities covered by the corporate governance code, and the auditors of such entities, to follow closely the implementation of the FRC's proposed changes to the code, which are anticipated this month.

Audit firms looking to break into or expand the scope of their activities in the PIE audit market will wish to engage closely with the FRC, including in relation to the audit scalebox project, and to ensure that they are in the process of putting in place suitable processes, recruitment and training, to ensure that they are able to adhere to the significantly more stringent standards associated with PIE audits.

Regulated entities and their auditors will wish to consider carefully the FRC's comments on its current areas of focus, as summarised above, and to ensure that they have taken all steps to avoid FRC criticism of reporting and audit work undertaken in relation to these areas. Firms will also wish to consider the scale and scope of their insurance cover.

In the longer term, the assumption remains that some, if not all, of the wider audit reforms will ultimately be implemented. It is currently anticipated that the definition of a PIE will be expanded to cover any company with more than 750 employees and £750m plus of annual turnover. It is also anticipated that ARGA will have enforcement powers over directors of PIEs, and will be able to impose substantive sanctions for breaches of duties relating to corporate reporting and audit. Companies falling within the new PIE definition, and the auditors of such firms, will thus face a significantly increased reporting burden and additional regulatory risks. It will therefore be essential for both directors and auditors of relevant firms to follow the progress of the wider proposed reforms closely.



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Horizon scanning

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The emerging shape of domestic and international AI regulation

What is happening?

The majority of AI regulatory regimes are still in their nascent stages, however, the outlines of domestic and international frameworks are beginning to emerge.

In the last edition of Regulatory radar we discussed the publication of the UK's pro-innovation AI white paper. Since then, there have been several important developments in respect of AI regulation, including:

- on 30 October 2023, the G7 published its international guiding principles on AI, in addition to a voluntary code of conduct for AI developers. The G7 principles are a non-exhaustive list of guiding principles aimed at promoting safe, secure and trustworthy AI and are intended to build on the OECD's AI Principles, adopted back in May 2019
- also on 30 October 2023, the White House published the US President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. The Executive Order sets out eight "guiding principles and priorities", in addition to a considerable amount of detail as to how those principles and priorities should be put into effect
- on 1 and 2 November 2023, the UK Government hosted the AI Safety Summit. The Summit brought together representatives from governments, AI companies, research experts and civil society groups from across the globe, with the stated aims of considering the risk of AI and discussing how they can be mitigated through internationally co-ordinated action
- one output from the UK's AI Safety Summit was the "Bletchley Declaration", made by the countries attending the summit, which in addition to the UK, included the USA, China, Brazil, India, France, Germany, Japan, Italy and Canada. A central theme of the declaration was the importance of international collaboration on identifying AI safety risks and creating risk-based policies to ensure safety in light of such risks
- it is reported that on 7 November 2023, the government of Japan, one of the members of the G7, set out 10 principles in draft guidelines for organisations involved with AI. The guidelines are intended to constitute Japan's domestic implementation of the G7's principles
- on 22 November a Private Members' Bill, the Artificial Intelligence (Regulation) Bill, was introduced in the House of Lords to create an AI Authority that would collaborate with relevant regulators to construct regulatory sandboxes for AI
- on 27 November 2023, the USA, the UK and 16 other countries reached an agreement on recommended (non-binding) guidelines for providers of AI systems, aimed at promoting the safe design and development of such AI systems.

Following what is posed to be the final trilogue negotiation on the proposed version of the law on 6 December, the EU AI Act (discussed in detail here) is scheduled to be formally adopted in the early part of 2024.

Why does it matter?

AI regulation is inevitable and early developers and adopters of AI models and systems will want to ensure that their AI systems do not fall foul of regulation that may come into effect in the future. It is therefore important to understand the direction of travel for AI regulation in relevant jurisdictions.

Amongst the various declarations, principles, guidelines and, in the case of the EU AI Act, draft legislation, a number of key themes are emerging that developers and deployers of AI systems should be paying attention to. These themes will undoubtedly play a central role in informing the final shape of domestic and international AI regulation over the coming months/years.

Key themes

- **A particular focus on foundation models** – the Bletchley Declaration states that particular safety risks arise in respect of "highly capable general-purpose AI models, including foundation models", whereas the US Executive Order defines "dual-use foundation models" as AI models that exhibit "high levels of performance at tasks that pose a serious risk to security, national public health or safety", and sets out special reporting requirements for companies developing such models. Following their rise to prominence at the end of 2022, the measures concerning foundation models have been among the most controversial aspects of the EU AI Act negotiations. It therefore appears that developers working on foundation models can expect to shoulder a greater share of the regulatory burden and scrutiny.
- **A risk-based approach** – risk-based models are emerging as the framework of choice for AI regulation. The EU AI Act is founded on a risk-based model. Similarly, the Bletchley Declaration speaks of "risk-based policies across our countries to ensure safety", and one of the G7's international guiding principles refers to the need for AI governance to be "grounded in a risk-based approach". Developers working on AI systems that will be deployed in particularly sensitive and/or "high-risk" domains, including biometrics, cybersecurity, national infrastructure and defence should therefore expect to be subject to more onerous regulatory obligations, and in some cases development of such systems may even be prohibited (as under the EU AI Act).
- **Authentication and provenance mechanisms** – the G7 principles include a requirement to develop and deploy techniques such as watermarking to enable users to identify AI-generated content. The US Executive Order also directs further research into, and development of standards for, the labelling of "synthetic content", including in respect of techniques such as watermarking. Developers of generative AI systems should therefore be paying attention to the development of authentication and provenance mechanisms, and how those could be implemented into their systems, if necessary.
- **Use of copyright protected material** – the thorny issue of how to interpret copyright law in relation to input training data and generative AI outputs remains, with no voluntary agreement or formal resolution imminent. The code of conduct aimed to provide guidance as to the legal responsibilities of AI firms and promised by the UK Intellectual Property Office "by the summer" has not materialised, while legal proceedings such as the Getty Images v Stability AI actions in the US and UK keep this issue firmly in the minds of rights holders and developers. Developers should be alive to issues surrounding the risk of infringement if their system was trained on third party copyright works without permission and should look to include appropriate contractual terms. Those using generative AI systems to produce outputs should do so under policies and terms that reduce copyright infringement risks.
- **Protection for personal data** – the US Executive Order notes that the increasing capabilities of AI can "increase the risk that personal data could be exploited and exposed". This sentiment is echoed in both the Bletchley Declaration and the G7 principles. Developers working with AI models that are trained using personal data will therefore need to ensure that the use of such data is compliant with relevant data protection laws. Further, there may be an increased onus on developers to show that they are taking appropriate data anonymisation measures, in addition to mitigating against potentially harmful biases.

What actions should you take?

- Continue to monitor the statements made by international organisations and domestic authorities regarding AI regulation.
- Reflect on what practices and measures can be put into place now, to get ahead of anticipated regulatory requirements – taking into account guiding principles such as transparency and explainability.
- Ensure that existing legal requirements, for example in respect of data protection and equality laws, are being complied with in respect of AI systems.

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Horizon scanning

Employment, the workforce and AI: privacy, bias, and roles and skills in the future

What is happening?

We are moving into and through our fourth industrial revolution: technological advancement founded on data and computing power and capability. Artificial intelligence (AI) is currently the poster child and focus of this new age. The convergence of technologies, including AI, will alter workplaces. Roles and jobs will evolve, because tasks undertaken by people will be more effectively, efficiently and accurately performed by AI and complementary technologies.

Academic research predicts more than 50% of jobs are susceptible to automation. The precise percentage varies – it could be up to 80%. If business leaders seek a more sobering statistic, US research suggests that if the full complement of technological capabilities, including AI, were collaboratively deployed, about 50% of all tasks could be more effectively and efficiently automated.

However, there is an alternative to this existential reality. The bleak description of mass unemployment will be averted. Bear in mind that on the eve of the second industrial revolution 40% of the workforce was engaged in agriculture; now it is 2%. However, in the UK, the rate of unemployment sits at just under 4%. And who would have imagined a few years ago that companies would employ "prompt and labelling engineers"? New roles and jobs will emerge.

Initially, basic AI will replace tasks that are data dependent and, also, predictive, analytical, and repetitive. This does not mean the work product is simple. Rather, it is that the combination of computing power and the size of the available relevant data makes the predictive capability of the underlying model more effective and efficient than the human when undertaking a task that is defined, discrete and concise. For example, even a basic clustering model, a form of unsupervised AI, will produce a quicker and more accurate customer recommendation solution than a human. And on a personal level, we each have seen the capability of generative AI when playing with OpenAI or Bard or any other large language models (LLMs).

The corporate catalyst and impetus for AI adoption, moving beyond the fear of missing out, is a vision where AI will free up precious expertise from replicable data-driven predictive tasks to more complex, high-value tasks that require our uniquely human emotional skills – skills that AI cannot currently replicate. For now, though AI might appear to be intelligent, we have not reached the point of 'singularity' when it is intelligent. Artificial general intelligence is not here, yet.

Increasingly, organisations are looking to embed machine learning (including generative AI) into their business operations. However, the speed of adoption must be balanced against governance, regulatory, legal and ethical risks. The more obvious concerns include privacy, confidentiality, bias, IP (if open source), accuracy (colloquially referred to as "hallucinations") and explainability.

The above challenges come into sharp focus in relation to AI supported programmes that facilitate or augment decisions that directly impact an individual's workplace opportunities, benefits or progression. These might include AI that automates recruitment, performance assessments, monitoring or the allocation of work tasks. It is in relation to these automated tasks that concerns of, and threats to, employee privacy and the risks of bias and discrimination are most stark.

Why does it matter?

Privacy issues

AI technology will engage the collection and processing of extensive amounts of data. For certain models – say AI that is designed and implemented to influence, measure, or assess employees' behaviour or performance - this will include a person's personal information and potentially sensitive personal data. Personal data might be used and processed at various stages of the AI model's lifespan, from its initial design phase where data is used to train, test and validate the model to the processing of personal data following implementation and then the use of data to update the model.

Beyond the ethical risk and, potential public relations challenges, at a foundation level employers adopting AI models must ensure that all associated data processing and collection does not breach either the employer's obligations under the UK General Data Protection Regulation (GDPR), nor infringe the right for individuals to have respect for their private life under article eight of the European Convention of Human Rights.

Bias and discrimination

The algorithms on which AI models are trained, tested and validated rely on huge sets of existing data. If this data is inaccurate, unrepresentative, incomplete or biased those failures will perpetuate within and be expressed by the predictions of the model. It is, therefore, critical that the provenance, quality and diversity of the data (and the prompts) on which the models are built are verified and understood. Otherwise, the risk of bias is real. With generative AI, using open-source data (where there is no source truth), the risk, without human intervention, of bias being repeated and magnified is real.

In any high risk AI model an organisation will look to ensure there is human intervention in the decision making process.

If any algorithmic bias leads to a person being treated less favourably because of a protected characteristic this will lead to discrimination claims under the Equality Act 2010. There is a well-publicised employment tribunal case that grants a reconsideration of whether the use and predictive quality of facial recognition technology was indirectly discriminatory when deactivating a gig economy worker's participation from a work platform.

Employee anxiety

There is an increased sense of "AI anxiety" in the workplace. According to research from the Office for National Statistics, 32% of adult workers fear that AI technology may put their jobs at risk. The fear of many in the workplace (especially if a positive counter vision is not provided) is that AI, which is not understood, is all consuming in its ability to change lives and remove jobs. The language of an existential risk is prevalent. A clear counter narrative explaining the adoption and benefits of AI will hold increasing importance. Organisations that establish a clear AI strategy and, by their communication, overcome employee resistance, will facilitate more engaged adoption.

Key dates:

End of November 2023: the Government published **guidance** to support businesses to upskill the AI competencies and confidence of workers.

2024: monitor progress of the **Artificial Intelligence (Regulation) Private Members' Bill**, which was introduced to the House of Lords on 22 November 2023. The Bill seeks to create a central AI Authority to oversee the regulatory approach to AI.

Early 2024: the TUC intends to introduce, and lobby for, a draft AI and Employment Bill to ensure workers are protected. The TUC has previously suggested:

- introducing an obligation on employers to consult trade unions on using intrusive forms of AI at work
- a legal right for all workers to have a human review of decisions made by AI technology to enable challenges against unfair or discriminatory decisions
- amendments to the UK GDPR and Equality Act 2010 to protect against discriminatory algorithms.

Horizon scanning

What actions should you take?

- Consider an AI governance board. Should a group of senior leaders from technology, risk, law, regulation, and human resources have AI oversight and accountability?
- Be aware of your data protection obligations and identify the lawful grounds on which any personal data is collected and processed, for example is there a legitimate purpose? Is it proportionate? Do employees understand the reasons for using AI?
- Ensure that AI is trustworthy, lawful and ethical. Such a principle will be underpinned by AI that is transparent, fair and robust with any systemic bias removed.
- Employees should hold an appropriate knowledge of AI. Encourage employees to engage with AI to explore how it can enhance their role, and to ease anxiety about job security.
- Communicate your organisation's policy on using AI at work and monitor consistency of approach across different work functions.

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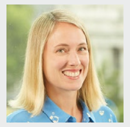

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Horizon scanning

CMA continues its AI scrutiny: review now in its second phase

What is happening?

The UK's Competition and Markets Authority (CMA) launched an initial review into AI foundation models in May 2023. The CMA is considering the rapidly emerging AI markets from a competition and consumer protection perspective. It recognises that AI has the potential to transform the way businesses compete, and to offer multiple consumer benefits.

Its AI review is also assisting the CMA with laying the groundwork for its Digital Markets Unit (DMU). With the Digital Markets, Competition and Consumers Bill (DMCC) on the horizon in 2024, the CMA is gearing up for the new pro-competition digital markets regime overseen by the DMU. See our blog here.

Spring 2024 – further AI reports planned

The AI review is well-advanced and moving at pace. In September 2023, the CMA published an update report including its "guiding principles" aiming to steer the future development of the nascent AI markets. The CMA's overarching principle is one of accountability for AI outputs provided to consumers by AI developers and deployers. Its further guiding principles relate to access, diversity, choice, flexibility, fair-dealing and transparency. The CMA wants to ensure competition and consumer protection remain a driving force in the early development of AI markets, avoiding consumer harms (for instance, false information, AI-enabled fraud, phishing and fake reviews) as well as ensuring a handful of firms do not gain or entrench positions of market power (such as through privileged access to data or consumer lock-in).

The second stage of the AI review is underway and the CMA will publish a further update in March 2024. In the second phase, the CMA has been driving an extensive programme of global engagement involving consumer groups, leading foundation model (FM) developers and deployers, innovators and academics. The March 2024 update is expected to include:

- further reflections on developments from a competition and consumer perspective
- how the CMA's guiding principles have been received
- how FM developers are accessing key inputs such as data.

The CMA is also working closely with government and advancing cross-regulatory collaboration as part of the Digital Regulation Cooperation Forum (DRCF). The DRCF brings together various UK regulators including the CMA, ICO, Ofcom and the FCA.

In spring 2024, the CMA and the ICO will be publishing a joint statement in relation to the cross-over between competition, consumer and data protection objectives. Joint DRCF research on consumers' understanding and use of FM-generated services is also coming soon.

Previous insights - algorithmic systems

The CMA's deepening understanding of AI, and algorithmic systems more generally, has continued to build up over several years. As a brief recap, previous work includes:

- in 2016, the CMA targeted algorithmic pricing used to enforce explicit collusive agreements. The CMA's Trod/GB eye decision related to pricing algorithms for consumer products used to give effect to the collusion
- in 2018, the CMA published an economic working paper on pricing algorithms, which considered the use of algorithms to facilitate collusion and personalised pricing. The paper discussed complex artificial neural networks in machine learning, recognising the difficulties of understanding what is happening in the "black box" layers
- in its 2021 paper, the CMA's DaTA Unit identified potential harms to competition and consumers from the use of algorithms. It considered personalisation, discrimination, exclusionary practices, and harms that may arise from misuse of algorithmic systems.

Insights from its prior work have also helped inform which additional investigative powers would be required, as well as which remedial powers for algorithmic systems would be needed for the forthcoming pro-competition digital markets regime under the DMCC.

Key dates:

The CMA continues to welcome views from stakeholders on its AI review report and proposed guiding principles by **12 January 2024**. The CMA's update on its AI review will follow in **March 2024**.

While certain provisions may yet change as the draft legislation journeys through Parliament, the DMCC reforms are expected to hit the statute books during 2024.

For a recap of further AI developments including the recent AI safety summit hosted in the UK, see RPC's recent Regulatory update **here**.

DMCC speeds through Parliament

The DMCC is currently being debated in the House of Lords before the draft legislation reaches the final stages. There appears to be broad political consensus regarding the aims of the DMCC reforms.

In relation to AI, and algorithms more generally, the new regime provides significant enforcement powers to the CMA. For instance, the reforms define "information" as including data, code and algorithms (among other aspects). In relation to information-gathering powers, the explanatory notes refer to the CMA requiring a firm to demonstrate a technical process with examples, such as how an algorithm operates, or to undertake testing or field trials of its algorithms and report the outcomes. This could include the CMA specifying relevant input data, parameters and other aspects of the test or demonstration.

Why does it matter?

The CMA's AI report due to be published in the spring on its findings following the second phase of AI review work will provide useful insights as to its potential competition and consumer concerns.

It remains to be seen how the CMA's enforcement approach may evolve in due course to tackle any competition and consumer concerns identified in AI markets.

As illustrations of possible CMA remedies, examples include the CMA:

- ordering firms to disclose information about their algorithmic systems to consumers
- requiring firms to disclose more detailed information to researchers, auditors and regulators, and cooperate with testing and inspections
- imposing ongoing monitoring requirements, providing continuous reporting data or access to key systems to auditors and regulators.

There is no doubt the CMA's enforcement toolkit in relation to AI, and algorithmic systems more generally, will be bolstered significantly by the forthcoming reforms. In building its expertise and recruiting relevant specialists, the CMA is preparing for taking enforcement action where necessary using existing powers and its new additional powers under the DMCC.

What actions should you take?

With the DMCC reforms enhancing the CMA's powers on the 2024 horizon, it is important businesses also gear up.

Businesses will be expected to be responsible for effective oversight of their AI, machine-learning and broader algorithmic systems, which should include robust governance, holistic impact assessments, monitoring and evaluation. In particular, it is also incumbent on companies to keep records and seek to ensure that more complex algorithmic systems would be explainable if scrutinised.

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Horizon scanning

The Law Society publishes world-first guidance on climate change and solicitors' professional duties

What is happening?

The Law Society of England and Wales (TLS) has published world-first guidance on the impact of climate change on solicitors (Guidance). The Guidance aims to support solicitors in understanding how the wide-ranging impacts of climate change might affect their practice area, their legal advice and their professional duties.

In short, the Guidance highlights the many emerging risks to organisations caused by climate change, and the legal issues flowing from this ("climate legal risks"). Against this backdrop, the Guidance states that there may be an increasing expectation that reasonably competent solicitors are able to identify, and advise clients on, these emerging climate legal risks as part of their day-to-day practice.

The Guidance is part of TLS's ongoing work under its Climate Change Resolution to foster a "climate-conscious" approach to legal practice across the profession, by educating and equipping solicitors to approach legal matters in a way which takes into account their climate impacts and which is also compatible with their professional duties.

To drive this forward, TLS has subsequently published further topic-specific guidance for solicitors on climate risk governance and greenwashing risks, to help them identify the climate-related issues that may be relevant to their practice areas.

According to the Guidance, the Solicitors Regulation Authority (SRA) is supportive of its content, but the Guidance should not be interpreted as its regulatory position on these matters.

Why does it matter?

At a time when the devastating impacts of global temperature rise are increasingly felt, and the UN's recent global stocktake synthesis report highlights the scale of ambition still required to limit global warming to 1.5°c, TLS acknowledges the unique role that the solicitors' profession can play in helping to mitigate the climate crisis. As trusted legal advisers, solicitors are uniquely placed to guide clients through the challenges presented by climate change, including by advising them on climate legal risks to their organisations.

The Guidance includes a number of examples of such risks and highlights solicitors' potential roles in advising on them. For corporate lawyers, this could include advising on the impact of increased physical climate risks (eg extreme weather events affecting business operations or supply chains) on a given transaction and ensuring these are properly accounted for in the contractual documentation. For commercial lawyers, this could include advising on new climate-related legislation or regulation which could increase clients' legal exposure, such as new consumer protection rules tackling "greenwashing" in advertising and marketing campaigns. For disputes lawyers this could include advising on global developments in climate litigation and the increasing litigation risk to clients from environmental NGOs and civil society groups.

The increasing impact of climate risks on clients' organisations, and the expanding scope of legal issues resulting from this, have a direct bearing on solicitors' professional duties. According to the Guidance, there may be an increasing expectation that reasonably competent solicitors are aware of the impact and the relevance of climate change to their practice areas and are able to advise clients accordingly, in line with their professional duties, including their duties to:

- **exercise reasonable care and skill** – solicitors may need to look beyond the narrow scope of a client's instruction to consider whether, and to what extent, climate legal risks are relevant
- **warn clients about potential risks** – whilst context-dependent, solicitors may need to warn clients about potential climate legal risks that materialise or are reasonably incidental to the work being carried out. This expectation is likely to be greater in respect of larger client organisations that have made their own public net zero commitments and are therefore deemed to have more specialist knowledge in the area
- **disclose material information to clients** (SRA Rule 6.4) – solicitors who, in the course of acting on a retainer, become aware of climate legal risks impacting the client's interests in the scope of the retainer should disclose those risks in a clear and understandable way and
- **provide a competent service to clients** (SRA Rule 3.2) – solicitors should maintain the level of competence and legal knowledge needed to practise effectively, taking into account changes in their role, practice context and the law. The Guidance highlights that the changing nature of solicitors' professional duties in the context of climate change may require solicitors to undergo further professional training and development to ensure they can competently advise clients on climate legal risks, or know when to refer the client for expert or additional advice.

The Guidance also makes clear that when considering solicitors' professional obligations in the context of climate change, the SRA Principles will also be relevant, including the requirements to act with integrity and in a way that upholds the public trust and confidence in the solicitors' profession (amongst others). Solicitors will need to take a balanced approach to meeting all of the SRA Principles however where the principles conflict, solicitors should prioritise those that safeguard the wider public interest. In the context of climate change, the interpretation of the SRA Principles and standards of professional conduct may well evolve over time as our understanding of the impacts and risks of the climate crisis continue to develop.

Finally, the Guidance sets out practical considerations for solicitors to have in mind when taking on new clients, or new instructions, where climate legal risks may be relevant.

The Guidance is an important first step in opening up the discussion and guiding the solicitors' profession through the legal professional implications of climate change. TLS reiterates, however, that the Guidance is just that, guidance. TLS makes clear that whilst the Solicitors Regulation Authority (SRA) is generally supportive of the Guidance, it should not be interpreted as the SRA's regulatory position (which, we understand, the SRA is currently considering).

TLS is not the only professional legal body in the UK considering the impacts of climate change for its members. The Bar Council's "Climate Crisis Working Group" is currently exploring how best to support barristers in understanding how their ethical obligations are impacted by climate change. Further updates are expected to follow.

Key dates: The Law Society guidance was published on 19 April 2023. Subsequent guidance followed in October 2023.

What actions should you take?

For solicitors (whether in-house or in private practice):

- take time to read the Guidance in full and consider how it might impact your own legal practice. Discussing this with colleagues in the same practice area can be a fruitful way to share ideas
- identify any obvious gaps in your current knowledge or skillset and consider what further training or support you might need to address these. Raise these with your line managers and/or learning support teams
- explore TLS's wider toolkit for further guidance on the implications of climate change for different practice areas
- for junior lawyers, consider joining Legal Voices for the Future, a collaborative learning forum and membership group which runs monthly knowledge sessions on a range of environmental issues and their intersections with the law
- direct any regulatory queries to your internal Risk and Compliance team, external counsel, or the SRA
- look out for regulatory guidance from the SRA in due course.

For law firm leaders:

- take time to read the Guidance and consider its implications for your firm and its lawyers. In particular, consider any current or potential implications for your firm's PII insurance, client retainers, policies on acceptance of new clients/ instructions and internal risk management processes
- consider whether any internal guidance or training sessions for staff are needed to help them understand the implications of climate change for their professional duties. Consider whether it would be helpful to adopt an official firm policy or position on this to guide staff
- consider what further support and resources your staff may need to enable them to competently identify and advise on climate change legal risks in the context of their work.

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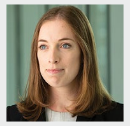

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Horizon scanning

Horizon scanning

Expanding the scope of due diligence to cover ESG risks

What is happening?

In 2023 we witnessed significant advancements in the drive to impose additional responsibilities on corporations to identify, prevent and mitigate environmental, social and governance (ESG) risks and impacts across their third parties and supply chains.

The Corporate Sustainability Due Diligence Directive (Due Diligence Directive), will mandate that companies conduct ESG due diligence as a means of identifying, preventing and mitigating specific ESG related risks and impacts in their business activities and supply chains. These European Union (EU) developments are anticipated to capture UK corporations that meet threshold requirements and reflect a growing momentum in ESG and Corporate Social Responsibility to hold corporations accountable for managing environmental and human rights risks.

On 14 December 2023, following lengthy negotiations the EU Council and Parliament reached a political agreement on the ground-breaking Due Diligence Directive. It is anticipated that the Due Diligence Directive will enter into force in Spring 2024.

Why does it matter?

Many companies will need to review and update the approach they take to conducting due diligence on third parties to ensure that they, along with entities in their supply chain, conduct their business in accordance with existing international voluntary standards that govern responsible business conduct, including those contained in the United Nations' Guiding Principles on Business and Human Rights, and OECD Due Diligence Guidance for Responsible Business Conduct.

The Directive, which mandates corporations to identify, prevent, and mitigate human rights and environmental impacts in their operations and supply chains, will complement the Corporate Sustainability Reporting Directive (CSRD). The CSRD came into force in January 2023 and imposes harmonised ESG reporting standards for large companies, requiring extensive disclosure on over 1,000 data points across 10 key ESG topics. The CSRD has transformed ESG reporting and applies to almost 50,000 companies, including non-EU companies with subsidiaries operating within the EU or listed on EU regulated markets. This includes UK companies with significant activity in the EU.

Under the Due Diligence Directive, existing and potential human rights and environmental risks and impacts will need to be identified as part of the due diligence process. Failure to satisfy these obligations could attract administrative penalties or civil liabilities. Once in force, supervisory authorities in each member state will have new powers to "name and shame" and take injunctive action against companies that fail to comply. Member states will also have the power to issue fines of up to 5% of net global turnover. Additionally, the Due Diligence Directive will require companies to develop and implement a climate transition plan to ensure that their business models and strategies are aligned with the 1.5°c temperature goal under the Paris Agreement.

The Due Diligence Directive is set to have a direct impact on both EU companies and non-EU companies operating within the EU, provided they meet certain employee and turnover thresholds. The Directive will affect EU companies with over 500 employees and a global turnover of over €150m, and non-EU companies that generate a €300m turnover in the EU. Lower thresholds apply to both EU and non-EU companies that are active in high-risk sectors such as textiles and mining.

The Due Diligence Directive is anticipated to apply to a number of larger UK companies due to its broad scope. This includes UK businesses with substantial EU activities, EU parents, or involvement in EU supply chains. Smaller UK businesses that operate in supply chains of in-scope EU companies will also be caught by the requirements of the Directive. Therefore, even if your business is based in the UK it may still be subject to the Due Diligence Directive. The obligations and expectations of the Due Diligence Directive will present unique and complex compliance challenges for companies, particularly those with significant global supply chains in high-risk sectors. Therefore, proactively preparing for the Directive can help enhance your compliance framework, mitigate risks, and contribute to a more sustainable and responsible business operation.

In the UK, calls for a similar legal obligation and offence have picked up pace. In November 2023 a Private Members' bill was placed before the House of Lords seeking an even more ambitious regime for mandatory environmental and human rights due diligence. Whilst only a minority of Private Members' bills become law, they are often successful in garnering MP support behind an issue to influence the government's agenda. Combined with a recent letter of support from UK investors representing £3.9tr in assets, the momentum is gathering for the UK to legislate its own due diligence requirements in the near future.

What actions should you take?

Your company's existing due diligence system may already serve as a solid foundation for compliance with the Due Diligence Directive. Below are just some of the steps you may wish to take to help your company prepare.

- **Review and update:** review your current due diligence system to identify any gaps in relation to the requirements of the Due Diligence Directive. This could involve assessing your current policies, procedures, and practices, or considering alternative technological solutions to conducting due diligence in a manner compliant with additional ESG obligations under the Due Diligence Directive.
- **Risk assessment:** conduct a risk assessment to identify potential and actual adverse impacts on human rights and the environment in your operations and value chains.
- **Prevention and mitigation:** develop and implement strategies to prevent, mitigate, and where possible, cease adverse impacts.
- **Monitoring and reporting:** establish processes for monitoring the effectiveness of measures implemented. Regularly report on your due diligence policies, processes, and findings.
- **Stakeholder engagement:** engage with relevant stakeholders, including potentially affected groups and other relevant third parties, throughout your due diligence processes.
- **Grievance mechanisms:** establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

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Horizon scanning

Product safety: what does the future hold?

What is happening?

On 2 August 2023, the Smarter Regulation: UK Product Safety Review, was opened as part of the government's programme of regulatory reform. This followed a call for evidence in March 2021 issued by the Office for Product Safety and Standards (OPSS) to look into the UK's system of product safety regulation.

Why does it matter?

The new regime seeks to modernise the way in which product safety is regulated in the UK and will likely have significant implications on considerations of product safety for online marketplaces, AI and the ESG agenda.

The aims of the legislation are to:

- ensure businesses' obligations are proportionate to the hazard presented by their products, exploring how to reduce compliance costs for lower risk products and make the conformity assessment process easier where possible
- shift the balance between regulations and industry-led standards to enable a more agile and responsive regulatory framework, allowing businesses greater scope to innovate when producing safe products
- use of digital solutions, such as voluntary e-labelling, to reduce business costs and explore how digital options can be utilised to reduce burdens
- address concerns regarding the ease with which unsafe products can be sold online, creating a fairer playing field so that shopping online is as safe as on the high street
- enhance the leadership and coordination role of the Office for Product Safety and Standards, alongside addressing identified enforcement gaps.

There is a focus on bringing products to the market, online supply chains, along with compliance and enforcement.

The government has suggested that the new regime will reduce the burden on businesses of regulation, to encourage innovation and consumer choice, without compromising safety.

One of the main proposals to ease the burden on businesses is the use of e-labelling to provide conformity markings, which is especially important for businesses after the government's recent U-turn on the continued use of the CE marking in the UK. However, the true impact of this proposal is limited because there are a number of exclusions that apply, including the need for devices using e-labelling to have integrated screens or be products designed for use with a screen. Also, any product safety warnings will still need to be provided physically with the product.

In order to streamline enforcement, the new regime will set out the key functions and principles which Local Authorities should apply when assessing product safety incidents and when using their enforcement powers.

Under the proposals, all product recalls and product safety incidents will need to be sent to the OPSS instead of separate Local Authorities which could in fact increase the burden on businesses and run contrary to the government's aims.

Examples of Stakeholder responses to the Consultation.

- **Which?** "There needs to be a balance between the use of regulation and voluntary standards to ensure businesses and enforcement agencies have clarity about safety requirements for products."
- **British Retail Consortium** "We feel that AI/smart tech is an area that is increasingly becoming part of consumers' lives, and should therefore be considered in further detail."

What actions should you take?

Whilst the Consultation closed on 24 October 2023, it is likely that any significant change to the regulatory landscape of product safety in the UK will take time.

With proposals suggesting less prescriptive rules, that are more proportionate than the current regime, it is difficult for businesses to prepare for what may come with the new legislation.


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Future of food safety assessments

What is happening?

In June 2023 the Food Standards Agency (FSA) introduced a revised model for delivery food standards controls which was produced following a consultation in late 2022. A phased rollout started in the summer of 2023 and the deadline for local authorities to transition to the new model is the end of March 2025.

Why does it matter?

This new model is aimed at helping local authorities take a more risk-based and intelligence-driven approach to the inspection of Food Business Operators (FBOs).

The changes will only come into force in England and Northern Ireland and the Food Law Code of Practice was updated to include a:

- new foods standards risk rating scheme to create a risk-based approach to inspections
- decision matrix to determine the frequency at which food standards controls should be delivered to a FBO as a result of any risk assessment.

As part of this new model the risk profile for a FBO has to be determined, and this is based on two separate elements.

- **Inherent risk profile:** issues assessed include scale and supply of distribution, ease of compliance, complexity of the supply chain and the potential for product harm.
- **Compliance assessment:** issues assessed include management systems and procedures, allergen information, current compliance level along with the confidence in management.

The decision matrix will use the above elements to create two scores which are combined to determine the minimum frequency that official controls much be carried out and this ranges from 1-120 months.

Resourcing will potentially be an issue to ensure local authorities are able to fulfil the requirements of the new model and this was highlighted by responses to the consultation which identified the general lack of suitably qualified officers.

However, a key aim of the new approach is to allow local authorities to focus their resources to the inspection of higher risk FBOs. It will also give them flexibility to use any of the office control methods and techniques available as long as they are effective and appropriate in the circumstances, including the use of remote assessments and intervention for lower risk businesses.

This approach should encourage compliance from FBOs who will, as a result, benefit from less frequent inspections if they found to be lower risk businesses in relation to food safety and hygiene.

Key date:
March 2025: A phased rollout started in the summer of 2023 and the deadline for local authorities to transition to the new model is the end of March 2025.

What actions should you take?

FBOs based in England and Northern Ireland should read the new Food Law Code of Practice and familiarise themselves with the changes; including the new risk rating scheme and decision matrix.

Steps should then be taken to ensure compliance with the new risk-based model and communication with their local authority will help identify when they are proposing to transition to the new model as it will differ across the local authorities.


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Horizon scanning

The Business in Europe: Framework for Income Taxation (BEFIT)

What is happening?

The European Commission has recently adopted a package of measures relating to large cross-border businesses in the EU. The Business in Europe: Framework for Income Taxation (BEFIT) is intended to reduce tax compliance costs for large businesses, primarily those who operate in more than one Member State, and make it easier for national authorities to determine which taxes are rightly due.

BEFIT is intended to build on the OECD/G20 international tax agreement on a global minimum level of taxation and the Pillar Two EU Directive. BEFIT will include the following.

- **Common rules to compute the tax base at entity level**
  All companies that are members of the same group will calculate their tax base in accordance with a common set of tax adjustments to their financial accounting statements
- **Aggregation of the tax base at EU group level**
  The tax bases of all members of the group will be aggregated into one single tax base. This will entail cross-border loss relief, as losses will automatically be set off against profits across borders, as well as increased tax certainty in transfer pricing compliance
- **Allocation of the aggregated tax base**
  By using a transitional allocation rule, each member of the BEFIT group will have a percentage of the aggregated tax base calculated on the basis of the average of the taxable results in the previous three fiscal years

The new rules will be mandatory for groups operating in the EU with an annual combined revenue of at least €750m, and where the ultimate parent entity holds, directly or indirectly, at least 75% of the ownership rights or of the rights giving entitlement to profit. For groups headquartered in third countries, their EU group members would need to have raised at least €50m of annual combined revenues in at least two of the last four fiscal years or at least 5% of the total revenues of the group.

The rules will be optional for smaller groups, which may choose to opt in as long as they prepare consolidated financial statements.

The profits and losses of related parties that are not members of the BEFIT group (eg because they are not in the EU) will not be aggregated in the group tax base. This means that their losses would not be relieved across borders and transfer pricing would still apply in the transactions between these entities and BEFIT group members.

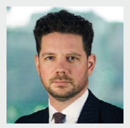
Why does it matter?

The Commission has acknowledged that the current systems of corporate income taxation in the EU give rise to high complexity and an uneven playing field for businesses, which impedes the proper functioning of the internal market and hampers the prospect for achieving its potential in terms of efficiency gains. If implemented, the BEFIT measures have the potential to bring significant savings to large businesses operating in the EU. The EU itself has indicated that the BEFIT measures could reduce business tax compliance costs by up to 65%.

Key date:
If adopted by the Council, the proposals are intended to come into force on 1 July 2028.

What actions should you take?

Businesses operating in the EU should familiarise themselves with the BEFIT measures, consider how the measures may affect their tax compliance costs and take tax steps to ensure they are best placed to take advantage of the measures if implemented.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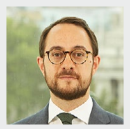
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RPC Raid Response

Your dawn raid survival toolkit

While you may invest significant time and money in maintaining compliance processes and procedures, even the best organised businesses can become the subject of an unannounced visit by a regulatory or criminal investigatory authority, commonly known as a dawn raid. Often, this is not due to any suspected wrongdoing by the organisation itself, but because one of their clients or customers is under investigation by regulators (such as HMRC, the SFO, the NCA and the FCA) and simultaneously being raided.

A dawn raid is one of the most stressful events you can experience. This is because getting it wrong can have such serious repercussions, including significant financial and reputational damage or even prison time for individuals. We have significant experience of dawn raids, and have assisted clients from a range of industries and backgrounds to navigate their way through this challenging time. Drawing on this experience, we have developed a truly market leading dawn raid response toolkit to assist you should the unthinkable happen.

RPC Raid Response is a free toolkit which provides all the guidance you need to successfully navigate and manage a raid in one easy to use interactive app.

Key features of the toolkit include:

- live report incident button which instantly connects to RPC's specialist lawyers
- interactive step-by-step guide on how to manage a dawn raid
- task list has a date and time stamp along with space for comments which can be used for evidential purposes
- ability to upload photos of key documents eg search warrant
- ascertain status of employees
- detailed Resources Library including FAQ's.

You can download RPC Raid Response via the Apple App Store and Google Play for free.

Download on the App Store

ANDROID APP ON Google play


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Recent regulatory developments

In this section we discuss recent regulatory developments, explore what these changes mean for businesses and the regulatory landscape, and answer some frequently asked questions.

Developments discussed include the EU Carbon Adjustment Mechanism, the change in leadership at the SFO, the ICO's statement on cookie banners and the CMA's guidance on its Green Agreements Guidance.

Customs – Advance Valuation Ruling Service (AVRS): FAQs

What is the Advance Valuation Ruling Service?

The Advance Valuation Ruling Service (AVRS) was first launched by HMRC in April 2023. The AVRS enables traders to apply for a legally binding Advance Valuation Ruling (AVR) from HMRC on the customs value of their goods. The AVR is valid for three years.

The accuracy of valuing goods crossing the UK border is essential, as the value will relate precisely to the duties and taxes payable on imports. The trader is responsible for ensuring that the correct valuation method is used when working out the customs value of goods imported into the UK.

AVR's are particularly useful for businesses who will be importing the same goods over a long period of time.

Who can use the AVRS?

You can apply for the AVRS if you are a trader using your own EORI number starting "GB". In addition, the AVRS is now also available to agents who represent traders. Use of the AVRS is not mandatory.

What will need to be included in an AVR application to HMRC?

In order to apply for an AVR, traders and/or agents will need:

- a Government Gateway user ID and password (you can create one when you apply)
- to identify the valuation method that they think is best to value the relevant goods (find out about methods for working out the customs value of the imported goods). As part of this, traders and/or agents may need to provide supporting documents to HMRC which are relevant to the goods being imported, such as:
  - commercial invoices from overseas suppliers
  - purchase orders
  - copies of previous import entries
  - a breakdown of manufacturers' costs
  - commercial agreements with suppliers
  - any other relevant documents.

HMRC can refuse an application if:

- you are not planning to import the goods
- not all of the necessary information about the goods is provided
- the goods have already been cleared through customs import procedures.

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How long does it usually take to obtain an AVR decision from HMRC?

After an application has been made, HMRC should confirm whether the application for a ruling has been accepted within 30 days. The correct valuation method should be confirmed within 90 days.

A successful AVR decision will include:

- the start and end date of the ruling
- a unique reference number that identifies the ruling
- the name and address of the business or person who holds the ruling (this cannot be transferred)
- a detailed description of the goods (including any specific marks and numbers) which can be used to easily identify the goods at the frontier
- an explanation of how HMRC came to their decision.

How do you use an AVR ruling, if successful?

- Tell the person completing your import declaration that your goods have been given an AVR.
- Give them the correct customs valuation method and the AVR reference to use when completing the declaration.
- Declare that you have an AVR in the Customs Declaration Service (CDS) as detailed in the CDS Declaration and Customs Clearance Request Instructions.

How long does an AVR decision last for?

The ruling will be legally binding for three years. The trader can use the ruling to calculate the value of their goods on their import declaration.

Can you appeal an AVR decision made by HMRC?

If you do not agree with HMRC's decision, traders and/or agents can request a review by an independent HMRC Officer by writing to the Advance Valuation Ruling Team, details of which will be included in HMRC's decision.

Alternatively, you can appeal directly to the tribunal service, who are independent of HMRC. If you disagree with the outcome of an HMRC review, you can still appeal to the tribunal following that review.

To read more on AVRS and to apply, see here.

What impact has AVRS had?

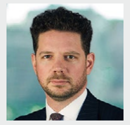
The biggest impact of the AVRS has been in providing legal certainty for traders and/or agents in respect of the customs valuation of certain goods prior to importation and for three years thereafter.

Key things to note about the AVRS

- Traders/agents need to apply for a ruling before all customs procedures have been completed – decisions cannot be made retrospectively.
- HMRC should confirm the application for a ruling has been accepted within 30 days.
- The correct valuation method should be confirmed within 90 days.
- Any AVR decision lasts for 3 years.
- A separate application will need to be completed for each type of good that requires an AVR decision.
- The AVR decision will refer to the name and address of the business or person who holds the ruling – this is who has the legal right to use it – AVR decisions are non-transferable.

Recent regulatory developments

EU Carbon Border Adjustment Mechanism (EU CBAM)



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From 1 October 2023, the European Union's Carbon Border Adjustment Mechanism (EU CBAM) began its gradual phasing-in period. The regulations became effective on 17 May 2023 and are to be fully implemented in January 2026.

The EU CBAM forms part of the bloc's ambition to fight climate change and reach climate neutrality by 2050. It sets out to complement and bolster the existing EU Emission Trading System (ETS) which is a carbon pricing mechanism established in 2015 in the EU.

The stated aim of the EU CBAM is to tackle "carbon leakage" which is a phrase used to describe the risk that carbon costs could lead businesses to move their operations to countries with less stringent carbon pricing mechanisms. It seeks to ensure that imported goods are subject to a carbon price that is equivalent to the carbon price of production in the EU. It is also designed to encourage sustainable practices to reduce carbon footprint globally.

In the UK, the government ran a consultation between March and June 2023 on a range of potential policy measure to mitigate future carbon leakage risk. On 18 December 2023, the government announced the UK Carbon Border Adjustment Mechanism, to be implemented by 2027. Further details on the design and delivery of a UK CBAM will be subject to consultation in 2024.

What impact has it had?

The way that the EU CBAM is designed to work is that each year from 1 January 2026, importers or indirect customs representatives (authorised CBAM declarants) for certain goods imported into the EU must purchase CBAM certificates. A CBAM certificate acts as an instrument with which importers can pay for the price of the emissions embedded in the goods they import. The price of the certificates will be calculated depending on the weekly average auction price of EU ETS allowances expressed in euros per tonne of CO_2 emitted.

By 31 May each year, the EU importer is required to declare the quantity of goods, and the embedded emissions in the goods imported in the preceding year. At that point the importer surrenders the corresponding number of CBAM certificates.

If importers can prove that a carbon price has already been paid during production of those goods (eg in the country of origin), then a corresponding amount can be deducted from the final bill.

For now, the EU CBAM applies to six sectors which are considered to be carbon-intensive due to significant GHG emissions associated with their production processes, the risk of carbon leakage and the practical feasibility. Those six sectors are: cement, electricity, fertilisers, irons and steel, aluminium and hydrogen. Certain goods are exempt, such as imports from countries covered by the ETS or countries with fully linked domestic ETS such as EEA and EFTA countries. Consignments and goods with a value which does not exceed EUR €150, and goods which are used for military activities are also exempt.

As of 1 October 2023, the transitional period includes a reporting mechanism and importers will only have to start paying the CBAM financial adjustment from 2026. Importers have to report at the end of each quarter, emissions embedded in their goods subject to CBAM.

A CBAM report is submitted using the CBAM Declarant Portal and must include the following information:

- the total quantity of each type of goods
- the actual total embedded emissions
- the total indirect emissions
- the carbon price due in a country of origin for the embedded emissions in the imported goods, taking into account any rebate or other form of compensation available.

During the transition period, importers of CBAM goods will not need to be authorised. Verification by an external independent body will only be mandatory from 2026.

UK businesses supplying to the EU need to collate the relevant data to allow their EU customers to meet their reporting obligations outlined above.

The amount of embedded emissions in the products that UK businesses sell impacts the additional costs that importers will bear through CBAM certificates. This will inevitably have an impact on the price of products and the ability of UK businesses to compete in the market. Therefore, a key consideration for UK businesses will be how to reduce those embedded emissions.

Considerations for businesses

Whilst the EU CBAM only currently affects certain industries, UK businesses should be prepared for the possibility of increased reporting requirements and the resulting market pressures to reduce embedded emissions in the products they sell.

In addition, now that the intention to implement a UK CBAM regime has been announced, it would be prudent for UK importers to consider how they might be impacted by and able to meet future obligations and to audit their current supply chains accordingly.

How does HMRC's "mis-handling" of R&D enquiries affect businesses?

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In recent years HMRC has been focussing its attention on claims to tax credits in respect of expenditure on research and development (R&D credits). In 2022, it updated its guidance in respect of claims for R&D credits where the research/development activity was carried out on a sub-contracted basis with a view to avoiding "double dipping" – where both the principal company and the sub-contractor claimed credit for the full amount of relevant expenditure incurred. It is fair to say that there have been a significant number of businesses "chancing their arm" by claiming R&D credits to which they have not been entitled, and a number of firms that have sought to market R&D credits to such businesses.

HMRC has therefore focussed its attention on tax returns in which R&D credits are claimed. However, it has not dedicated sufficient resource to the relevant enquiries, which are frequently being run by junior HMRC caseworkers who lack both the necessary training and experience to manage an enquiry into a complex corporation tax return. Frequently, claims for R&D credits have been denied on spurious grounds – including in reliance on "research" by the HMRC officer which has consisted of nothing more than looking at internet search engine or Wikipedia results which suggest that the R&D in respect of which credits have been claimed is not work towards a genuine innovation – and enquiries are being conducted solely by correspondence as HMRC will not agree to a meeting with the businesses affected so that they can explain the nature of the research in respect of which they have validly claimed R&D credits.

What impact has it had?

This has had a severe impact on businesses that are affected, many of which are, by their very nature, start-ups for which cashflow can present issues. For claims to R&D credits that have not yet been paid, businesses may be constrained in the future research that they can carry out without the benefit of the R&D credits for legitimate R&D activities that they have already undertaken. Even for claims that have been paid, but where HMRC is seeking to recoup funds, the spectre of significant penalties and the prospect of having to find money to repay HMRC where the R&D credits have already been spent on R&D activities will loom large. For any affected business, even a routine enquiry from HMRC can take up a significant amount of management time and entail significant expenditure on professional fees; this is particularly the case where that enquiry is understaffed by HMRC with personnel who do not have the necessary expertise to understand the R&D activities that are the subject matter of the claims.

Considerations for businesses

Businesses whose claims to R&D credits are the subject matter of an enquiry from HMRC may feel as though they are banging their heads against the proverbial brick wall. A key method of progressing these enquiries is to ensure that the matter is placed before someone more senior, or in a different team, at HMRC. While it may seem counter-intuitive to suggest that the best means of resolving a dispute is to escalate it, even by going so far as to apply to the First-tier Tribunal for a closure notice to bring HMRC's enquiry to an end, unfortunately, in the context of R&D enquiries, this can be the most effective way of progressing matters and enabling businesses to focus on their core activities.

Recent regulatory developments

Who regulates the regulators?

The UK Government has launched a consultation and call for evidence to understand what works and what could be improved in how regulators operate to deliver for the sectors they regulate. This forms part of the government's Smarter Regulation reform programme, which emphasises "using regulation where necessary and ensuring its design and use is both proportionate and future-proof". It is aimed at identifying steps that could be taken to reform various regulatory regimes.

The deadline for submitting responses was 7 January 2024.

The government's call for evidence

In its call for evidence, the government has invited feedback from a broad spectrum of stakeholders, encouraging insights from central government public bodies with regulatory functions across the entire UK, Britain, or England & Wales. However, the government has specified its desire for detailed examples and case studies derived from experiences interacting with individual regulators.

While welcoming responses from various sectors in the economy, the government has clarified that it is not seeking views on financial services regulators and regulations, an area overseen by HM Treasury, where recent industry-welcomed reforms have been implemented.

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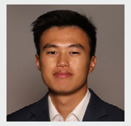

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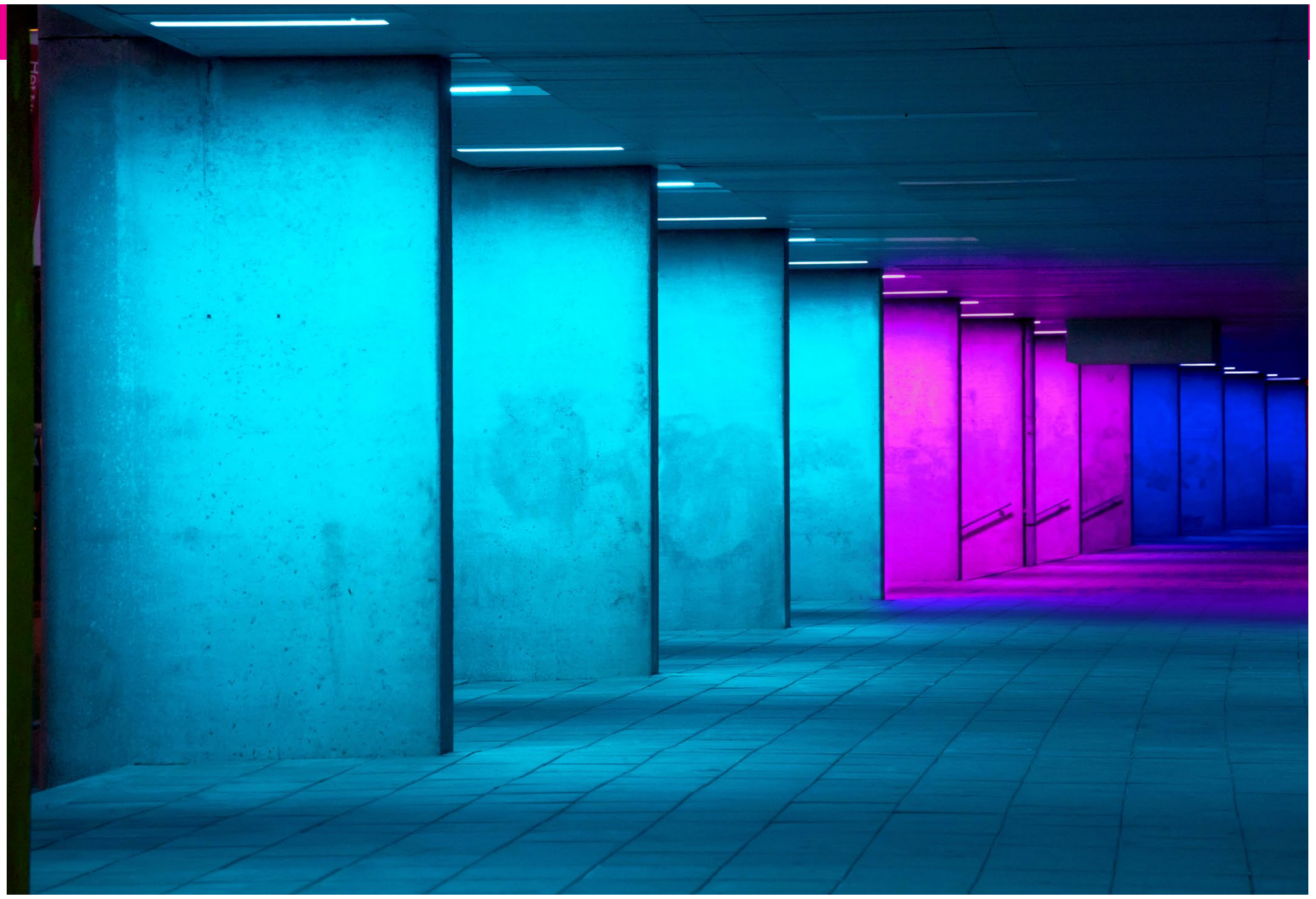
It comprises eight sections, with questions on:

1. The landscape of regulation
2. Complexity and ease of understanding the regulatory system
3. Regulator ability, responsiveness, and skills
4. Proportionality in implementing regulation
5. Process and governance
6. Regulator performance
7. Concluding questions on suggestions for reform on UK regulators
8. Closing questions on the questionee's interaction with UK regulators and regulated businesses



Potential outcomes of the consultation

The potential outcomes of the consultation are contingent on the feedback received and subsequent analysis. However, speculative avenues for reform include:

- **streamlining of regulatory process:** addressing redundant or complex procedures, reducing paperwork, and expediting regulatory approval processes
- **legislative changes:** amendments or introductions to address gaps in regulatory coverage, with an emphasis on data privacy, algorithmic transparency, and ethical considerations
- **increased transparency:** initiatives to enhance transparency in regulatory processes or increasing ease of public access to information, decision-making criteria, and rationales behind regulatory decisions
- **increased accountability:** introduction of mechanisms to ensure comprehensive oversight and alignment with government policies
- **integration of technology:** digital transformation initiatives and the encouragement or limitation of the use of digital tools within regulatory processes
- **further training and feedback mechanisms:** investment in training for regulatory professionals and the refinement of feedback mechanisms for ongoing dialogue.

While these examples are hypothetical and have not been publicly deliberated or endorsed, they outline potential directions for regulatory development and showcase prospective positive shifts in regulatory dynamics.

The impact on businesses

The consultation is an opportunity for the government to proactively address contemporary regulatory challenges, particularly amidst the backdrop of criticisms that have been levied against regulators.

In the process of reviewing the responses, the government will need to bear in mind the overarching pillars of the Department of Business and Trade (which leads the Smarter Regulation reform programme), reforming existing regulations to minimise regulatory burden and ensuring they are contemporary and forward looking, making regulation a last resort and not a first choice, and ensuring a well-functioning regulatory landscape.

These principles reflect a commitment to shaping a regulator environment that is conducive to business growth. It appears that, in pursuing these objectives, the Department for Business and Trade takes on a role that can be likened to a quasi-regulator of the regulatory system itself, laying the groundwork for a resilient and business-friendly future.

Recent regulatory developments

A new way to safeguard data flows to the US for the EU and UK

The EU and UK have granted limited recognition to the US as a jurisdiction offering an adequate level of protection over EU and UK personal data and data subject rights.

Historically, data flows from the EU to the US had to be safeguarded in the absence of an adequacy decision by the European Commission. This typically involved the implementation of EU Standard Contractual Clauses (SCCs). Following changes to US intelligence-gathering, the EU-US Data Privacy Framework (DPF) has been adopted by the EU as a lawful basis for trans-Atlantic data transfers between EU data exporters and US data importers, provided that those importers have certified that they comply with a prescribed set of data protection principles under the DPF. While this means that certain cross-border transfers of personal data to the US from the European Economic Area (EEA) now do not require the use of SCCs and Transfer Risk Assessments, it is almost inevitable that the DPF will come under heavy scrutiny and likely attack from activist groups. It is expected that the organisation run by Max Schrems (None Of Your Business) will launch a legal challenge in early-to-mid 2024. It remains to be seen if the DPF can remain standing where the Safe Harbour and Privacy Shield before it failed to do so.

In addition, the new UK-US data bridge, an extension to the DPF, will allow UK businesses to transfer personal data to certified US organisations without needing to put in place the typical safeguards (eg SCCs) or performing a transfer risk assessment.

The UK Secretary for Science, Innovation and Technology laid regulations before the UK Parliament implementing a UK–US data bridge which took effect on 12 October 2023. The data bridge allows UK businesses and organisations to transfer personal data to US businesses certified under the UK Extension to the DPF, provided the latter comply with their obligations under the DPF. US businesses certified with the DPF commit to complying with certain GDPR-style privacy obligations (eg purpose limitation and data minimisation).

What impact has it had?

The DPF and the data bridge are welcome developments as they will cut down time taken for businesses to agree and implement data transfers to the US by eliminating the need for transfer risk assessments and SCCs. They should also provide UK and EU data subjects with confidence that their data transferred to the US will be protected in line with requirements in their home country.

Businesses may benefit from cost savings by not needing to implement SCCs or carry out the appropriate risk assessment, although this is with the caveat that the new mechanisms require an annual fee to be paid by registered entities, which themselves may be subject to additional scrutiny by regulators to ensure ongoing compliance with the schemes' rules.

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Considerations for businesses

Businesses with significant operations in the US and EU should consider the benefits of this new mechanism to cover intra-group transfers. Businesses should also check if any US-based suppliers have certified under the DPF or data bridge. However, it may be prudent to retain and continue using existing SCCs until both mechanisms have withstood the anticipated upcoming legal challenges. Also, in December 2023, the ICO issued new guidance on transfer risk assessments for data transfers to the US, simplifying the use of SCCs for UK-US transfers.

Changing of the guard: a new Director of the Serious Fraud Office (SFO)

Nick Ephgrave QPM was appointed as the new Director of the Serious Fraud Office (SFO) on 25 September 2023, replacing outgoing Director Lisa Osofsky. The SFO has the power to investigate any corporate or individual suspected of serious fraud or corruption offences (amongst others) under English law.

Mr Ephgrave will be responsible for determining the SFO's priorities for the next five years, including the investigations and prosecutions that are pursued. He is the first non-lawyer to serve as SFO Director, having worked in law enforcement with the police for the past 30 years. Mr Ephgrave previously worked as Assistant Commissioner of the Metropolitan Police Service and Chief Constable for Surrey Police. He has also held various roles on the Criminal Procedure Rules Committee and at the Sentencing Council and served as Chair of the National Police Chiefs' Council Criminal Justice Co-ordination Committee.

What impact has it had?

Mr Ephgrave's appointment signals the start of a new chapter at the SFO. He takes charge shortly after the agency dropped two of its most high-profile cases, the investigations into Rio Tinto and ENRC, and he therefore has a clean slate from which to allocate many of the resources available to him.

We expect there will be a series of changes under his leadership, in particular regarding: (i) the use of new offences and SFO powers that have just come into force; and (ii) updates to the SFO's procedures around disclosure. These are discussed in further detail below.

The timing of Mr Ephgrave's arrival is significant as it coincides with the arrival of an arsenal of new powers for the SFO. In particular, corporate criminal liability has been expanded materially by the Economic Crime and Corporate Transparency Act 2023 (the Act), which has just come into force. See our recent article for full details.

- Under the Act, a new failure to prevent fraud offence has been introduced for corporates. This new offence is expected to make it easier for the SFO to pursue companies where fraud takes place for their benefit
- In addition, the test for corporate criminal liability has also been expanded. Previously, only the individuals that made up the "directing mind and will" of the company could create liability for the company itself. Under the Act, this group is extended to include anyone considered to be a 'senior manager' of the company, which is a much broader group. It is expected that this will make it easier for the SFO to attach corporate liability to the actions of individuals, especially for larger organisations, which typically have more complex, multi-layered management structures. This has been a significant challenge for the SFO in recent years
- Lastly, the Act also provides the SFO with additional pre-investigation powers. Previously, the SFO was only able to use its powers of compulsion before opening a formal investigation for cases of potential bribery and corruption. The Act removes that limitation, allowing the SFO to use these powers in respect of a wider range of economic crimes, including fraud

These external changes will have an impact on the SFO's approach, but Mr Ephgrave will also bring his own priorities to the table as well. Mr Ephgrave earned a reputation with the police for making significant improvements to its practices around disclosure exercises in prosecutions and investigations. The SFO has faced significant challenges with its disclosure processes in recent years, with prosecutions of corporates collapsing due to disclosure issues, such as the failed prosecutions of

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senior employees at Serco and Unaoil. No doubt improving disclosure processes at the SFO will be a key objective for Mr Ephgrave.

The SFO has already shown its teeth under Mr Ephgrave's leadership regarding its new investigation into the law firm Axiom Ince, which was closed down by the legal regulator when £60m went missing from its client account. The SFO carried out nine dawn raids and arrested seven individuals upon commencing this investigation in November, showing Mr Ephgrave is keen to use the range of tools at the SFO's disposal.

Considerations for businesses

Organisations may wish to observe the types of investigations opened by the SFO in the coming months and take note of speeches made by the senior leadership of the SFO as this will likely give an indication of Mr Ephgrave's plans for the SFO over the next five years.

These new powers under the Act have supercharged the SFO's ability to pursue fraud cases in a way it has not been able to before. The combination of these new powers and the closure of the SFO's two largest long-running investigations into Rio Tinto and ENRC (without charges being brought), means there will be increased capacity and appetite at the SFO to open new investigations. We expect to see an increasing focus on fraud investigations alongside bribery and corruption cases and will follow these developments closely.

Recent regulatory developments

The DSA: a game-changer for online services in the EU

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The internet is a powerful tool that connects people, businesses, and ideas across the world. But it also comes with challenges, such as illegal content, data breaches, and privacy violations. How can we ensure that online services are safe, fair, and transparent for everyone? In the European Union, that's the question that the Digital Services Act 2022 (DSA) tries to answer.

The DSA is a set of new EU regulations which establishes a framework that governs digital services. Its aim is to make the online world safer and to promote accountability by focusing on key areas such as handling illegal content online and defining the responsibility of various online intermediaries.

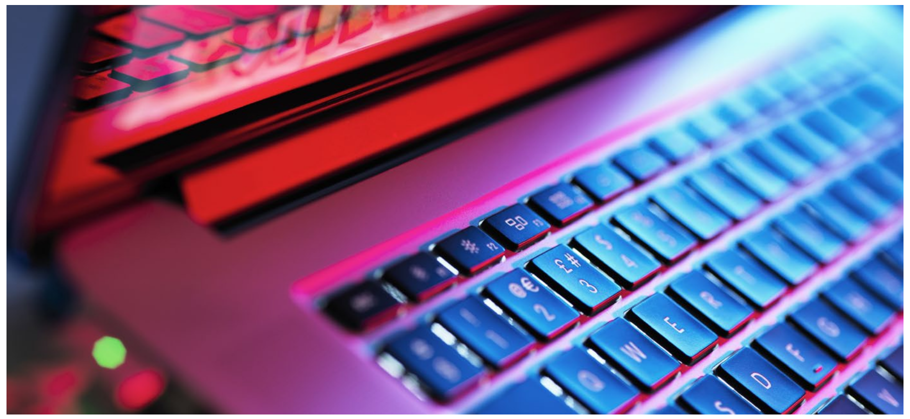
The DSA applies to intermediary services within the EU, such as internet service providers, cloud providers and social media networks. For the regulations to apply, the service needs to be offered to individuals or legal entities established or located within the EU. As the DSA operates a tiered regulatory system, all intermediary services are subject to general obligations which are supplemented by further obligations depending on which tier the intermediary is part.

New obligations will apply to intermediaries within scope of the DSA. A key example is requirement for the swift and efficient removal of illegal content. However, the time limits for this remain unspecified and illegal content will be defined separately by each Member State.

Another obligation is to appoint a legal representative to represent the intermediary and to act as a contact for authorities. This legal representative can be held liable for non-compliance with the DSA, separately to the liability of the provider.

Service providers will also have to follow some reporting obligations based on their classification. Most providers will be required to submit reports on the number of administrative or court orders they have had against them. Intermediary service providers must also provide evidence of content moderation practices. Hosting service providers must provide details of actions taken in response to notices received and whether these actions were automated. Additionally, online platform providers must report on the number of out of court dispute settlements and the number of suspensions of recipients within the EU.

Further additional obligations include taking appropriate steps to ensure high levels of data protection and safety for minors and the implementation of a crisis response mechanism to use in the event of an extraordinary crisis.



Alongside this, the DSA places a partial ban on profiling-based advertising, under which advertising is prohibited from being profiled based on sensitive data or from being aimed at minors.

For providers that do not comply with the DSA, significant financial penalties can be issued of up to 6% of the provider's annual global turnover, that is alongside the negative press coverage and wider reputational damage that censure for being found to have failed to comply with the DSA would cause.

The DSA is a game-changer for online services in the EU. It aims to create a harmonised and modern legal framework that balances the interests of users, intermediaries, and society. It is also intended to enhance the EU's digital sovereignty and competitiveness, as it sets high standards for online services that operate in the EU or target EU users.

The DSA is not only a challenge, but also an opportunity for online services to improve their practices and reputation. However, it comes with risks and uncertainties, such as the divergent interpretation and implementation of the DSA by Member States, as well as the potential conflicts with other legal regimes, and the possible legal disputes arising from alleged illegal content and user rights violations. For organisations within the scope of the regime, starting to plan for its impact now is vital.

ICO issues statement on cookie banner enforcement priorities

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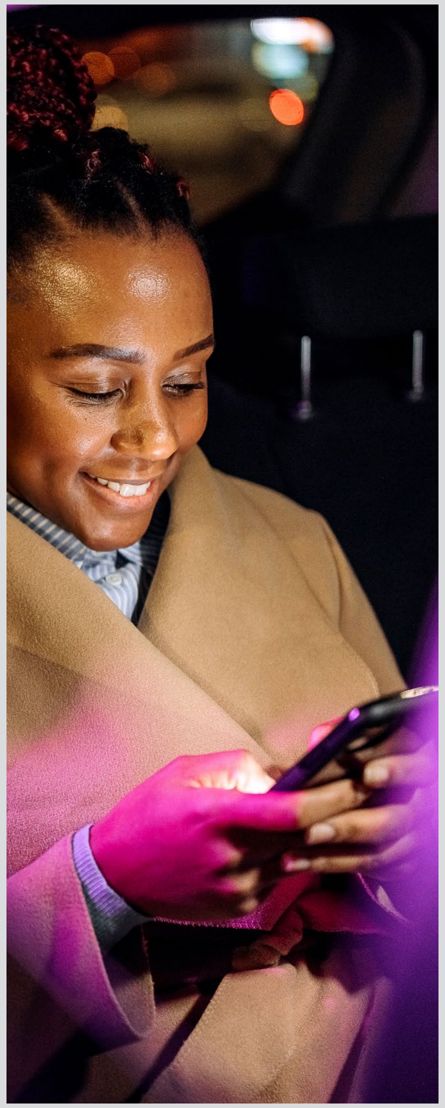
The Information Commissioner's Office (ICO) has recently announced that companies that fail to put a "reject all" cookies option on the top layer of their cookie banners will be far more likely to be investigated by the ICO, which is cracking down on improper consent mechanisms. However, Stephen Bonner (the Deputy Commissioner) left the door open for businesses to quickly remedy any non-compliant cookie banners to reduce the chance of a fine being issued.

This follows the trend in the EU where regulators have similarly been cracking down on non-compliant cookie banners such as in France where the regulator CNIL issued €210k in fines against three companies. The ICO followed up its announcement with a blog piece reiterating the power that online websites have over their users. This includes affecting the content users may see for several weeks after a cookie may have been accepted. Having a clear "reject all" option is in-keeping with the principle that it should be as easy to reject cookies as it is to accept them, which the ICO is seeking to enforce more frequently. The ICO also referred to its joint guidance with the CMA which highlighted the need to avoid harmful design such as "nudging" techniques which, in the cookies context, would involve using language and design to inappropriately encourage users to accept all cookies, or to not click a "reject all" option.

Recent action following this statement has seen the ICO add further detail to its approach. In response to a recent complaint concerning a website cookie banner which did not feature a "reject all" button, instead implementing a "got it" button accompanied by an option to customise cookies, the ICO further stated that its approach is to focus on sites that are doing nothing to raise awareness of cookies. No enforcement action was taken in this case. However, the ICO has recently issued a letter to some of the UK's top websites that if they do not amend their cookie banners, they will face enforcement action. The ICO plans to release a summary of its enforcement action in January, naming websites which have not addressed its concerns.

Whilst for the time being cookie banners are a consistent feature of websites, and therefore invite regulatory risk, they are expected to start disappearing over time as large industry players move away from using third-party cookies. Although the ICO's recent non-enforcement may be viewed by some as an indication that only the most opaque cookie-setting practices will result in enforcement, the ICO's recent letter to infringing companies demonstrates that this is an area of focus for the regulator.

Businesses should ensure that they have a clear "reject all" option available to customers on their primary cookie banner and comply with the transparency requirements for cookies used.
They should further avoid practices that may amount to inappropriately "nudging" users to click "accept all" or equivalent options in cookie banners.



Recent regulatory developments

Recent regulatory developments

Going green: the CMA publishes its Green Agreements Guidance

The Competition and Markets Authority (CMA) recently published its Green Agreements Guidance (Guidance) following an extensive consultation process. The Guidance clarifies the application of competition law to environmental sustainability agreements (ESAs), climate change agreements and mixed agreements. As a recap, these "green agreements" are between actual or potential competitors which aim to prevent, reduce or mitigate the adverse impact of their activities on the environment, or to assess their impact. Examples include an agreement between:

- fashion manufacturers to stop using certain fabrics contributing to microplastic pollution
- delivery companies to switch to using electric vehicles
- a group of tech companies to develop a sustainability label (eg a carbon footprint score) for electronic devices they sell.

The new Guidance clarifies how the CMA will consider businesses' green agreements under the UK's competition law framework. Notably, the CMA has made clear it considers sustainability issues are not only an important parameter of competition (as an aspect of the quality of a product or service) but sustainability is also a policy goal in itself, particularly given the UK's binding net zero obligations under the Climate Change Act 2008.

The CMA has placed sustainability high on its regulatory agenda and has a dedicated sustainability taskforce. In its recent annual plan, its stated ambition is to promote an environment where the whole UK economy can grow productively and sustainably. This is reflected in the discretionary work the CMA prioritises. For example, it has taken a leading position in shaping the consumer law framework concerning "green claims" (ie marketing claims about the environmental impacts of products or services). It published a new Green Claims Code in September 2021 and has since been investigating potential "greenwashing" by brands in the fashion and FMCG sectors (see our update).

The Government's recent "strategic steer" to the CMA further emphasises the importance of the CMA's role in boosting sustainable growth, including promoting competition and protecting consumer trust in markets for sustainable products and services as the economy transitions to net zero.

The impact of the new Guidance

Given the scale and urgency of the challenge to address environmental degradation and combat climate change, the CMA's new Guidance is welcomed in helping companies navigate which forms of cooperation may be considered permissible.

The Guidance explains which types of collaboration are unlikely to infringe competition law and which could be anti-competitive. Several further examples added to the final guidance provide greater clarity on how businesses should assess their arrangements.

Examples of collaboration unlikely to infringe competition law include agreements:

- to phase out non-sustainable products (such as single-use plastic packaging), where this does not involve an appreciable increase in price or a reduction in product quality/choice for consumers, and does not have the object of eliminating or harming competitors
- to pool information about the environmental sustainability credentials of suppliers (eg to help businesses assess environmental risks in their supply chains), as long as this does not require parties to purchase (or stop purchasing) from those suppliers, or share competitively sensitive information
- setting industry-wide environmental targets (such as net zero targets), provided each party is free to determine their own contribution to meeting that target.

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Examples that could be anti-competitive include agreements:

- that have the object of restricting competition, such as an agreement between competitors on the price at which to sell products meeting an agreed environmental standard – for example, an agreement between textile companies on the minimum price at which to sell 100% organically grown cotton
- that have the effect of restricting competition, such as an agreement by a group of competing purchasers to only purchase from suppliers that sell sustainable products (known as a "collective withdrawal agreement") – for example, an agreement by competing food manufacturers to only purchase food packaging from suppliers selling 100% biodegradable packaging.

However, even where a collaboration may be anti-competitive, businesses should still consider whether they might benefit from an exemption. The Guidance usefully explains how an exemption is likely to be assessed. In summary, businesses must demonstrate and substantiate that the green agreement will give rise to objective benefits (such as reducing greenhouse gas emissions, or creating products with reduced environmental impact), and that various criteria are met, including that consumers will receive a fair share of the benefits. The benefits arising from the Green Agreement need to be to UK consumers, and must outweigh any harm. For example, if the agreement will reduce greenhouse gas emissions outside of the UK, the CMA has confirmed that a benefit to UK consumers can be presumed because they will receive a share of the benefits of tackling global climate change.

Not every scenario will be captured in the CMA's various Green Agreement examples, leaving some difficult questions unanswered. However, if businesses are in doubt when self-assessing whether competition law prohibitions may apply, the CMA urges them to seek informal guidance through the CMA's "open-door" policy. This offers a "light touch review" of businesses' proposed Green Agreements proportionate to the size, complexity and likely impact of the agreement.

A further benefit of approaching the CMA at an early stage is the protection that businesses could get against fines where they have discussed their agreements in advance and the CMA does not raise any competition law concerns (or any concerns are duly addressed).

Considerations for businesses

Businesses should review the new CMA Green Agreements Guidance carefully and consider how it may apply to their potential sustainability initiatives.

In particular, businesses should consider carefully:

- whether their proposed Green Agreement may restrict competition and if an exemption might apply
- if an exemption may be relevant, is there sufficient evidence to demonstrate the various criteria are met, including objective benefits?
- whether to seek further advice. Where the competition law assessment is unclear, businesses should seek advice as early as possible and, in certain circumstances, may also choose to seek guidance from the CMA given its stated open-door policy.

In relation to Green Agreements, it is important businesses keep full and detailed records including risk assessments and evidence regarding consumer benefits. This can help inform any discussions with regulators and support any exemption, if relevant.

As the CMA has made clear, competition law concerns should not unduly prevent businesses from pursuing sustainability initiatives, provided they adhere to the principles of the CMA's Guidance. The CMA wants to ensure that competition law is not seen as an unnecessary barrier to companies pursuing such initiatives.

Businesses may be surprised to know they have more scope to collaborate on environmental initiatives than previously thought.

The CMA's door is very much open and in December 2023 it published its first informal guidance. In its fairly detailed response to a request for guidance, the CMA set out its views on Fairtrade International's "shared impact initiative" (relating to long term supply arrangements for bananas, coffee and cocoa from fairtrade producers, providing stability and enabling investment in more sustainable farming practices). The CMA confirmed the initiative is unlikely to raise competition concerns. For further information, see:

- The CMA's first informal guidance
- Staying on the right side of competition law

Recent regulatory developments

When do you need to consider the Change in Control Regime?

If you are looking to acquire a company in a corporate transaction, you or one of your team should check the Financial Services Register (the FCA Register) as early as possible. The FCA Register will reveal whether or not the entity or one of the entities in the group you are purchasing is a Prudential Regulatory Authority (PRA) and/or Financial Conduct Authority (FCA) authorised firm. If it's established that there is, the Buyer (and to a certain extent the Seller) will need to consider the Change in Control Regime under Part 12 of the Financial Services and Markets Act 2000 (FSMA).

What is the Change in Control Regime?

Part 12 of FSMA sets out that persons who decide to acquire or increase control (ie changes in shareholding or voting rights above a certain threshold) in an authorised firm are obligated to notify the appropriate regulator of the proposed changes in control in that business. This notification must be sought prior to the change in control in order to seek the FCA's prior approval. It is a criminal offence if such persons proceed with the acquisition or increase in control without notifying or receiving approval from the appropriate regulator. The process of notifying is contained in section 178 of FSMA.

In addition, any authorised firm that is subject to a change in control must notify the appropriate regulator about the change in control, and then also make a notification when the change of control has taken place.

This means that in practice if there is a change in ownership contemplated as part of a group restructuring, public takeover or private acquisition, approval must be received from the regulator before completion can take place.

When does the Change in Control Regime apply?

By way of reassurance, not all changes in control will need to be notified to the appropriate regulator. Banks, insurers, payment/electronic money institutions and investment firms follow the approach taken in the EU qualifying holdings regime under the Acquisitions Directive, which means that a person with a 10% (20%, 30%, or 50% or more) holding will be considered a controller.

For firms referred to as non-directive firms eg insurance intermediaries and consumer credit lenders, the threshold for a controller is 20% or more. While limited permission consumer credit firms have a threshold of 33%.

Since 11 August 2022, registered cryptoasset firms also fall within the change in control regime if 25% or more of the business is being acquired.

Some authorised firms fall outside of the regime such as, open-ended investment companies, UCITS qualifiers and sole traders, and others benefit from an adapted version like fund managers.

Which regulator is deemed to be the appropriate regulator?

The regulator who you will submit your section 178 notification to will depend on whether the authorised firm is authorised by the PRA or the FCA. If the firm is authorised by the PRA, the appropriate regulator is the PRA and for all other firms, the appropriate regulator will be the FCA.

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A section 178 change in control notification

The obligation to complete and submit a change in control notification is on the Buyer, with the notification being made using the forms specified by the appropriate regulator. The obligation is triggered once the Buyer "decides" to acquire or increase control over an authorised firm. This generally means once a decision has been made. In the context of a share purchase sale, the FCA guidance states that notification will not usually be required before the Buyer enters into an SPA, with the SPA including a condition to obtain change in control approval before the transaction completes.

The FCA's forms are on its notification forms webpage and the PRA forms on its change in control webpage. There are specific forms depending on the Buyer's legal status eg corporate controller form for limited company and limited liability partnership. In addition, the form will be supported by a number of supplemental documents. Once completed, the section 178 notification should be sent to the appropriate regulator via email to the allocated email address set out on the PRA and FCA webpages.

Recent regulatory developments

When does the assessment period start?

The date the appropriate regulator acknowledges receipt marks the start of the assessment period. The appropriate regulator has 60 working days but it can interrupt the assessment period should it require further information and extend the assessment period by a further 20 working days. This interruption will "stop the clock", meaning that the assessment period will not start to run again until the appropriate regulator has received the information it requires.

Are the PRA and/or the FCA meeting their statutory assessment period?

Over the past few years, experience has shown that the regulators, particularly the FCA, have found it difficult to process notifications in a timely manner and some clients found themselves waiting more than six months for approval. The FCA had acknowledged this and was previously providing updates relating to delays in allocating notifications on its webpages. This has recently been removed.

In the last few months certainly, we have seen that the FCA is moving in the right direction and has been demonstrating an improvement to its process timescales. The FCA in March 2023 communicated that it now allocates and begins work on notifications within three days of receipt on average and expects to continue to improve on its speed as part of its ongoing performance improvement. We continue to monitor this and where clients express particular priority and urgency to their notifications, we look to engage and collaborate with the FCA to try to meet an expedited timeframe, where necessary.

Special features

Arbitrators and AI chatbots: are they compatible?

Since its release in November 2022, ChatGPT reportedly reached 1 million users in five days and an estimated 100 million by January 2023, making it the fastest-growing application in history. The technology is also developing quickly – the recently released GPT-4 scored in the 90th percentile in the US Uniform Bar Exam, whereas the previous version placed in the 10th percentile.

If an artificial intelligence (AI) chatbot could perform better than 90% of law students, digest voluminous information in a fraction of the time and output answers that are convincing and grammatically correct, could it be good enough to assist humans who arbitrate human affairs? For some lawyers, the answer is a tentative "Yes". In May 2023, a Colombian judge cited ChatGPT in a ruling on the medical funding of an autistic boy. The judge included extracts of his conversations with the chatbot in his judgment, but stressed that he had not relied on the technology to make his decision. The judge opined that ChatGPT could generate efficiencies, effectively performing the work of a tribunal secretary, so long as judges still exercise their independent judgement.

This leads arbitration users to consider the extent to which AI chatbots can responsibly be used to assist the decision-making of arbitrators.

Impartiality, independence and freedom from bias

Impartiality, independence and freedom from bias are fundamental principles required of arbitrators under the leading institutional rules (see Article 11 of the ICC Rules and HKIAC Rules).

Depending on how AI chatbots are used, they may hamper the arbitrator's ability to uphold these principles, since:

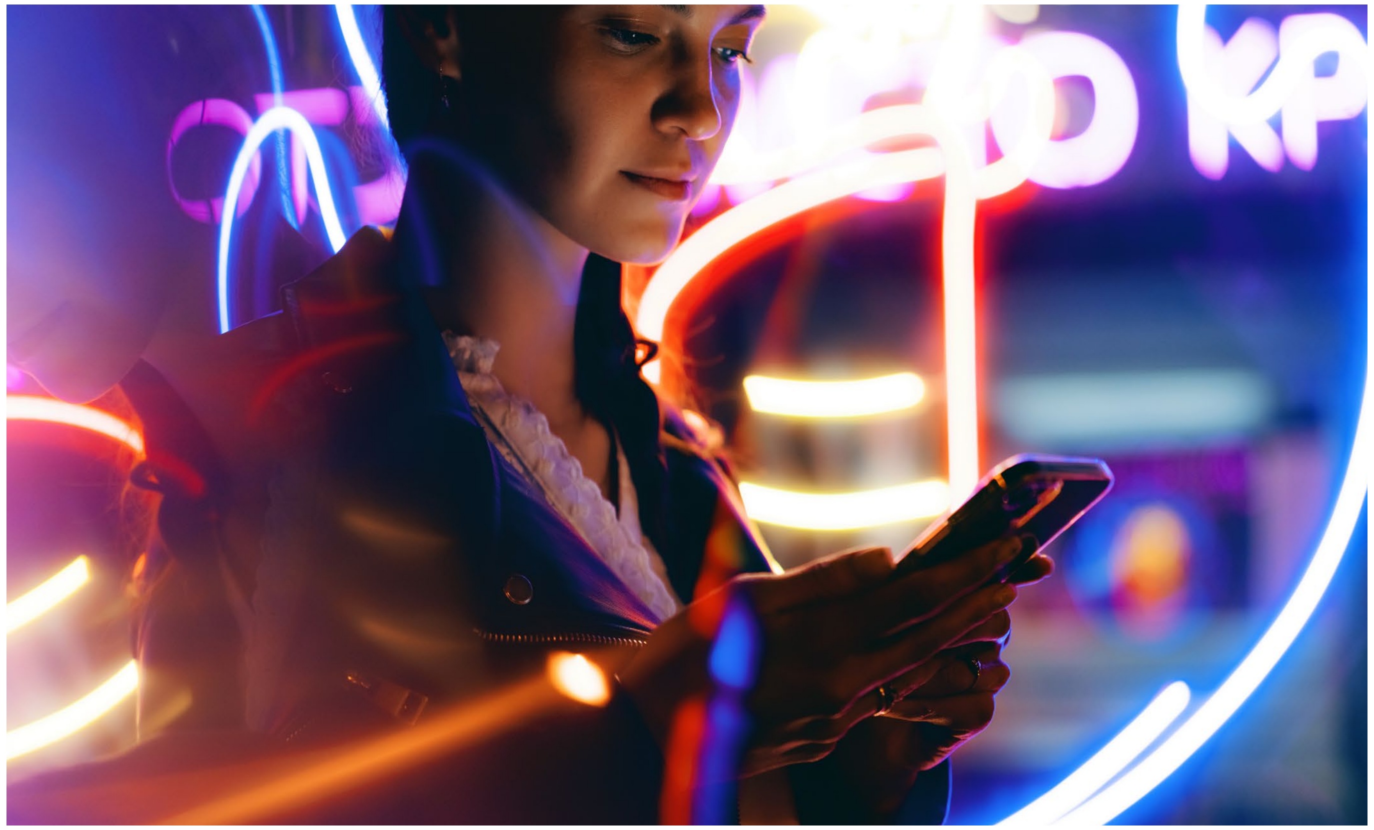
- AI chatbots rely on text and data mining and machine learning and may develop biases over time as a result of reviewing and processing biased data, and
- AI chatbots may pull information from sources connected to a stakeholder in the arbitration and the arbitrator may unwittingly use such information.

The counter-argument to this is that human intelligence operates likewise in a black box and is just as prone to inherent biases arising from our education and experience. In this regard, using an AI chatbot as a sounding board may be no worse than chatting with a colleague or having an internal monologue. That said, using an AI chatbot as a tool to gather information about parties or summarise case facts may involve greater risk – arbitrators would have virtually no control over how such information is filtered and presented to them.

Arbitrators are required by the UNCITRAL Model Law (Article 12), leading institutional rules and guidelines (see IBA Guidelines on Conflicts of Interest in International Arbitration) to disclose circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence. Arbitrators should of course avoid using AI chatbots in a way that would jeopardise these principles, but even if there is no obvious risk, it would be prudent for arbitrators to disclose any intended use to parties and seek informed consent.

Expectation of competence

Parties have a reasonable expectation that the arbitrators they have appointed will be competent, in terms of experience, technical expertise and skill. There is an inherent risk that delegation to AI chatbots could undermine this competence. While chatbots can perform some simple legal analysis well, they can also face issues of inaccuracy. AI chatbots have been known to produce 'hallucinations' in which they invent responses and supporting sources. A lawyer in the US and a litigant in person in the UK each faced criticism recently when they cited case law in court that was fabricated by ChatGPT. There is also a risk that AI chatbots will produce answers that are outdated. ChatGPT is only current up to 2021. AI chatbots can also suffer from a lack of transparency of data sources, making verification of results challenging. Such issues might damage the perception of an arbitrator's competence, were they to rely too heavily on AI chatbots in reaching decisions.



Confidentiality

Parties and arbitrators are prohibited from disclosing material related to the proceedings unless agreed between the parties. This is another distinguishing factor from litigation and parties will often opt for arbitration to avoid making their disputes in public. However, AI chatbots retain and process data that is inputted by users for the purposes of machine learning irrespective of whether that data is confidential in nature, which can lead to wrongful disclosures. After software engineers used ChatGPT to fix source code, Samsung's commercially sensitive information was unintentionally leaked on three occasions. Arbitrators would need to be particularly careful only to input information that is general in nature, and to avoid disclosing parties' identities or details specific to the dispute.

Cost efficiency

Perhaps the greatest potential benefit to arbitrators of using AI chatbots is increased cost efficiency. AI has been used by UK start-up DoNotPay since 2015 to assist customers in making small claims such as disputing parking tickets, which might otherwise be prohibitively expensive to contest. It is feasible that chatbots could be safely used to assist arbitrators with simple tasks such as indexing or sorting documents in chronological order, with proper oversight, generating similar cost efficiencies.

That said, arbitrators will have to balance any efficiency gains against the risks outlined above. Increased efficiency was the justification cited by judges in India and Pakistan who recently used ChatGPT to assist their judgments in bail hearings for criminal rape and murder trials. While the judges stressed that they did not rely on the AI chatbot, only asking it simple legal questions, the seriousness of the alleged crimes throws into light the question of whether any increased efficiency is worth the risk of imprecision, bias or breach of confidentiality (or at least the risk of perception of these) where personal liberty is at stake.

Conclusion

Arbitrators are encouraged to consider carefully the risks of using AI chatbots in their current versions to assist in their decision-making before doing so. Even if arbitrators are able to deploy AI safely using careful review and exercise of independent judgment, this may still carry the risk that parties may be concerned as to the perception of the accuracy, independence and confidentiality of the decision, potentially negating the finality of awards that is a key factor in drawing parties to the use of arbitration in the first place.

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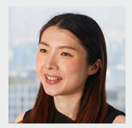

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Special features

Coffee with… Gavin Reese

We speak to Gavin Reese, Head of Regulatory Law at RPC and find out more about Gavin, his career, and his thoughts on the regulatory landscape.

Tell us about yourself

I have been qualified for 38 years. Everyone thinks that I am an RPC "lifer", but I actually began my legal career in a well-known London criminal practice but transferred my articles to another firm to get more civil experience. I moved to RPC in 1988 to work in the Professional Indemnity team representing solicitors and accountants. Following a secondment to an insurer I began receiving General Liability work and gradually began to specialise more and more in that area. As part of that practice, I started to handle more and more Health & Safety and Product work, and that saw me returning to my roots in the criminal arena.

You have worked at RPC for over 30 years, how have you seen the regulatory landscape change during this time?

Almost inevitably the scope of regulation has developed hugely in my time at RPC. The amount and complexity of regulations has increased significantly. It also the case that where there is an issue, more and more the burden is on companies to establish that they are innocent rather than the regulator/prosecutor proving that they are guilty. This can be seen in Health & Safety where a defendant must prove they have done everything reasonably practicable to prevent an accident, and it can be seen in the proliferation of "failure to prevent" offences.

What types of regulatory advice do you offer to clients?

My own area is Health & Safety and Product law. Some of this is advisory and compliance, but a significant amount is dealing with the consequences of things going wrong. Often, we are retained in the immediate aftermath of an accident or incident when there may be intense public scrutiny.

What are the biggest regulatory challenges you're seeing organisations face?

Clearly any changes in regulation cause organisations uncertainty. In the early stages it is often not very clear how a new regulation will be interpreted and enforced. This can be particularly problematic when there may be several regulators involved. Surveys also suggest that most organisations struggle simply to keep up with the sheer volume of regulation.

Looking ahead how do you see the regulatory landscape evolving?

We are living in interesting times. Some regulation has struggled to keep up with the pace of innovation. With the advent of new technologies, including AI, and new ways of commerce, regulators are having to adapt. New regulation takes time and trying to future proof it is not easy. For example, in the recent UK product safety review the government stated that it wants to rebalance regulations and industry-led standards to enable a more agile and responsive regulatory framework. Time will tell if they able to achieve this.

The Centre for Legal Leadership

in association with RPC

Special features

Core business skills for GCs (actually all legal in-housers!)

Let's not beat around the bush. There are many business skills needed but there are only a few cores ones…

1. Know your company and stakeholders
2. Talk the same language
3. Get involved early
4. Clearly define your advice – Legal or Business?

And last but by no means least

5. Promote your worth

The Centre for Legal Leadership (CLL) is a resource for in-house lawyers on everything other than law.

CLL provides advice, insights and support to help you find your feet and build your career as an in-house lawyer. We cover everything from your first 100 days in the role, through team building and gaining respect across your organisation, to succession planning.

In this special feature, CLL look at core business skills for GCs.

Understanding what your company does and how it does it sounds obvious but, ask yourself do you really know how all the numerous moving parts fit together and the challenges involved.
The company's current strategy will be known but what will next year's be, especially in such a turbulent changing economic climate?

Who are your key stakeholders? These may not only be those above you on the seniority ladder but consider those sidewards too. Nurture these relationships, build on your understanding of the company, the part they play, the projects they are involved with and establish allies you can turn to and they to you.
Learn their behaviours; working styles and best time to approach. Consider also cultural differences and most importantly be self-aware. Do you need to dial down or up to achieve your aims?

Speaking the same language as the company is vital.
Your understanding of the company will make it relevant, considered and commercial. Most companies have a website presence and internal intranet – studying these will give you additional insight. No one wants to add to their inbox, but subscribe to updates, etc; you will soon be able to cherry pick the ones of relevance to help shape conversations and build your knowledge bank.

Ultimately the language of all companies boils down to the finance sheet! Understanding the numbers. Don't be too proud to ask, this is where a key stakeholder in corporate finance or tax could come in useful. Alternatively invest in a course or if the situation allows ask your human resources or learning and development team to book you on one.

Unfortunately, legal is often seen by others in a company as a "blocker". Totally undeserved and frankly unfair as who is going to give sign off on a document when they have no background on the specific matter; no understanding of the part this plays in relation to the company's strategy and an "eleventh hour" panic!

Draw on your collaboration skills; stakeholder relationships and don't forget the "water cooler" moments to open doors and get involved early. Gentle steering, raising queries early and suggesting routes to projects to avoid hurdles will demonstrate your worth, build credibility for yourself and at the same time raise the wider legal team's profile.

Great news - you are involved early and noticed, however, there is always a but. Your unique positioning and skillset. As with almost all roles, different hats are worn at different times but here it's vital – are you providing legal or commercial advice? Crystal clear clarity is paramount. Don't be afraid to voice which it is. A helicopter view in any company is to be valued, however be clear on why you are in the 'discussion' and in what capacity.

Which leads nicely into promoting your worth. Often the unsung heroes. Many teams, and in turn individuals, within your company are more visible. Most individuals will know what your sales or business development teams, for example, do and especially when a deal is struck, or target reached. Can the same be said about Legal? Activity on challenging contracts in the early hours; mitigating risks and steering projects/discussion, etc with that unique access being just a few examples.

The very strong chances are, that not many do!

It doesn't need to be labour intensive, look at what others are doing within the company and adjust; note the number of contracts you are involved with; the figures involved and specific steering given; can you pull in anything from your KPIs; are there any internal committees you can join; external networking and speaking opportunities raising the company's and your own profile?
These are only a few suggestions, consider everything that crosses your desk and fills your inbox.

Show that worth!

Knowledge and resources from CLL

CLL's knowledge base is a comprehensive guide to everything you need to know about your role and career, except the law itself! Each article has been written either by an experienced in-house lawyer or by a subject matter expert in the area.

They also run regular events for GCs, including the quarterly Regulation Forums for senior leaders in major regulators and in the organisations that they regulate. These roundtables are held under Chatham House rule. Attendance is by invitation and the sessions are chaired and moderated by CLL.

Find out more about CLL and the resources they offer on their website: www.legalleadership.co.uk

Regulatory radar: quick takes

Formerly known as our Regulatory update, Regulatory radar: quick takes pulls together recent developments and upcoming changes from across the UK's regulators to help you navigate the regulatory maze.

This section gives a sample of the extensive updates that form our bi-monthly Regulatory radar: quick takes publication. Find out more, and download November's full update here.

Financial services

FCA releases new proposals to mitigate potential redress liabilities

The Financial Conduct Authority (FCA) has released a consultation paper (CP 23/24), proposing that personal investment firms (PIFs) set aside capital equivalent to at least 28% of the value of potential redress liabilities. These changes aim to address consumer harm caused and reduce the burden on the Financial Services Compensation Scheme (FSCS). PIFs failing to hold enough capital to cover their potential liabilities would be subject to automatic asset retention orders, preventing them from disposing of assets until they meet the necessary capital requirements. The FCA is seeking feedback from industry participants and stakeholders during the consultation period, which concludes on 20 March 2024.

Click here to read more.

FCA issues Regulatory Initiatives Grid

In November, the FCA released its Regulatory Initiatives Grid, which sets out the regulatory pipeline in order for financial services firms to be able to plan for upcoming initiatives. Key initiatives listed in the grid include the Access to Cash consultation that opened in December 2023; the PRA Consultation Paper on the capital regime for Simpler Regime Firms in the second quarter of 2024; and the coming into force of the trading activity wind down policy in March 2025.

Click here to read more.

FCA seeks information on data asymmetry between Big Tech and financial firms

On 11 November 2023, the FCA issued a call for input asking for information on data asymmetry between Big Tech companies and financial services firms in order to understand the extent of market power that Big Tech companies may hold in the financial services market. The FCA is also interested in other factors that could contribute to Big Tech companies gaining marker power in the sector. This is following feedback from a discussion paper published by the FCA in October 2022 detailing the potential impacts on competition brought on by Big Tech entering the financial services market.

Click here to read more.

Speech on culture and conduct

On 23 November 2023, Emily Shepperd, Chief Operating Officer and Executive Director of Authorisations at the FCA, gave a speech at City & Financial's Culture and Conduct Forum. The speech focused on the importance for firms to ensure that culture can enable more efficiencies and positive outcomes, in particular in light of the Consumer Duty. The speech highlighted the importance of flexible Diversity and Inclusion proposals and emphasised how firms need to understand the purpose of these policies while allowing their people to contribute.

Click here to read more.

Cyber security

Key round-up of developments in cyber, tech and evolving risks from the latest RPC Cyber_Bytes

- NCSC Annual Review: UK's critical infrastructure faces enduring cyber threats
- Booking.com scam emails threaten hotel reservations
- Ransomware group reports victim to SEC for non-compliance
- Information Commissioner seeks appeal in Clearview AI case
- ICO and EDPS strengthen collaboration with Memorandum of Understanding
- Former NHS secretary fined for illegally accessing patient records

Read the latest Cyber_Bytes issue here.

UK Government and tech companies agree on pledges against online fraud

The UK Government has agreed to develop the Online Fraud Charter alongside major tech companies including Amazon, eBay, Instagram, Google, LinkedIn, Microsoft, X, Snapchat, TikTok and YouTube. The Charter looks to protect the public from online fraud, including scams, romance fraud and fake adverts, with tech companies playing their part by blocking fraudulent activities on their platforms through several different actions, including increased verification steps. In addition to the Charter, an action plan supported by the Online Advertising Taskforce will set out how the government and the industry can protect children from online harms.

Click here to read more.

Data protection

Amendments to Data Protection and Digital Information Bill

A series of amendments to the Data Protection and Digital Information Bill have been tabled in order to build a new data protection regime in the UK. These include granting new powers that would allow authorities to obtain data from third parties, in particular banks and financial services organisations, to reduce benefit fraud. Another proposal looks to support families where children have died by suicide, by requiring social media companies to retain personal data to be used in investigations related to the event. The amendments also propose that the Counter Terrorism Police should be able to retain biometric data of individuals deemed to be a threat.

Click here to read more.

Data Protection and Digital Information Bill second reading

On 29 November 2023, the Data Protection and Digital Information Bill moved a step closer to passage. The UK House of Commons voted to avoid recommitting the bill following the recent introduction of UK Government-backed amendments, instead moving the proposal to the report stage of consideration. The second reading in the House of Lords, which will be a general debate on all aspects of the bill, is scheduled for 19 December 2023.

Click here to read more.

Professional services

Professional risks and opportunities facing the legal profession

This article, previously published by Law360, examines the risks that lawyers face due to the pandemic, the prominence of ESG issues, evolving regulations and AI, including the Solicitors Regulation Authority's (SRA) focus on addressing toxic workplaces and sexual misconduct, cultural shifts, and the implications of AI.

Click here to read more.

Product regulation

Key updates from RPC's latest product law bulletin:

- EU CE marking recognition extended indefinitely
- Best Practice for food allergen labelling published by FSA
- Consultation on non-surgical cosmetic procedures
- UK Product Safety Review Consultation
- EU Product Liability Directive
- New regulations on batteries
- Developments in e-scooter and e-bike battery safety discussion

Read the full product law bulletin here.

Regulatory radar: quick takes

Digital advertising and marketing

ASA launches AI strategy to help improve ad regulation

The Advertising Standards Authority (ASA) has unveiled a new five-year strategy for ad regulation using artificial intelligence (AI). The ASA has already begun to utilise AI to identify potentially problematic ads and to enhance its compliance work, and it has successfully launched a world-first pilot plan focusing on platform and intermediary transparency and accountability. During 2024-2028, the ASA intends to invest more in preventative and proactive work than in reactive complaints casework. It seeks to settle inquiries more quickly, to focus on preventing irresponsible advertising from appearing in the first place, and to provide continuing, agile, and visible enforcement, including through mechanisms built with platforms and intermediaries. To do this, it will continue to invest in AI in the aim that the system will allow it to deliver more and better reporting on areas where there is high compliance in online ads, especially after its interventions.

Click here to read more.

Action plan published on tackling harms associated with paid-for online ads

The Department for Culture, Media and Sport (DCMS) has published an Online Advertising Taskforce action plan outlining promises made by industry and government to address the harms associated with paid-for online advertising. This comes after a consultation on the Online Advertising Programme, which ran from March to June 2022 and ended in the government declaring that it plans to intervene to address "the most concerning harms associated with online advertising." According to the action plan, the Taskforce will collaborate with the advertising industry, regulators, and relevant government departments to better understand and improve the evidence on illegal advertising and children being shown advertisements for products and services that are illegal to sell to them, as well as to identify ways in which voluntary initiatives or standards can be strengthened to address these harms.

Click here to read more.

Competition law

DMCC Bill amendments

The Digital Markets, Competition and Consumers Bill (DMCC) has completed its passage through the first House of Commons stages and has now reached the House of Lords where two readings have taken place. After completing Committee stage, Report stage and its third and last reading in the Lords, the bill will return to the Commons for its final stages. In relation to the proposed powers for the UK's Competition and Markets Authority (CMA) under the new digital markets regime, the updated bill currently provides that the CMA's Digital Markets Unit (DMU) may only impose conduct requirements or make pro-competition interventions if "proportionate" to do so. The new statutory powers envisaged for the DMU will apply to those companies the CMA designates as having Strategic Market Status (SMS) in respect of a digital activity. This is likely to only apply to the very largest digital companies given the necessary criteria for SMS designation, including turnover thresholds.

One of the more hotly contested aspects of the bill debated during its parliamentary passage has been the requisite review standard on appeal for the CMA's DMU decisions. As it stands, only certain DMU penalty decisions can be appealed on a merits basis. However, most of the DMU's decisions under the new regime will only be reviewable on a judicial review standard on appeal. Other additions to the bill include provisions regarding subscription renewal reminders to consumers on "concessionary contracts" and a change to the definition of "damages-based agreements" as regards competition claims (aiming to address, in part, some of the litigation funding uncertainty arising from the Supreme Court's PACCAR ruling earlier in 2023). For further background on the proposed DMU powers, click here. The final provisions may change prior to the bill receiving Royal Assent, currently expected in 2024 - we continue to monitor the bill's progress before it hits the statute books.

AI Regulation

Political agreement reached between the European Parliament and the Council on the AI Act

Obligations for high-risk systems: for AI systems classified as high-risk (due to their significant potential harm to health, safety, fundamental rights, environment, democracy and the rule of law), clear obligations were agreed. MEPs successfully managed to include a mandatory fundamental rights impact assessment, among other requirements, applicable also to the insurance and banking sectors. AI systems used to influence the outcome of elections and voter behaviour, are also classified as high-risk. Citizens will have a right to launch complaints about AI systems and receive explanations about decisions based on high-risk AI systems that impact their rights.

Guardrails for general artificial intelligence systems: to account for the wide range of tasks AI systems can accomplish and the quick expansion of its capabilities, it was agreed that general-purpose AI (GPAI) systems, and the GPAI models they are based on, will have to adhere to transparency requirements as initially proposed by Parliament. These include drawing up technical documentation, complying with EU copyright law and disseminating detailed summaries about the content used for training. For high-impact GPAI models with systemic risk, Parliament negotiators managed to secure more stringent obligations. If these models meet certain criteria they will have to conduct model evaluations, assess and mitigate systemic risks, conduct adversarial testing, report to the Commission on serious incidents, ensure cybersecurity and report on their energy efficiency. MEPs also insisted that, until harmonised EU standards are published, GPAIs with systemic risk may rely on codes of practice to comply with the regulation.

The agreed text will now have to be formally adopted by both Parliament and Council to become EU law. See press release.

Health, safety and environmental

Key updates in the Food and Drink sector from the latest RPC Bites

- CMA groceries sector review: what's the story so far?
- It's crunch time: OHA finds certain supermarkets 'blatant disregard' for HFSS rules
- New ASA rules on NoLo products side-step dry January
- WRAP calls for regulation as voluntary plastic packaging initiative falls short of targets
- All Campari wants for Christmas is Courvoisier
- Lab-grown turkey out of the equation in Italy this Christmas
- Waste not, want not: Industry welcomes Defra's U-turn on mandatory food waste reporting

Read the full details on RPC Bites here.

Cutting the red tape: MHRA publishes new guiding principles for AI-based medical devices

The UK's medical device regulator, the MHRA, has published new principles to guide manufacturers of AI-based medical devices on making updates without undergoing burdensome re-approvals. As AI needs continuous improvements, red tape around updates poses issues. Regulators in the UK, US and Canada collaborated on "Five Guiding Principles" to enable a "Predetermined Change Control Plan" (PCCP). With a robust PCCP outlining planned modifications, protocols, and impact assessments, manufacturers can implement changes without regulatory re-assessments. This avoids catch-22s from improving AI performance while needing re-approvals from updates. The principles prepare manufacturers for impending healthcare AI regulations. Insurers should advise clients to draft PCCPs accordingly - enabling product enhancement without red tape. Overall, this signals positive movement in innovative regulation to support safe and cutting edge AI in healthcare. Manufacturers benefit from reduced bureaucracy through proactive PCCPs.

Click here to read more.

Tax

Key updates from the tax world from the latest RPC Tax Bites

- HMRC publishes guidelines on R&D for tax purposes
- UK to implement the Cryptoassets Reporting Framework by 2027
- HMRC publishes guidance on tax reporting for digital platforms
- OECD publishes its annual progress report of the OECD/G20 Inclusive Framework on BEPS
- Case reports
  - Tribunal confirms that payments of a punitive nature are not deductible
  - Upper Tribunal dismisses taxpayer's appeal in substantial shareholding exemption case
  - Tribunal finds that CGT saving was not the main purpose of wider arrangements

Read the full details on RPC Tax Bites here.

RPC at a glance

RPC is a modern, global and commercially-focused full-service law firm, headquartered in London with offices in Bristol, Singapore and Hong Kong. Our lawyers are market leaders, our clients are often household names and together we achieve award-winning results which have seen RPC regularly voted amongst the best for commercial advice.

We are consistently ranked highly by both the Legal 500 and Chambers & Partners directories.

With over 1,100 employees – including 131 partners and more than 490 lawyers, plus access to a further 21,000+ lawyers through the TerraLex network – we are big enough to handle the most complex matters, but nimble enough to adapt quickly to our clients' changing needs.

RPC is not like most global law firms – and we're proud not to be. Clients are often surprised by just how different we are. We hire lawyers for whom listening to clients is a genuine passion – and we invest heavily in their professional development, well-being and technology.

Our lawyers focus on building close partnerships with our clients based on a deep knowledge of their operations, assets and technology. As testament to the high priority that we place on client service, RPC has won multiple accolades in this area.

> *"RPC is an absolute phenomenal firm. It is second to none in terms of the full service it can offer to large multinational clients, and small clients alike. It compares more favourably than with other firms principally because of the can-do attitude and responsive nature of the service given to its clients."*
>
> **Legal 500, 2024**

Specialists

130+ partners

490+ total lawyers

1100+ people

Global reach

Access to more than 21,000 lawyers in over 117 countries through the TerraLex network

4

RPC offices: London, Bristol, Hong Kong and Singapore

TOP RANKED
Leading Risk Advisory Firm: Corporate Governance
Legal 500 2024

LEADING INDIVIDUALS
across multiple disciplines, including investigations and compliance, data and cyber, health and safety

TOP RANKED
Leading Technology Firm
Chambers & Partners 2024

TOP 100
One of the World's Top Data Firms –
Global Data Review 100 2023

> *"The team had previous experience in implementing an anti-corruption compliance program at a multinational. This experience was invaluable in resolving the practicalities of rolling out our third party risk management process (TPRM) framework."*
>
> **Legal 500, 2024**

Navigating the maze

Our regulatory services

- Advertising and marketing
- AI regulation
- Competition and anti-trust
- Crisis management
- Data protection and privacy regulation
- Dawn raids
- ESG
- Financial services regulation
- Health, safety and environmental
- Product regulation
- Professional services regulation
- Regulatory investigations
- Sanctions
- Tax investigations and HRMC prosecutions
- White collar crime and compliance

Why RPC?

We know it is all about relationships.
Clients want smart lawyers. Smart lawyers they are happy to spend time with. We understand our clients want unstuffy specialist advice fit for today's complex regulatory world. And that's what we deliver.

We know one-size never fits all.
Regulatory needs are complex and unique. Our emotionally savvy advisers take the time to listen to clients' specific needs so that we can work together to provide bespoke practical solutions that works for them.

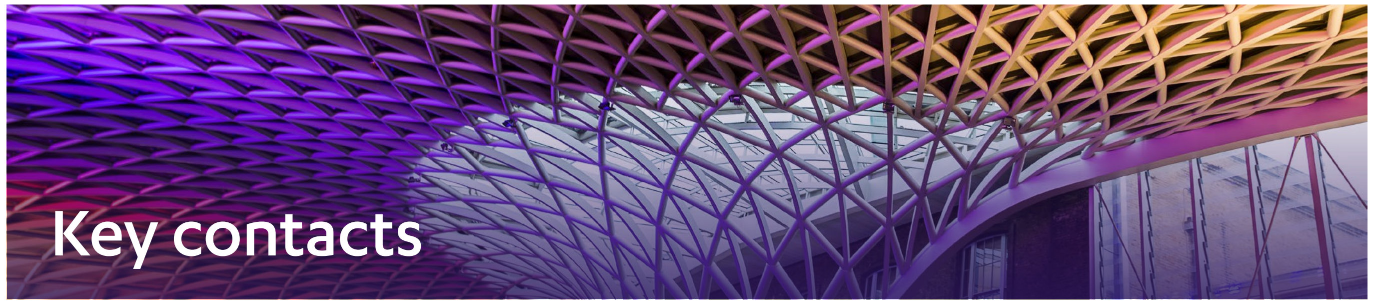
We provide an agile response.
Regulatory issues can quickly become crises, and any potential misstep can result in severe repercussions. Our experienced team can provide an immediate response to help you on the ground and get it right from the start.

We see things differently.
Our senior team combines an in-depth understanding of the practicalities of our clients' industries together with vast regulatory experience, so we don't just give legal opinion; we provide strategic advice in the broader commercial context.

We provide a complete legal solution.
Our multidisciplinary team is made up of a broad range of regulatory specialist to ensure our clients have easy access to a full range of complimentary services to cover "all the angles".

More from #RegulatoryRPC

- Regulatory update
- Taxing Matters podcast
- Raid response app
- Tax Take +



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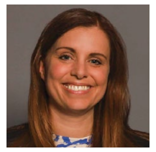

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