



Regulatory update

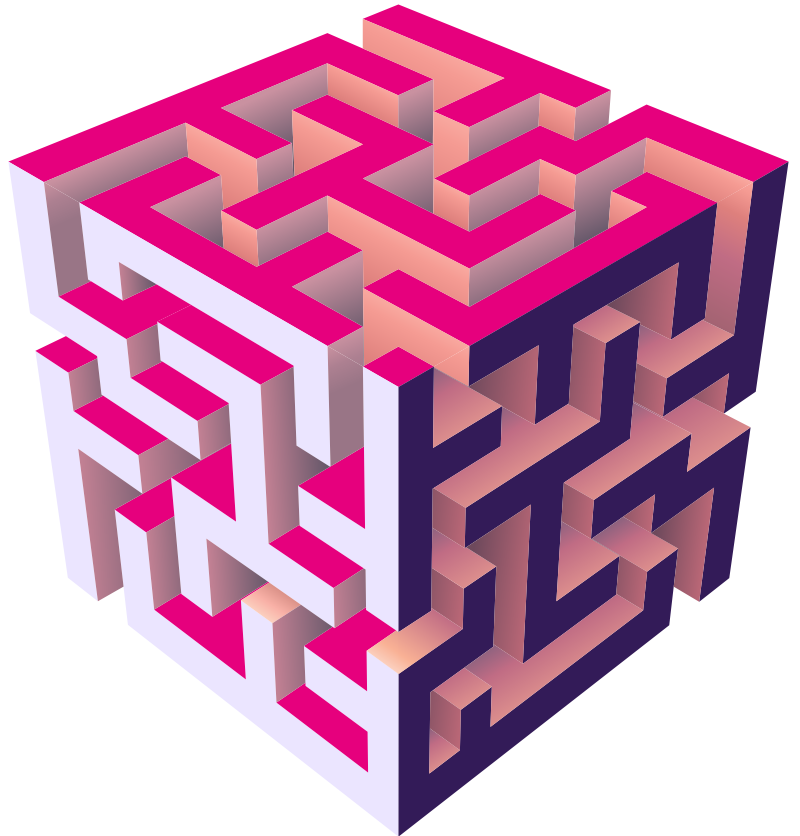
March 2020

Welcome to the March edition of our monthly Regulatory Update, which aims to pull together key developments from the past month across the various UK regulators – and help you to navigate the regulatory maze.

With the world grappling with the COVID-19 pandemic, many of the Regulators have issued related guidance on how they are dealing with the “new normal” and their expectations for the businesses they regulate. However, during the past month there have also been several other regulatory developments worth noting. This includes the new guidance on National Minimum Wage and the ICO’s draft direct marketing code.

Click on the sections below to find out more.

I hope you enjoy reading this latest update. Please do not hesitate to contact me, or your normal RPC contact, if you would like to discuss any of the topics highlighted or have any suggestions for areas you would like to see in future updates.



A handwritten signature in black ink, appearing to read 'Gavin Reese'.

Gavin Reese
Partner, Head of Regulatory

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WHITE COLLAR CRIME

by Sam Tate and Davina Given

SFO guidance: Does your compliance programme meet expectations?

Since the start of Lisa Osofsky's Directorship of the Serious Fraud Office (SFO) in 2018, the resources and guidance available to companies has been growing. The latest, and arguably the most useful, document to be published to date is [Evaluating a Compliance Programme](#).

While not to be relied on as the basis for legal advice, read together with the SFO's Guidance on Corporate Prosecutions and Code for Crown Prosecutors, this Guidance does serve as a very useful document for firms considering whether their compliance programmes match up to the expectations of the SFO. The Guidance covers the three key elements of:

1. what stages the SFO may consider a business's compliance programme
2. how the assessment will fit into the investigation process, and

3. the principles the SFO will use as part of any assessment.

The SFO Guidance also sets out (albeit in brief terms) what you can expect from the SFO during an investigation. The Guidance acknowledges that the size of a business makes a difference and, as such, prosecutors will consider proportionality when evaluating a business compliance programme. However, it remains clear that all businesses, no matter their size and complexity, must have internal systems and procedures in place to ensure compliance with legal requirements.

Click [here](#) to read more

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UK's "freeze and seize" powers upheld in first contested account forfeiture application

The case of *National Crime Agency (NCA) v Vlad Luca Filat* represents the NCA's first contested account forfeiture application through an Account Freezing Order (AFO).

Given that AFOs were only introduced in January 2018, through POCA 2002, and the maximum period of freezing is two years before the law enforcement agency must decide whether to unfreeze or pursue forfeiture, this year will see more and more AFO decisions battle out in the courts.

In this case a sum of money held in Filat's name was claimed by the NCA to have been derived from bribery and corruption (Filat's father was the convicted former Prime Minister of Moldova).

In 2018, the NCA was granted account freezing orders over bank accounts under the Proceeds of Crime Act 2002 (POCA 2002) allowing the agency to investigate the origin of the funds. Later that year, the NCA applied for forfeiture of the money on the grounds that, on the balance of probabilities, it was recoverable property. In response to this ruling, Filat appealed to the Crown Court, who has now ruled against Filat and upheld the original forfeiture.

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TAX

by Adam Craggs

Businesses failing to pay employees minimum wage to be publicly named by government

Employers that fail to pay their workers the National Minimum Wage or National Living Wage will continue to be publicly named, following a review of the Government's naming scheme. Naming rounds will now occur more frequently, in a bid to deter employers from contravening minimum wage legislation.

The threshold has been increased, meaning that businesses that owe arrears of more than £500 in minimum wage payments will be named. Previously, the threshold was set at £100. Businesses that

underpay staff by less than £100 will have the chance to correct their mistakes without being publicly named. However, they will still face fines of up to 200% of the arrears.

Click [here](#) to read more.

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HMRC publishes number of live Corporate Criminal Offences investigations

In 2015, the Government announced that it would make it a crime for corporations to fail to implement reasonable procedures to prevent associated persons from facilitating tax evasion. These measures were introduced by Part 3 of the Criminal Finances Act 2017.

Since then, HMRC has commenced 30 potential Corporate Criminal Offences investigations. The investigations span 10 different business sectors, including software development, financial services and construction.

Click [here](#) to read more.

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HMRC publishes its annual Transfer Pricing and Diverted Profits Tax statistics

The Diverted Profits Tax (DPT) and transfer pricing rules are important parts of HMRC's suite of measures to ensure multinationals pay the correct amount of tax on the share of their profits arising in the UK.

HMRC has recently published its transfer pricing and DPT statistics for 2018/19. These statistics contain some interesting details, including a drop in transfer pricing yield figures from 2017/18 to 2018/19. There was a significant decrease in DPT yield amounts for the period 2018/19 compared with 2017/18.

However, this was largely due to HMRC's decision to exclude the amount of additional corporation tax arising from transfer pricing enquiries that was estimated to result from behavioural change relating to the DPT.

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HEALTH, SAFETY AND ENVIRONMENTAL

by Gavin Reese

FSA imposes deadline for CBD industry to provide product information

The Food Standards Agency (FSA) has imposed a deadline for businesses trading in Cannabidiol (CBD) to submit applications for authority to market their CBD products and contents. CBD extracts are derived from hemp and cannabis plants. The FSA have said that the CBD industry must provide information about the safety and contents of their CBD products by 31 March 2021. Following this date, only products which have submitted the appropriate application will be permitted to remain on the market. This is to ensure novel foods meet legal standards so as to reassure consumers.

The FSA is advising vulnerable groups not to take CBD, and for healthy adults to consume no more than 70mg a day, unless under medical direction.

CBD was confirmed as a novel food product in January 2019. Under the current regulations, any foods with no history of consumption before May 1997 should be evaluated before being placed on the market.

Click [here](#) to read more.

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Updates to the FSA's guidance on food allergen labelling

From 1 October 2021 new legislation will come into force, changing the way in which food businesses in England must provide allergen information on prepacked for direct sale food. The FSA has conducted a consultation into proposed updates to the existing Technical Guidance on Food allergen labelling and information requirements, to seek the views of stakeholders and affected parties.

The proposed amendments have been designed to reflect the new legal requirements facing food businesses in England. Separate, equivalent legislation is planned in Wales and Northern Ireland.

Click [here](#) to read more.

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Chair of Environmental Agency discusses future environmental standards in UK

Chair of the Environmental Agency, Emma Howard Boyd, recently spoke at a Westminster Energy, Environment & Transport Forum on environmental standards and the Office for Environmental Protection.

be the shift in public perception about climate change and the natural environment.

Click [here](#) to read more.

She touched on topical themes, including the UK's recent departure from the EU and the introduction of the new Environment Bill. However, she believes the biggest change may

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DATA PROTECTION AND PRIVACY

by Jon Bartley

EU deliberations on the UK as a third country for data transfers

Due to the UK's departure from the EU, the UK will be considered a "third country" under EU law – and possibly subject to restrictions on the free flow of personal data to the UK – at the end of the transition period in December. There is currently no agreement on what the UK-EU data relationship will look like after that point, but February has seen a [resolution](#) from the European Parliament and an [Opinion](#) from the European Data Protection Supervisor (EDPS) on the point.

The EU could simply acknowledge that domestic law is equivalent to the EU regime by making an 'adequacy decision', removing the need for companies to apply any contractual or other safeguards in relation to EU-UK data flows. However, the resolution (at paragraphs 32-34) indicates that prior UK derogations (in connection with immigration-related data processing, electronic telecoms data retention & mass surveillance/national security data processing by law enforcement) mean the UK regime is

insufficient, and requests that the Commission "carefully assess" the UK's data protection framework.

The EDPS supports the "endeavour" of forming a comprehensive UK-EU data partnership within the transition period but recommends:

- the UK & EU must ensure the partnership is underpinned by a respect for personal data protection, and
- priorities related to data processing by public bodies should be clearly defined.

It is clear that a great deal of uncertainty remains regarding what the post-transition relationship will look like, but these recent developments indicate the possibility of a rocky path ahead.

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ICO launches consultation into draft guidance on AI auditing framework

The ICO has launched a consultation into the draft AI auditing framework guidance for organisations. The guidance provides advice regarding ways to mitigate the risks AI poses to individuals and is aimed at technology specialists developing AI systems and risk specialists whose organisations use AI systems.

The ICO is seeking feedback from those with a compliance focus including data protection officers, risk managers and general counsel. It is also seeking the views of technology specialists such as data scientists and cyber security and IT risk managers.

Click [here](#) to read more.

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COMPETITION

by Lambros Kilaniotis

Hotel Accommodation: Prices Based on Guest Nationality

Following a three-year investigation, the European Commission has [announced](#) that it has fined the Melia hotel group almost €6.7 million (including a 30% reduction for co-operation) for imposing anti-competitive restrictions in their contracts with tour operators. In the meantime, it has also confirmed that it has closed its proceedings against the tour operators: Kuoni, Thomas Cook, TUI and REWE.

Melia's standard terms and conditions provided that its contracts with tour operators were only valid for bookings for consumers located in specified countries. Thus, a tour operator could not freely sell hotel accommodation directly to consumers throughout the EEA (active sales), but only to those in its allotted

countries of operation, nor could it respond to direct requests from customers who were resident outside of the countries allocated to it (passive sales). Consequently, consumers were unable to check fully hotel availability or book hotel rooms at the best prices with tour operators in other Member States. The European Commission concluded that the terms and conditions amounted to discrimination between customers on the basis of their place of residence or nationality in breach of EU competition law (Article 101 of TFEU prohibits agreements between companies which prevent, restrict or distort competition within the EU).

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Mixed Fortunes for Parties to Mergers in UK Phase II References

In the UK, mergers and acquisitions face in-depth scrutiny in circumstances where the Competition and Markets Authority ("the CMA") makes a Phase II reference. It has been a busy time for the CMA and there have been mixed fortunes for transactions subject to a Phase II investigation with one merger being abandoned, two potentially facing being blocked and a fourth potentially being cleared unconditionally.

At the very end of January, the CMA had [issued](#) its provisional findings that Prosafe SE's proposed acquisition of Floatel International Limited (the two largest suppliers, owning the vast majority of semi-submersible offshore accommodation support vessels used by oil and gas companies, on the UK and Norwegian Continental Shelves) may result in a substantial lessening of competition (the "SLC" test) and customers may face higher prices and/or lower quality when tendering for these vessels. The CMA's initial view was that the only way of addressing its competition concerns was to block the transaction. The Norwegian Competition Authority had already blocked it and the parties had been appealing that decision. Following the CMA's provisional SLC finding, Prosafe announced the abandonment of the transaction and the CMA has now issued its [merger cancellation notice](#) to formally end its investigation.

The parties to another two mergers in Phase II have also received adverse provisional findings. In relation to JD Sports Fashion plc's completed acquisition of Footasylum plc, the CMA has provisionally [found](#) that the transaction substantially lessens

competition nationally in relation to sports-inspired causal clothing and footwear both in-store and online. The CMA is concerned that the loss of competition between the parties could result in fewer discounts, less choice and lower quality of service for consumers. The CMA's initial view, on which it is consulting, is again that blocking the transaction may be the only way of addressing its concerns. If this were ultimately its conclusion, JD Sports would be required to sell off the Footasylum business. Although the UK operates a voluntary notification regime, this merger highlights the potential risks of completing a transaction without notifying and seeking clearance first.

The CMA [announced](#) another SLC provisional finding in relation to Sabre Holdings Corporation's proposed acquisition of Farelogix Inc. and is again considering whether to block the merger in order to address its competition concerns. The companies provide software solutions to help airlines to sell flights via travel agents and to connect with passengers via travel agents. The CMA's concerns relate to reduced innovation, higher fees and more limited choice of supplier for airlines using such IT systems, ultimately to the detriment of UK passengers. With regard to innovation, it is interesting to note that Farelogix has developed certain technology allowing airlines to offer more choice to passengers in terms of booking their flight experience, which Sabre does not currently offer, but has invested in developing. If Farelogix were to remain independent, the CMA's view is that there would be greater incentive for Sabre to innovate further.

However, the CMA has also provided proof that all is not necessarily lost for the parties to a merger whose transaction is referred to an in-depth Phase II. The CMA has recently [announced](#) its provisional findings that the completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway business and related assets is not likely to raise competition concerns. Thus, it is now expected to be cleared unconditionally. Both parties provide payment software used by businesses to submit direct debits, make payroll payments and

pay suppliers. At Phase I, the CMA had been concerned that the transaction might lead to reduced competition and, thus, to an increase in prices, as well as a reduction in product availability and in investment in innovation. As a result of its more in-depth Phase II, the CMA has been able to ascertain that there are sufficient alternative providers and that the Experian Payments Gateway business is no longer a strong force in the market.

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ADVERTISING & MARKETING

by Olly Bray

ASA publishes guidance on influencer marketing

The Advertising Standards Authority (ASA) has published detailed guidance on the rise of influencer marketing, and the rules by which advertisers and influencers must abide by.

The [Scope of the Code](#) outlines categories of content to which the Code applies, including "online advertisements in paid-for space". Examples of this type of advertising include pop-ups, banner ads and sponsored search results.

Other forms of advertising subject to regulation include "advertorials", or advertisement features, and "affiliate" ads, for example posts containing a discount code for a particular product.

Click [here](#) to read more.

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INSURANCE AND FINANCIAL SERVICES

by Matthew Griffith and Jonathan Cary

FCA publishes its annual review of regulated sectors

The Financial Conduct Authority (FCA) has published its annual Sector Views, providing a picture of how each financial sector is performing. It also provides analysis of the ways in which the financial landscape is changing and the impact of these changes on the market.

The report considers the impact of the following on the FCA's seven regulated sectors:

- the macroeconomic environment
- the potential impact of Brexit
- societal changes
- technological developments

Click [here](#) to read more.

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Big tech firms' move into finance may cause market instability

The Financial Stability Board (FSB) has warned that big tech firms' move into finance may "materially alter" the sector, in addition to posing fresh threats to financial stability. It has also expressed concerns that Big Tech provides services that many banks and financial companies rely on, such as the cloud. Although the provision of these services reduces a company's risk at an individual level, it increases the system-wide risk, should a major provider, such as Microsoft or Google, collapse.

The FSB further detailed concerns that, due to the size and presence of BigTech, its effect may not make for a more competitive financial sector in the long-term.

Click [here](#) to read more.

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PROFESSIONAL PRACTICES

by Rob Morris and Graham Reid

Court of Appeal decision on FRC privilege challenge

The Court of Appeal has allowed a landmark appeal regarding the provision of privileged information to the Financial Reporting Council (FRC). The court held that the recipient of a request made under the Statutory Auditors and Third Country Auditors Regulations 2016 (SATCAR) by the FRC is not legally required to produce privileged documents.

The decision, which reverses a previous High Court decision, applies whether the person entitled to the privilege is the audited entity or the auditor under investigation.

This is likely to be the type of challenge regulators increasingly face when exercising investigatory and enforcement powers.

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FRC announces plan to speed up pace of Enforcement investigations

The FRC has announced a shakeup of its oversight and supervisory functions in a bid to speed up the pace of Enforcement investigations. It will also be implementing high standards of corporate governance, reporting and audit to serve the public interest.

The new strategy will see the FRC further progress in its transition to a new regulatory body, which was proposed by last year's independent review of the FRC. In order to meet the requirements of the review, FRC will also recruit over 100 additional employees.

The FRC will speed up the investigation and conclusion of Enforcement cases by strengthening its case examination function to fast-track decisions on whether to open an Enforcement case.

Click [here](#) to read more.

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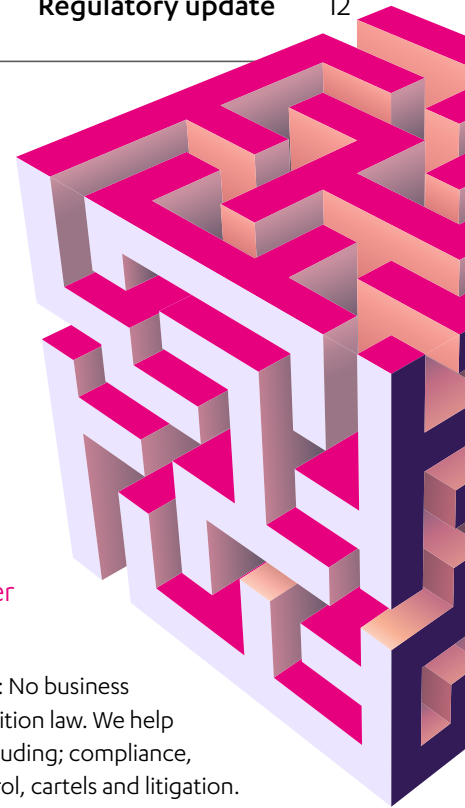
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NAVIGATING THE MAZE

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.

From helping to implement robust compliance strategies to conducting investigations and defending against enforcement proceedings, our multidisciplinary team can be relied on to add value, provide ideas and deliver a complete regulatory service whatever challenges you face, now and in the future.

- **White collar crime and investigations:** The burden of facing a regulatory or criminal investigation can be significant. We defend clients under investigation for regulatory breaches, corruption including; breaches of financial sanctions, false accounting, insider dealing and market misconduct.
- **Anti-bribery and corruption:** Our team works closely with clients to implement robust, cost effective anti-bribery programmes in line with international standards, and to manage risks and responses when things go wrong.
- **Anti-money laundering:** AML continues to be one of the most significant regulatory risks to firms. We help clients from implementing effective AML processes and controls to defending clients under investigation of breaches.
- **Data protection:** Protecting the data you hold has never before been so essential to your business. We regularly advise on data regulations, including GDPR, relating to subject access requests, data handling, sharing and processing, breaches, and training strategies.
- **Product liability and compliance:** Our Products team have the expertise you needed if you are faced with product recall or class actions.
- **Health, safety and environmental:** our expert team can support you whether you are shoring up your health, safety and environmental protocols, or facing an investigation in respect of an incident.
- **Tax investigations and dispute resolution:** Our dedicated tax dispute lawyers provide a comprehensive service covering pre-emptive advice on a wide range of risk issues, tax investigations and litigation before the tax tribunals and higher courts.
- **Insurance and financial services:** Our specialist lawyers advise on regulation, business and financial crime and compliance, including both contentious and non-contentious matters to ensure our clients avoid the pitfalls.
- **Competition and anti-trust:** No business can afford to ignore competition law. We help clients through all issues including; compliance, investigations, merger control, cartels and litigation.
- **Dawn raids:** A dawn raid situation can be extremely stressful – and if you get it wrong, the repercussions can be severe. Our experienced team can provide an immediate response to help you on the ground, as well as in the all-important preparation for the possibility of a dawn raid.
- **Professional practices:** Our team combines sector knowledge with regulatory expertise to provide comprehensive support and advice for professional services firms, covering all aspects of their regulated business.
- **Advertising and marketing:** Some of the world's largest corporates rely on us to keep their brand communications above board, from advertising standards to consumer regulation we help clients to simplify the complex.



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