Regulatory radar

2020/2021

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

Hello and welcome to the 2020/21 edition of RPC's 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.

Given the breadth of our regulatory expertise, this guide covers a range of regulators to give you the full picture a view across regulatory regimes - helping join the dots and navigate the regulatory maze. You will find digestible summaries of the key regulatory developments and trends and any key actions you should consider taking in preparation.

In any typical year, the regulators seek to implement new regulatory obligations that businesses must contend with. However, this year is far from typical. The COVID-19 pandemic has caused every aspect of our lives to have to adapt to the "new normal". Political parties have broken from decades of dogma to provide record levels of state support, and whole industries have changed working practices overnight. The regulators have been no different. They have ushered in a period of regulator forbearance, seeking to identify where rules can be relaxed to allow business much needed flexibility during this period.

However, while some expected regulatory developments have been pushed back or curtailed, there are several key issues worth having on your radar. So, this is the last mention of COVID-19 you'll find in this document while we focus on the other important regulatory topics. This includes the steps various regulators are taking to tackle environmental, social and governance (ESG) issues, and how different regulators are attempting to regulate the rapid adoption of evolving technology.

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.

Gavin Reese
Partner
T +44 20 3060 6895
gavin.reese@rpc.co.uk

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The UK's new and improved Stewardship Code

WHAT IS HAPPENING?

On 1 January 2020, the UK Stewardship Code 2020 (the Code) came into effect. While this is the Financial Reporting Council's third iteration of the Code, this edition substantially raises expectations and significantly increases the scope, standard and application of the context of "stewardship". A core tenet of the new Code puts much greater emphasis on environmental, social and governance issues, reflecting the increased importance society has placed on these areas. Primarily aimed at institutional investors and asset managers, the underlying requirements of the Code should also be of great interest to any business with, or seeking, investors.

WHY DOES IT MATTER?

The UK Stewardship Code 2020 ostensibly sets out the standards UK institutional investors need to adopt when engaging with their investments. But, while on the face of it this may seem to only be of importance to the investors, the true implications of the changes introduced by the Code are far reaching and it is difficult to imagine many businesses for whom it will not have a knock-on effect.

One particular change the Code will enforce on institutional investors and asset managers is the need to ensure that any investment made "creates long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society." Thus, any business seeking investors needs to ensure it has a strong plan to control its environmental footprint and demonstrate corporate social responsibility.

Another key change is the level of engagement the investors are expected to have with the management of the businesses in which they have invested in. Principles 9 to 12 of the 2020 Code set out that interaction and should be welcome news to many businesses as it will force investment firms to revisit how they work with senior management and how best they can foster collaboration.

WHAT ACTIONS SHOULD YOU TAKE?

- Businesses seeking investment, or already with investors, need to ensure they have a strong plan to control their environmental footprint and demonstrate corporate social responsibility.
- For businesses with investments from institutional investors and asset managers, the introduction of the Code may provide the opportunity to revisit established engagement methods with their investors and develop more effective ways of working with them.
- Consider how you, as a business, can help the institutional investor in drafting compelling disclosure for their investors.

Will this be the year of the modern slavery crackdown?

WHAT IS HAPPENING?

While the exact figure is hotly debated, it is likely that at least a quarter of businesses do not currently meet their reporting obligations under the Modern Slavery Act 2015. All companies that carry out business (or part of a business) in the UK, supply goods or services, and have an annual turnover of £36 million or more, are caught by this legislation. Organisations which meet these criteria are required to prepare a slavery and human trafficking statement each financial year and publish it prominently on their website. Non-compliance could result in an injunction against the organisation. However, it is often the reputational issues of non-compliance that pose the more significant risk.

WHY DOES IT MATTER?

The Modern Slavery Act (MSA) came into force in the UK in 2015 and established the UK as a world leader in the fight against the crime of modern slavery. This year will mark the five-year anniversary of the MSA being passed in Britain, and while the UK remains one of the leaders in tackling modern slavery, an independent review has found several significant deficiencies in the MSA.

Significantly, the report explicitly refers to the transparency requirements relating to supply chains, and "recommends putting teeth into this part of the MSA so that all businesses take seriously their responsibilities to check their supply chains".

Under s.54 of the MSA there is a self-reporting requirement; currently an organisation (wherever incorporated), which has an annual turnover of £36 million or more and carries on a business or part of a business in the UK, is required to publish a statement on its website stating what steps (if any) it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business.

The government is considering the review's recommendations and will respond formally in due course, and has launched a consultation specifically around transparency in supply chains (which closed at the end of last year). The outcome of this aspect of the review will be particularly relevant to those businesses with complex and/or international supply chains which are regarded as facing a comparatively high risk of modern slavery occurring.

WHAT ACTIONS SHOULD YOU TAKE?

- Ensure you have a due diligence process for onboarding new suppliers and conduct a risk assessment of your own business and current suppliers.
- Make sure that you have internal policies in place in respect of modern slavery and human trafficking and that training is provided so that your staff know what to look for and how to discuss modern slavery both internally and with suppliers.
- Put relevant modern slavery provisions into your supplier contracts, to ensure your suppliers behave in accordance with your own organisation's standards and so your suppliers provide all the information and assistance you need to meet your obligations.
- Consider whether your organisation meets the s.54 MSA criteria and if so publish a modern slavery statement.

A mandate to focus on corporate criminal liability

WHAT IS HAPPENING?

Recent figures from HMRC show that they are pursuing their new mandate to focus on corporate criminal liability. In 2017, the Criminal Finances Act 2017 (Act) brought in two new corporate offences for failing to prevent the facilitation of tax evasion. In February 2020, HMRC announced they had 30 active investigations and 'opportunities'; a 600% increase in less than a year. The business sectors being targeted are diverse and include "some of the UK's largest organisations."

WHY DOES IT MATTER?

Facilitation of tax evasion is a strict liability offence criminalising the actions of companies and limited liability partnerships. If criminal tax evasion (whether successful or not and whether prosecuted or not) and facilitation by a person or entity performing services for or on behalf of the business are proven, the business' guilt for failing to prevent follows. There does not need to have been any assent, co-operation, or even awareness of the facilitation of tax evasion by the business.

The Act does provide a defence. The business must have either had in place such reasonable preventive measures as was reasonable in all the circumstances or, in all the circumstances, it was not reasonable to have any preventative procedures in place.

Government Guidance (published 1 September 2017) provides that the reasonable preventative measures should be informed by the guiding principles of:

- risk assessment;
- proportionality of risk-based prevention procedures;
- top level commitment;
- due diligence;
- communication (including training); and
- monitoring and review.

This substantial increase in the number of cases under active investigation indicates that HMRC is likely to be pro-active in its prosecutorial duties, particularly as the offences were enacted at the end of September 2017; it is anticipated that it will not be too long before the first prosecutions are brought.

WHAT ACTIONS SHOULD YOU TAKE?

- Review the business' engagements with those who perform services for, or on behalf of, your business to ensure that there are appropriate controls (contractual and otherwise) in place to address potential tax evasion.
- Ensure the business conducts a full risk assessment for potential tax evasion and implements appropriate policies and controls to address any risks, including incorporating due diligence of tax evasion risks into the business' wider due diligence programme.
- Create and enshrine the no-tolerance 'tone from the top'; including a training system for employees and contractors with periodic review, modifying and improving the training and policy as required.

"No ifs, no buts" – Government's stance on the National Minimum Wage

WHAT IS HAPPENING?

Minister Kelly Tolhurst recently spelt out the Government's stance on the National Minimum Wage (NMW) going forward: "Anyone who is entitled to the minimum wage should receive it – no ifs, no buts – and we're cracking down on companies that underpay their workers".

The government has brought in new NMW regulations, which came into force in April 2020, to provide greater stability to workers, greater clarity about earnings, and greater flexibility to employers and workers around pay arrangements. It also hoped that the reintroduction of a "name and shame" scheme will encourage compliance by businesses and protection for workers.

WHY DOES IT MATTER?

The new NMW regulations have three key objectives: to name and shame employers who fail to pay the NMW, to ensure the government calls out cases of abuse by employers, and to ensure compatibility with modern pay arrangements.

Businesses should take note of, and take appropriate measures to ensure compliance with, the following:

- A "naming and shaming" scheme will be resurrected. This will effectively "name and shame" businesses who fail to pay their workers the National Minimum Wage. However, the new threshold has increased to only those businesses owing arrears of more than £500 in NMW payments. Any businesses which underpay by less than £100 will have the chance to correct the mistake without being named (though they still have to pay back workers and can face fines of up to 200% of the arrears).
- The range of pay arrangements available to businesses employing "salaried hours" workers will be expanded to include:
  - permitting additional payment cycles for salaried workers
  - allowing employers to choose their "calculation year", and
  - ensuring salaried workers can receive premium pay without losing their entitlement to equal and regular instalments in pay.
- Employers offering salary sacrifice and deductions schemes will no longer be subject to financial penalties if the scheme brings payment below the NMW rate (eg where staff buy products from their employer and pay for these via salary deductions).

A stay of execution, but IR35 is still on its way

WHAT IS HAPPENING?

Following a consultation in Spring 2019, the government published draft legislation in July 2019 which will extend the changes to the 'intermediaries legislation' (commonly known as 'IR35') recently imposed upon the public sector to large and medium-sized private sector businesses with effect from April 2021. These are the rules which apply to workers who are engaged through intermediaries, usually personal service companies (PSC), and seek to impose employment income tax and national insurance contribution (NIC) charges in cases where, if the worker was directly engaged by the client business, the worker would have been an employee.

WHY DOES IT MATTER?

The changes introduced will impose significant compliance burdens on client businesses. Under the old rules, the intermediary (ie the PSC) was required to account for employment income tax and NICs in cases where the IR35 legislation applied. However, under the new rules, client businesses will be required to determine for each worker whether or not that worker would be an employee if he or she was engaged directly by the client and ensure that income tax and NICs are deducted from payments in cases where the IR35 rules apply.

In a basic supply chain, an end-user might contract directly with the PSC. In such circumstances, the end-user will also be the fee-payer under the new regime. This will result in the end-user being liable for both:

- carrying out a status determination regarding the individual worker, and
- where the regime applies, including the individual worker on their payroll and accounting for the resultant income tax and NICs.

Often, however, off-payroll worker supply chains are more complex, and may involve one or more intermediaries between the end-user and the PSC. Generally, where the new regime applies to such supply chains, the fee-payer (not the end-user) will be responsible for including the individual worker on their payroll and accounting for the resultant income tax and NICs.

It will therefore be crucial for both end-users and fee-payers to use the time before 6 April 2021 to review the nature of, and their role in, any existing off-payroll engagements to determine which are likely to fall within the scope of the reforms, and what their potential obligations and liabilities will be (either as an end-user or a fee-payer).

WHAT ACTIONS SHOULD YOU TAKE?

Engagers and contractors should:

- identify and understand their current external labour model;
- identify contractor base/population and understand existing contractual arrangements;
- assess whether their current labour model fits with their future propositions;
- carry out IR35 assessments on "as is" contracts and conduct scenario planning;
- agree a standard approach to IR35 and identify exceptional cases;
- test the new model;
- carry out formal IR35 assessments; and
- monitor compliance, evaluate change and report on the effectiveness of the new model.

Digital Markets: A Priority for the CMA

WHAT IS HAPPENING?

Digital markets have been, and are set to remain, a priority for the Competition and Markets Authority (the CMA), as set out in its recently published draft Annual Plan for 2020/21. Other areas of focus include protecting consumers, particularly the vulnerable (eg the ongoing work following Citizens Advice's loyalty penalty super complaint), and the CMA taking on its new post-Brexit responsibilities (until the end of the Brexit Transition Period, the status quo regarding competition law is maintained). The CMA has emphasised that digital markets do not just encompass a discrete sector as most markets are becoming increasingly digital with the expansion of online trading.

WHY DOES IT MATTER?

The CMA is looking to ensure that it understands, and is able to respond effectively to, evolving business models, technologies and consumer behaviour in light of digital developments. It is planning to continue the work identified in its 2019 Digital Markets Strategy, a key part of which is its ongoing market study into online platforms and digital advertising (the CMA's final report is due by 2 July 2020). This study is expected to help inform the development of any new regulatory framework following the proposals for a digital markets unit and the designation of certain businesses as having "strategic market status". In the meantime, the Government has announced its proposal to appoint Ofcom to regulate digital platforms in relation to illegal and harmful conduct and the establishment of a new Digital Markets Task Force (to be led by the CMA and involving Ofcom and the ICO) to advise it on potential measures to promote competition in digital platform markets.

However, in addition to potential regulatory changes, the CMA will be updating its merger assessment guidelines to take account of how digital markets function and its recent practice in assessing digital mergers. The CMA is also considering whether changes are needed to the UK merger regime.

The CMA will continue to develop its Data, Technology and Analytics Unit to improve: how the CMA gathers and manipulates data of differing scales; the efficiency of its investigations through building bespoke software; and its understanding of technologies. For example, businesses' use of algorithms is coming under greater scrutiny in investigations into pricing practices. The CMA is also now better placed to monitor and anticipate potentially problematic practices and address both competition law and consumer law compliance concerns.

Thus, the CMA's activities in, and focus on, the digital arena going forward will not just have a potential impact on digital platforms.

In addition, the European Commission has launched a consultation (open until 8 September 2020) on its Digital Services Act package, covering issues such as safety online, freedom of expression, fairness and a level-playing field in the digital economy (given a few large online platforms act as gatekeepers). In parallel, it has launched a second consultation on the need for a possible new competition tool to deal with structural competition problems across markets "in a timely and effective manner".

WHAT ACTIONS SHOULD YOU TAKE?

- Many businesses have dealings, or otherwise interact, with digital platforms. It is advisable to keep any regulatory changes under review as they may not just impact on the digital platforms themselves, but may also have implications for your own commercial arrangements in the future.
- For businesses involved in fast-moving tech markets, you may wish to keep a watching brief on the CMA's assessment of mergers going forward, particularly if you have possible expansion aspirations through acquisition or merger.
- For those in the manufacturing and retail sectors, particular care should be taken with regard to the use of price monitoring software and pricing algorithms. Potentially anti-competitive practices cannot be disguised behind the use of technology.

Work-related stress identified as an HSE priority

WHAT IS HAPPENING?

Work-related stress (WRS) has been identified by the Health & Safety Executive (HSE) as an area of health priority. This reflects ever increasing public awareness of mental health issues. The HSE's stated aim is to see a significant increase in the number of employers taking a proactive (rather than reactive) approach to managing WRS through suitable risk assessment methodology, as well as recognition that preventive action on WRS can make a valuable contribution to the wider mental health agenda.

WHY DOES IT MATTER?

WRS is acknowledged by the HSE as a major cause of sickness absence in the workplace. It costs over £5 billion a year in the UK, with employers having to deal with to sickness absence, replacing staff, lost production and an increased risk of accidents.

HSE statistics show that WRS has led to 15.4 million working days being lost as a result of stress, anxiety or depression. In 2018/19, stress, anxiety or depression accounted for 44% of work-related ill health and 54% of working days lost. Reasons commonly cited included workload, lack of managerial support, and organisational change as primary causes.

There is a step-by-step workbook available from the HSE entitled "Tacking Work-Related Stress using the Management Standards Approach". This sets out a systematic approach to implementing a methodical process for managing WRS. The guide includes examples of risk assessments, stress policies and practical steps that can be taken to deal with individual concerns. It can be accessed here.

The HSE's approach to date has been to educate rather than prosecute, but, with such detailed guidance available, businesses without appropriate systems in place will find themselves at increased risk of enforcement action.

During the COVID-19 pandemic, a lot of workers will be working at home. The HSE is concerned that lone working could affect stress levels and mental health and has issued guidance to employers to support home workers.

WHAT ACTIONS SHOULD YOU TAKE?

- Review your business's policies and procedures.
- Ensure that your managers have the competencies require to prevent or reduce the potential sources of WRS.
- Communicate effectively with staff, giving clear information about project objectives, employee involvement, and progress updates.

The long-awaited Environmental Bill

WHAT IS HAPPENING?

The long-awaited Environmental Bill is set to deliver a national infrastructure strategy in 2020, supporting development in the energy, transport and digital sectors. Key to this will be measures designed to improve air and water quality, tackle plastic pollution (by charging for specified single use items) and restore wildlife. The government will be held to account by the implementation of a new Office for Environmental Protection. Whilst it won't be able to inflict fines, this independent Office will have the power to halt projects or hold authorities in contempt of court for breaching environmental standards.

WHY DOES IT MATTER?

The Environmental Bill sits alongside the Government's long-term objective for "this to be the first generation to leave the environment in a better state than that in which we inherited it". It creates a framework with a lasting impact on all businesses, as the environment comes to the forefront of policy making. This bill will underpin the 25 Year Environmental Plan and will set long-term, quantifiable goals to improve the state of the natural environment. It provides businesses with clear signals regarding investment in environmental improvements and resource efficient processes.

If effectively implemented, the Bill will enhance the competitiveness of the British economy. Recent research by the Aldersgate Group indicates that properly enforced regulations will promote business investment in innovation and skills, business competitiveness, job creation and improve products/infrastructure. The value chain of public, manufacturers, local authorities and recycling organisations are already seeing a peak in investment. ESA members have committed to investing ten million in the UK in the next ten years, if given the right policy framework. This would create 50,000 jobs, deliver 50 million tonnes of CO2 savings and help the UK to become a world leader in this field.

Businesses should also be aware that the cost burden of pollution and environmental degradation is likely to increase under the proposed approach to governance. Every business that interacts with the natural environment will have a growing legal duty of care, enforceable through the courts. Compliance will become a necessity.

WHAT ACTIONS SHOULD YOU TAKE?

- Businesses will be encouraged to work with local powers to tackle air pollution and water pollution, by investing in infrastructure and adopting "cleaner" working methods.
- Businesses should reduce overall use of specified single use plastic items, such as water bottles, straws, coffee stirrers and food packaging.
- Businesses should help the Government to tackle issues which undermine the sector, such as waste crime, which threatens investment by legitimate operators.
- Businesses should move to a paperless/ electronic working method where possible.
- Businesses should recycle electronics.
- Businesses should provide relevant information to employees.

Landmark change for food labelling

WHAT IS HAPPENING?

The Food Information (Amendment) (England) Regulations 2019 (SI 2019 No. 1218) will come into force on 1 October 2021 and will change the way in which food businesses in England provide allergen information of prepacked for direct sale (PPDS) food. Separate equivalent legislation is planned in Wales and Northern Ireland. Similar legislation is planned for Scotland.

WHY DOES IT MATTER?

The current law requires food businesses to ensure that mandatory food allergen information relating to the 14 key allergens is accurate, available and accessible to a consumer. Distinction is made between prepacked foods and non-prepacked foods in how the allergen information is provided to consumers: any food that is prepacked must have an ingredients list with any allergens present emphasised in the list, whereas non-prepacked foods are not required to carry labels or information on allergens. At present, any food that does not fall within the definition of prepacked food is deemed to be a non-prepacked food, including PPDS food.

The new legislation requires PPDS food to include the legal name of the food, a list of ingredients and any relevant ingredient used in the manufacturing or preparation of a food and still present in the finished product. This information must be set out on the packaging or a label attached to it and must be clear, visible and in a minimum font size. Any derivatives must be followed by the allergen (eg "cheese (milk)").

There is currently no definition of PPDS in the underpinning law, the EU Regulation governing Food Information for Consumers (EU FIC). This issue is the subject of a Government Consultation aimed at stakeholders in England, Wales and Northern Ireland.

WHAT ACTIONS SHOULD YOU TAKE?

- Food businesses will be expected to be familiar with and act upon the new legislation's Technical Guidance once it is finalised. They should not delay reviewing their procedures.

Medical Devices Regulation on the horizon

WHAT IS HAPPENING?

The EU Regulation on Medical Devices 2017/745 (the MDR) had been due to become fully applicable on 26 May 2020. However, its implementation has been delayed by the EU until 26 May 2021. The MDR replaces Medical Device Directive 93/42/EEC. To cater for Brexit, the UK is expected to transpose the key elements of the MDR into UK legislation. Medical device manufacturers will need to prepare to comply with a greater regulatory burden designed to improve product safety.

WHY DOES IT MATTER?

The MDR was drafted in the aftermath of high-profile litigation concerning medical devices, such as the PIP breast implant litigation and metal-on-metal hips litigation. The new law recognises that the previous regulatory regime had struggled to keep up with technological developments over the past 25 years. The MDR is intended to improve the traceability features and safety management of medical devices for sale in the EU.

It is hoped that in return for incurring the expense of compliance with the MDR, manufacturers will be able to take advantage of a reduced risk of litigation from patients or consumers. Manufacturers should reap the benefit of a new regulatory regime that intended to make medical devices safer.

New rules under the MDR include:

- An expanded definition of medical devices, to include aesthetic products.
- A restriction on manufacturers' ability to "self-certify" that their products comply with regulatory standards.
- New rules for determining risk classification.
- Requirements for manufacturers to have in place sufficient financial cover for potential liability.
- Obligations on manufacturers of apps, including requirements in respect of security measures.
- Greater oversight of Notified Bodies (the organisations designated by EU regulators to assess conformity of products before they are placed on the market).
- A requirement for manufacturers to use unique identification codes to improve the identification and traceability of devices once they are in the market.
- Obligations on other entities in the supply chain, including importers and distributors, to cooperate with manufacturers over tracing of devices.

WHAT ACTIONS SHOULD YOU TAKE?

- Assess whether your products are covered by the expanded definition of a medical device.
- Be prepared to gather information from postmarket experience with your devices, to update technical documentation and cooperate with regulators charged with overseeing market vigilance activity.
- Consider investing in technology to enable the tracing of products and packaging once they are in the market place.
- Consider whether apps relating to fitness and health issues fall within the scope of the MDR.
- Review your financial provisions to ensure you have cover for potential liability for defective products, which may be in the form of insurance.
- Engage with your distribution chains to ensure other parties comply with their obligations to track and recall products.

UK as a third country for data transfers

WHAT IS HAPPENING?

Brexit has caused a series of headaches for the UK's regulators in attempting to maintain the regulatory status quo at the end of the transition period. A particular hot issue is what the exact nature of the UK relationship will be with the EU when it comes to data.

WHY DOES IT MATTER?

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 2020. There is currently no agreement on what the UK-EU data relationship will look like after that point, but February saw both 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.

WHAT ACTIONS SHOULD YOU TAKE?

- Review the extent of any personal data transfers you conduct between UK and EU jurisdictions in readiness of the potential imposition of regulatory barriers.
- Discuss with any relevant business partners the possible need for a contractual response to ensure compliance and sufficient data protection.

The new ePrivacy Regulation

WHAT IS HAPPENING?

The Presidency of the Council of the EU released a progress report on the ePrivacy Regulation on 29 May 2020, which has been the subject of intense negotiation since the proposed Regulation was first published in January 2017. The report makes clear that, since a revised draft was issued in February 2020, the reactions from Member States have been mixed, and the new German presidency now has the task of trying to move the legislation forwards.

Eventually the new ePrivacy Regulation will replace the current ePrivacy Directive which is the European law that informs the UK's Privacy and Electronic Communications Regulations 2003 (PECR). The ePrivacy Regulation was due to come into force on 25 May 2018 alongside the GDPR, however, continued deliberation has delayed its enactment.

WHY DOES IT MATTER?

The lack of certainty as to when the ePrivacy Regulation (the "ePR") will come into force, and what it will say, is unwelcome for businesses that are still bedding down their GDPR practices, particularly given the overlap between ePR and GDPR. It is up to the European Commission to either withdraw the entire proposal or await new text provided by the incoming new Germany presidency.

The draft ePR covers electronic communications (email, apps, direct marketing etc), the right of confidentiality and much more. The ePR recognises that there has been an excess of cookie consent requests from websites and therefore aims to simplify the rules regarding cookies by streamlining cookie consent in a more user-friendly way. The latest version of the proposal attempted to align ePR further with GDPR, by proposing that in limited circumstances, cookies and similar technologies could be placed on users' equipment on the basis of legitimate interests, thus avoiding the need for so many cookie consents. Safeguards included a prohibition on sharing collected metadata with third parties unless anonymised and the legitimate interests basis not being available if the technology was being used to build profiles on end users. However, this proposal met with a mixed reaction from Member States.

Publicly accessible wireless networks such 'Wi-Fi hotspots', will be subject to the ePR, regardless of the method in which that service is delivered. Wi-Fi hotspots that are closed to the public, such as business networks, are not subject to the ePR.

Penalties will range from up to 10,000,000 EUROS or 2% of worldwide annual turnover for some breaches and up to 20,000,000 EUROS, or 4% of worldwide annual turnover, for more serious breaches – whichever is the higher in each case.

As the UK's MEP have vacated Brussels, they will not be privy to voting on the next draft of the ePR (whenever that may be!). Once the ePR comes into force, it will be up to the UK Government to review and decide on how this will be implemented within the UK.

WHAT ACTIONS SHOULD YOU TAKE?

- There is a need for clarity on how the privacy of electronic communication is governed in this evolving technological age. As it stands businesses should continue to review the rules on electronic tools, such as cookies, on a country by country basis.
- As the text of the ePR is yet to be agreed, it is difficult for businesses to prepare for its arrival. Businesses should look out for any developments on the fate of the ePR as it is set to shake-up how data protection will be applied to electronic services provided over telecom networks, the internet and much more!

SMCR: The tricky implementation phase

WHAT IS HAPPENING?

The Senior Managers and Certification Regime (SMCR) came into force for all financial services firms solo-regulated by the Financial Conduct Authority (FCA) on 9 December 2019. The SMCR replaces the previous APER regime under which the FCA had oversight of the individuals working in the financial services industry. There is a one year implementation period for firms to make the changes required by the SMCR, which expires on 9 December 2020.

WHY DOES IT MATTER?

As of 9 December 2019, the SMCR applies to approximately 47,000 solo-regulated financial services firms. It represents a seismic change to the process by which individuals working in these firms are supervised by the FCA. The individuals are divided into the following categories under the SMCR and each is treated differently by the FCA:

- **Senior Managers**: must be directly approved by the FCA to carry out their functions (as under the previous APER regime);
- **Certification employees**: employees who do not carry out senior management functions but can have a significant impact on customers, the firm and/or market integrity. They are no longer required to be approved by the FCA, but must instead be certified by the firm on an annual basis as being fit and proper to carry out their role(s); and
- **Other employees**: other than ancillary staff (such as receptionists) all other employees, in addition to the senior managers and certification staff are required to comply with the Conduct Rules set by the FCA, which include obligations such as acting with integrity and acting with due skill, care and diligence.

By 9 December 2020, firms are required to action various changes required by the SMCR. In particular, they are required to have completed the certification process for all "certification employees" and notified the FCA of their identities to be included in the FCA's newly created directory. The Conduct Rules will also apply to all relevant staff from 9 December 2020 as well.

WHAT ACTIONS SHOULD YOU TAKE?

Solo-regulated firms to whom the SMCR began to apply on 9 December 2019 should undertake the following key steps before 9 December 2020:

- Ensure that the process of certifying all relevant employees as fit and proper to carry out their roles has been conducted and all certificates have been completed;
- Notify the FCA of the names of the certification employees to be added to the FCA's directory.
- Provide appropriate training to all staff regarding the Conduct Rules and their implications before they come into force on 9 December 2020.

Audit market: From recommendations to reforms

WHAT IS HAPPENING?

The Brydon Report on audit quality and effectiveness was released on 18 December 2019. The Report sets out recommendations for "urgent reform" in order to increase public confidence and seek to prevent unnecessary corporate failures. It builds on two previous inquiries into the sector - the Kingman Review of the Financial Reporting Council and a market study conducted by the Competition and Markets Authority. The government must now turn a wide range of recommendations into a holistic package of reforms which will shape the future of audit.

WHY DOES IT MATTER?

Reform has been on the horizon for several years, following a succession of high-profile corporate collapses linked to perceived audit deficiencies. There is recognition throughout the industry that reform is necessary. It is now a question of what and when reforms will be implemented.

The Brydon Report contains some bold proposals with the potential to fundamentally change the way audit functions in the UK. These include:

- creating a standalone audit profession (as distinct from accounting), with separate governing principles and training requirements;
- imposing additional duties on auditors to detect fraud eg by requiring them to exercise 'professional suspicion' (as opposed to scepticism);
- greater transparency in terms of remuneration and profitability from audit work; and
- new reporting requirements for directors and more opportunities for shareholders to hold directors and auditors to account.

These proposals add to the (already far-reaching) recommendations of previous reports, including the operational split of audit from provision of consulting services and the possibility of joint audits. These reforms would be relevant to auditors of any size, as well as firms throughout the accountancy sector.

Meanwhile, pending formal reforms, the FRC is pressing on with its plans to ringfence audit practices from other parts of professional services businesses, which the FRC considers will contribute to an increase in audit quality.

Reforms will have implications for any business subject to audit requirements, as well as their directors and shareholders. There is likely to be an increased focus on the role played by all the directors of a company and the need for the whole board to be accountable.

However, given the Government are currently tackling the impact COVID-19 as well as dealing with Brexit this year, it may well be that the auidt market reforms could be delayed.

WHAT ACTIONS SHOULD YOU TAKE?

- There will be a greater emphasis on forensic accounting (to detect fraud) – consider additional training for auditors to meet new standards.
- Directors should review and improve their company's internal controls in anticipation of greater scrutiny from auditors, regulators and shareholders, and check whether D&O policies will extend to personal liability they may face.
- A split of audit and consulting would create opportunities for firms outside the Big Four to keep monitoring developments as to the final structure of audit businesses to take advantage of potential opportunities.

New Regulation for Surveyors

WHAT IS HAPPENING?

On 1 April 2020 the Royal Institution for Chartered Surveyors introduced new rules for the registration of firms. The new rules include the following key changes:

- For a firm to be registered with the RICS it will now be necessary for at least 25% of the firm's principals to be RICS-qualified members.
- A new role of "responsible principal" has been created. That individual will be responsible for ensuring that the firm as a whole complies with its obligations as a regulated firm.
- It will be permitted for a firm to register a department, division or practice (most likely in circumstances where the firm as a whole does not meet the registration criteria).

WHY DOES IT MATTER?

We anticipate that there will be a number of firms who do not have the required 25% of qualified principals. In these circumstances the firm will need to liaise closely with RICS to consider who should be defined as a "principal" on its RICS annual return. In the event that a firm is unable to achieve compliance it will need to liaise with the Head of Regulation to determine what steps it can take to remain registered, or, alternatively, to begin deregistration.

The main change is the introduction of the "responsible principal" role. The responsible principal will have overall responsibility for ensuring the firm's compliance with RICS technical, ethical and professional standards. They will also be the person within the firm who acts as the main point of contact with RICS.

It is of note that the responsible principal does not have to be an RICS member – it could be another senior professional within the firm such as a senior accountant or lawyer. In the event that a non-member is selected for the role, the firm will need to be in a position to justify why that individual has been chosen – ie experience of compliance activities or knowledge of RICS regulation.

For a person to be permitted to act as a responsible principal they will need to firstly satisfy the Head of Regulation that they are appropriate to hold the appointment through answering questions during the nomination process. Secondly, they will need to satisfy the Head of Regulation that they are able to influence the strategy and direction of the firm – either directly or through someone that they report to. Lastly, they will either need to be an RICS member, or the firm will need to demonstrate that it is not possible for them to nominate an RICS member **and** that the nominated individual has experience in carrying out regulatory compliance activities.

It seems likely that certain characteristics will preclude someone from acting as responsible principal – including bankruptcy, directors disqualification proceeding or previous adverse disciplinary findings.

WHAT ACTIONS SHOULD YOU TAKE?

- Firms will need to confirm whether **at least** 25 % of their principals are RICS qualified. If not, then they will need to contact the RICS for advice.
- Firms will need to begin to consider who will act as the "responsible principal". RICS has issued detail guidance on the selection of an appropriate individual.
- Whilst there is a 12 month transition period, any ongoing failure after this date could lead to RICS taking disciplinary action against the firm. Nominations will therefore need to be submitted to RICS in good time.

Key contacts

For further information on any regulatory matter, please contact our team below:

HEALTH, SAFETY AND ENVIRONMENTAL

Gavin Reese
Partner
Head of Regulatory
+44 20 3060 6895
gavin.reese@rpc.co.uk

ANTI-BRIBERY AND CORRUPTION/AML

Sam Tate
Partner
+44 20 3060 6605
sam.tate@rpc.co.uk

PRODUCT LIABILITY AND COMPLIANCE

Dorothy Flower
Partner
+44 20 3060 6481
dorothy.flower@rpc.co.uk

COMPETITION AND ANTI-TRUST

Lambros Kilaniotis
Partner
+44 20 3060 6033
lambros.kilaniotis@rpc.co.uk

INSURANCE AND FINANCIAL SERVICES

Jonathan Cary
Partner
+44 20 3060 6418
jonathan.cary@rpc.co.uk

Matthew Griffith
Partner
+44 20 3060 6382
matthew.griffith@rpc.co.uk

WHITE COLLAR CRIME AND INVESTIGATIONS

Davina Given
Partner
+44 20 3060 6534
davina.given@rpc.co.uk

PRIVACY, SECURITY AND DATA PROTECTION

Jon Bartley
Partner
T +44 20 3060 6394
jon.bartley@rpc.co.uk

TAX INVESTIGATIONS AND DAWN RAIDS

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

ADVERTISING AND MARKETING

Oliver Bray
Partner
+44 20 3060 6277
oliver.bray@rpc.co.uk

PROFESSIONAL PRACTICES

Graham Reid
Legal Director
+44 20 3060 6598
graham.reid@rpc.co.uk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

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.
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- **Product liability and compliance**: Our Products team have the expertise you needed if you are faced with product recall or class actions.
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