



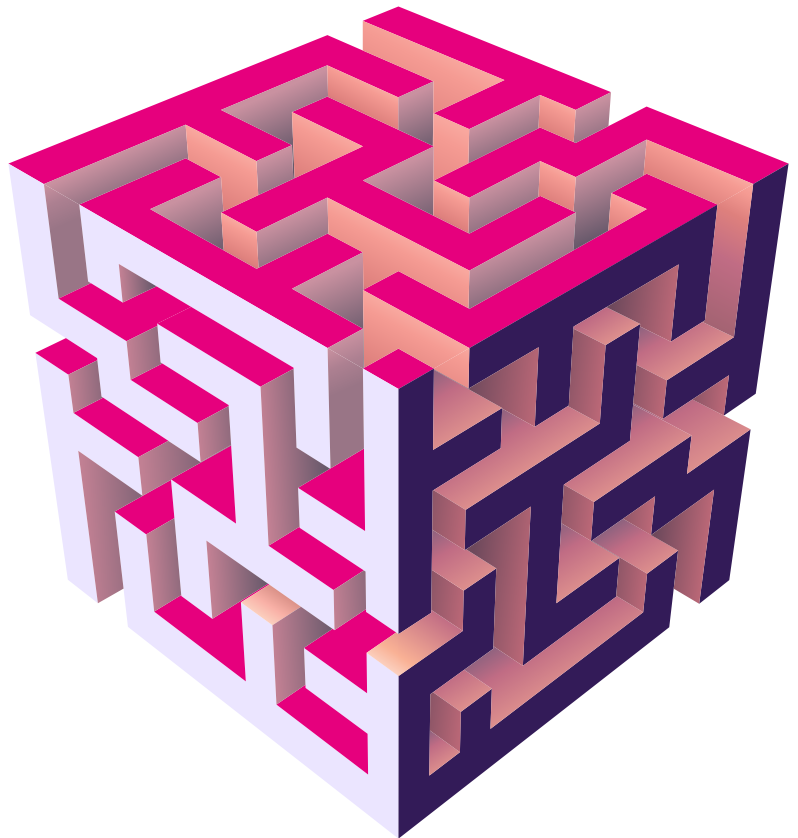
Regulatory update

August 2020

Welcome to the August edition of the Regulatory update, which pulls together recent developments from across the UK's regulators – to help you navigate the regulatory maze.

While people have been heading off on holiday over the last few weeks, it has been a busy time for Government and regulators. HMRC has been given new powers to tackle furlough fraudsters, the UK imposed its first “Magnitsky” sanctions, and the Draft Building Safety Bill has now been announced. In a cross-regulator bid for increased coordination, the CMA, ICO and Ofcom have jointly set up the Digital Regulation Cooperation Forum to harness collective expertise.

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, reading 'Gavin Reese'. The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Gavin Reese
Partner, Head of Regulatory

KEY HEADLINES

UK imposes first so-called “Magnitsky” sanctions	3
Treasury consult on economic crime levy.....	3
G4S to pay £38.5m to settle fraud charges	3
HMRC to be handed powers to tackle furlough fraudsters.....	4
COVID-19: HMRC guidance on implications of crisis driven changes to trading activities	4
Government announce Draft Building Safety Bill	5
Businesses urged to become COVID-secure	5
FSA publishes risk review of COVID-19 transmission via food.....	5
ECJ strikes down EU-US Privacy Shield	6
Data protection implications of NHS Test and Trace for hospitality sector	6
UK regulators join forces to ensure online services work well for consumers and businesses	6
CMA Investigations: Further Focus on RPM Infringements and Covid-19 Excessive Pricing Developments ...	7
UK Merger Control Developments.....	7
EU Merger Control Developments.....	8
Climate Financial Risk Forum publishes practical recommendations for firms	9
DB Transfers – the FCA’s views on good and bad practice.....	9
FCA publishes discussion paper on prudential regime for UK investment firms.....	9
FRC announces principles for operational separation of audit practices	10
SRA consults on 2020-21 business plan	10
FRC reviews firms’ going concern policies and procedures.....	10
Key contacts	11
Navigating the maze	12

WHITE COLLAR CRIME

by Sam Tate and Davina Given

UK imposes first so-called “Magnitsky” sanctions

On 6 July 2020 the UK imposed its first so-called “Magnitsky” sanctions, pursuant to the Sanctions and Money Laundering Act 2018 (the Act). Sanctions have been imposed on both entities and individuals alleged to have been involved in human rights abuses in contravention of the Global Human Rights Sanctions Regulations 2020 (the Regulation).

Under the Act, the UK Government is able to create sanctions “in the interests of international peace and security”. Sanctions are currently targeted at individuals from Myanmar, Russia and Saudi Arabia, however it is expected that further sanctions will follow.

The Regulation provides a framework under which entities and individuals can be sanctioned should they be involved in activities amounting to a serious violation of an individual’s right to life.

For more information, please click [here](#).

[Back to contents >](#)

Treasury consult on economic crime levy

The Government used the 2020 Budget to announce its intentions to bring in an economic crime levy, to raise £100m of revenue. The levy will be used to fund government initiatives to tackle money laundering, and help deliver the reforms set out in the 2019 Economic Crime Plan.

The Treasury consultation now seeks views on what the levy will pay for and how it should be calculated and distributed across the anti-money laundering regulated sector. The consultation calls

for evidence on current levels of private sector investment on counter fraud measures, as well as gauging private sector views on contributions towards funding the fraud response. The Treasury’s initial proposal is that the levy might be calculated by reference to revenue at a rate of £100-£200 per £1 million of revenue.

For more information, please click [here](#).

[Back to contents >](#)

G4S to pay £38.5m to settle fraud charges

Security outsourcing company G4S has entered into a deferred prosecution agreement (DPA) with the SFO under which it is to pay a penalty of £38.5 million in relation to fraud identified regarding a contract with the Ministry of Justice (MoJ). Under the DPA, G4S subsidiary Care and Justice Services (UK) Ltd (G4S) accepts responsibility for three offences of fraud in relation to dishonestly misleading the MoJ regarding the true extent of its profits earned between 2011 and 2012 under contracts concerning the provision of electronic monitoring services.

The DPA concludes the SFO’s ongoing investigation into G4S. Investigations into allegations of improper billing have also concluded, with no criminal charges brought against G4S.

For more information, please click [here](#).

[Back to contents >](#)

TAX

by Adam Craggs

HMRC to be handed powers to tackle furlough fraudsters

Draft legislation granting HMRC greater enforcement powers under the new Finance Bill 2020 is being rushed through parliament and is expected to be made law this month. The proposed legislation will grant HMRC powers to pursue those who have broken the furlough scheme rules. Additionally, HMRC will be able to hold company officers jointly and severally liable where a business has become insolvent.

Furloughed employees are not permitted to undertake remunerative activity for their employer while furloughed. Various factors have left the furlough scheme open to abuse, with HMRC receiving over 3,800 reports of fraudulent claims since April.

The new legislation is expected to provide for a window in which employers can self-report if a mistake has been made. They will then be able to repay the furlough sums back without incurring any penalties.

For more information, please click [here](#).

[Back to contents >](#)

COVID-19: HMRC guidance on implications of crisis driven changes to trading activities

In response to the COVID-19 outbreak, HMRC has published guidance in its Business Income Manual on the implications of crisis driven changes to trading activities. The guidance sets out how HMRC will respond in situations where a crisis has resulted in changes to normal business activities. In particular, it notes that:

- A business that starts carrying on a new activity that is broadly similar to its existing trade should not be treated as commencing a separate trade. This, however, depends on the facts. The guidance includes an example of a restaurant business starting to manufacture gowns and face masks, which should be treated as the commencement of a separate trade, compared to a business that already manufactures clothing articles starting to manufacture gowns and face masks using the same staff and premises, which should be treated as an extension of the same trade.
- Temporary breaks in trading activity do not constitute a permanent cessation of a trade for tax purposes, provided the

trading activities that resume are the same as, or similar to, those before the break.

- Donations of money to meet revenue expenditure or supplement trading income are trading receipts. If a business makes donations of goods or services, the impact on taxable trading profits should be considered.
- Partial refunds offered to customers (for example, on gym memberships) should be allowable as expenses. Taxpayers will welcome this clarification at a time when many businesses are having to adapt in order to survive during the COVID-19 pandemic.

For more information, please click [here](#).

[Back to contents >](#)

HEALTH AND SAFETY

by Gavin Reese

Government announce Draft Building Safety Bill

Touted as the “biggest improvements to building safety in nearly 40 years”, the Draft Building Safety Bill was announced this month. The Bill follows findings laid out in Dame Judith Hackitt’s Building a Safer Future report written in the wake of the Grenfell Tower fire.

The new Bill seeks to overhaul the current regulatory regime and will bring about key changes including:

- A new Building Safety Regulator responsible for overseeing the “safety and performance of all buildings”.
- New powers to ensure compliance through prosecution, and for those who fail to comply with building regulations penalties will be increased.
- The government will have new powers to regulate construction materials and products and ensure they are safe to use.

- More stringent rules for high-rise residential buildings will apply at design, construction and occupation stages.

The Bill will now be examined by a Parliamentary Committee, who will offer feedback with their findings before it is finalised, and stakeholders and external experts will also be consulted. It will then be formally introduced into the House of Commons and House of Lords.

For more information, please click [here](#).

[Back to contents >](#)

Businesses urged to become COVID-secure

The Government is urging businesses in the UK to make sure they’re COVID-secure, as more sectors continue to re-open their doors. The Health and Safety Executive (HSE) have set out five practical steps businesses can take to ensure they are compliant:

1. Carry out a COVID-19 risk assessment in line with HSE guidance
2. Develop increased cleaning, hand washing and hygiene procedures
3. Take all reasonable steps to help people work safely, from home or (as from 1 August) within the workplace if COVID-19 secure guidelines are followed closely

4. Maintain 2m social distancing where possible
5. Where people cannot be 2m apart, ensuring at least a 1m distance and taking all mitigating actions possible to manage transmission risk

Inspectors are out, checking in on employers to ensure they are complying with relevant health and safety law.

For more information, please click [here](#).

[Back to contents >](#)

FSA publishes risk review of COVID-19 transmission via food

The Food Standards Agency (FSA) has released a qualitative risk assessment on the risk of food as a transmission route for COVID-19. It considers there to be a negligible probability of UK consumers receiving potentially infectious exposure via the consumption of food or the handling of food contact materials or packaging.

However, the risk assessment has limitations. The FSA identified significant data gaps relating specifically to COVID-19; a number of assumptions in the FSA’s report are based on data regarding

other coronaviruses such as SARS-CoV and MERS-CoV. Additionally, the risk assessment does not consider risks associated with illegal importation activities (due to lack of data) or wider implications for integrity of the food chain.

For more information, please click [here](#).

[Back to contents >](#)

DATA AND PRIVACY

by Jon Bartley

ECJ strikes down EU-US Privacy Shield

The European Court of Justice (ECJ) has struck down a major agreement governing the transfer of EU citizens' data to the United States. The EU-US Privacy Shield, which "underpins transatlantic digital trade", allowed US companies to sign up to stringent privacy standards providing companies governed by GDPR with a mechanism to transfer personal data to those companies. However, it was challenged by privacy advocate Max Schrems, who argued that US national security laws did not go far enough in protecting EU citizens from government snooping.

Companies affected by this decision will now have to sign "standard contractual clauses" (SCCs) or find another basis under GDPR for data transfers. SCCs are already used by many large

US corporations such as Microsoft and Salesforce.com. The last time a major deal of this nature was struck down was 2015 when the predecessor to Privacy Shield was also declared invalid. Back then, a grace period was introduced, allowing companies time to figure out how to navigate the change, but it doesn't appear that any grace period is being proposed this time. The decision also requires companies using SCCs to risk-assess the jurisdictions to which the data is being transferred, rather than using the SCCs as a silver bullet.

For more information, please click [here](#).

[Back to contents >](#)

Data protection implications of NHS Test and Trace for hospitality sector

The Government has recommended that businesses operating in the hospitality sector keep a temporary record of customers and visitors for 21 days, to assist NHS Test and Trace with requests for that data if needed. The recommendation comes with the Government's latest guidance on keeping workers and customers safe during Covid-19.

However, there are measures that hospitality businesses will need to take to ensure they collect, use and dispose of personal

data for these purposes in compliance with GDPR and other data protection legislation.

Businesses are further required to demonstrate that they have one of the GDPR-specified lawful bases for processing personal data.

For more information, please click [here](#).

[Back to contents >](#)

UK regulators join forces to ensure online services work well for consumers and businesses

The Competition and Markets Authority, Information Commissioner's Office and Ofcom have collaborated to set up a new forum to help ensure online services work well for businesses and consumers alike. The Digital Regulation Cooperation Forum aims to harness each regulator's collective expertise regarding data, privacy and competition.

In today's climate, with an evolving landscape as EU transition arrangements end, regulatory cooperation is critical. The regulators have outlined how they will collaborate to support effective regulation, whilst still encouraging innovation.

The Forum will help the regulators coordinate action and develop informed regulation.

For more information, please click [here](#).

[Back to contents >](#)

COMPETITION

by Lambros Kilaniotis

CMA Investigations: Further Focus on RPM Infringements and Covid-19 Excessive Pricing Developments

The Competition & Markets Authority (the “CMA”) is continuing its wide range of competition investigations in the financial services, pharmaceuticals and construction sectors, amongst others.

Resale Price Maintenance or RPM

In the meantime, the CMA has [announced](#) formal infringement decisions against Roland (UK) Limited and Korg UK Limited, suppliers of electronic drum kits and synthesisers/DJ production tools and fines of c. £4 million and £1.5 million respectively (including reductions under leniency and settlement procedures). These businesses had engaged in illegal RPM by requiring their retailers to sell their products online at, or above, a minimum price.

In its press release, the CMA also announced a separate provisional RPM finding involving Yamaha products and the first fine for a retailer’s involvement in RPM. Until now, the CMA has exercised its discretion to only address its RPM infringement decisions to, and to fine, the manufacturers. The retailer had previously received an advisory letter from the CMA about RPM practices, but had failed to act on it. It has agreed to pay a maximum fine of £278,945 as part of its settlement with the CMA.

The CMA has also issued warning letters to c. 70 manufacturers and retailers in the musical instruments sector about illegal RPM

activities and the need to ensure compliance with competition law. It has published on its website an [open letter](#) to the sector with a case study and further guidance.

The CMA’s DaTA Unit has launched its own in-house price monitoring tool to monitor pricing levels initially in the musical instruments sector.

Excessive Pricing

As previously reported, the CMA has set up a Covid-19 task force which has received thousands of complaints regarding both unfair practices in respect of cancellations and refunds and also unjustifiable price increases. The CMA has now confirmed that it has launched investigations under Chapter II of the Competition Act 1998 (which prohibits an abuse of a dominant position) into suspected breaches by four pharmacies and convenience stores. They are suspected of having charged excessive and unfair prices for hand sanitiser during the Covid-19 pandemic.

[Back to contents >](#)

UK Merger Control Developments

New Public Interest Ground for Intervention by the Secretary of State

The Secretary of State has the power to intervene in qualifying mergers under the UK merger regime on the basis of certain specified public interest grounds set out in s58 of the Enterprise Act 2002. Until recently, these grounds have been limited to national security, media plurality and the financial stability of the UK financial system. In light of the Covid-19 pandemic, but not limited to this public health emergency, a further public interest ground has now been [added](#), namely: “the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies”.

The Department for Business, Energy and Industrial Strategy has published [guidance](#) on this new public interest consideration. Although it comes as no surprise that this new ground could

be raised in relation to transactions involving companies active in vaccine research or the manufacture of personal protective equipment, it has a potentially much wider effect. The Government has said that it may need to intervene in a takeover of a company which provides (or could provide) the UK with the ability to mitigate the effects of the Covid-19 pandemic or a future public health emergency and gives the examples of an internet service provider or food supply chain company. In addition, it has also made clear that it considers repurposable capabilities to fall within the scope of this new ground. For example, engineering companies have, during Covid-19, turned from their usual manufacturing activities to designing and producing ventilators.

To date, since the introduction of the Enterprise Act 2002, there have been twenty interventions on public interest grounds (12 in relation to national security, 7 in relation to media plurality and

1 in relation to financial stability), but none have resulted in the transaction being blocked by the Government.

When [announcing](#) this new ground for intervention and the changes to the application of the lower jurisdictional thresholds (see below), the Secretary of State for Business commented:

“These measures will strike the right balance between the UK’s national security and resilience while maintaining our world-leading position as an attractive place to invest - the UK is open for investment, but not for exploitation.”

Wider Application of the Lower UK Jurisdictional Thresholds

In 2018, changes to the turnover and share of supply thresholds were introduced for transactions involving businesses in certain sectors, namely: the development or production of (i) military/dual use items or (ii) of quantum technology; and the design and maintenance of aspects of computing hardware. Based on these lower thresholds, the CMA has jurisdiction to review a qualifying transaction on competition grounds and the Secretary of State can review it on national security grounds following a public interest intervention notice.

These lower thresholds are now set to apply to three further sectors: artificial intelligence, cryptographic authentication technology and advanced materials. [Legislation](#) has now been laid before Parliament which has to be approved by both Houses before coming into force.

Revision to the CMA’s Preliminary Findings in Deliveroo/ Amazon

Covid-19 has had its part to play in the CMA’s assessment of Amazon’s proposed investment and 16% stake in Deliveroo. The CMA had originally published provisional findings in April clearing the transaction on the basis of the “failing firm defence”. It had concluded that, without access to “significant additional funding”, Deliveroo’s exit from the market would be “inevitable” and that,

as a result of the pandemic, only Amazon was willing and able to provide this funding. The CMA’s view was that its exit would have been worse for competition than permitting Amazon’s investment. These provisional findings had led to significant third-party comment.

The CMA has since gathered more evidence and conducted a further detailed assessment of Deliveroo’s finances and the potential impact of the transaction on competition. In its [revised provisional findings](#), the CMA has established a “considerable improvement” in Deliveroo’s finances, such that it was unlikely to exit the market. The CMA has still provisionally cleared the transaction on the basis that it is not expected to result in a substantial lessening of competition in either restaurant or online convenience grocery delivery. However, if Amazon were to seek a greater level of control over Deliveroo in the future, the CMA has not ruled out the possibility that this could trigger a further merger investigation.

Challenges to CMA Merger Prohibition Decisions

With two mergers recently being abandoned by the parties at Phase II (McGraw-Hill’s acquisition of Cengage Learning re student text books and Kingspan’s acquisition of Building Solution re standard foam sandwich panels), the CMA is now facing appeals in the Competition Appeal Tribunal against two recent decisions to block mergers: (i) Sabre Holdings is appealing against the decision to block its proposed acquisition of Farelogix Inc. It is challenging the CMA’s jurisdiction under the share of supply test and the finding of a substantial lessening of competition on the evidence; and (ii) JD Sports is challenging the decision to block its completed acquisition of Footasylum. In addition to challenges regarding the CMA’s conclusions on the competitive constraints faced by the merging parties, it has raised Covid-19 in its arguments and, in particular, the CMA’s exclusion of its effect on the counterfactual.

[Back to contents >](#)

EU Merger Control Developments

European Commission’s Prohibition Decision Overtaken

In a rare development, the EU General Court has [quashed](#) entirely the European Commission’s 2016 decision to block the mobile telephony acquisition of Telefonica UK (O2), and Hutchison 3G UK3 (Three).

The General Court concluded that the European Commission had not proven “to the requisite legal standard” the effects of the acquisition on prices and on the quality of services for

consumers. The European Commission had erred in considering Three an “important competitive force” and in assessing the closeness of competition between the parties. It had also failed to demonstrate a “significant impediment to effective competition” in relation to the network -sharing agreements and the mobile network infrastructure in the UK and in the wholesale market.

[Back to contents >](#)

FINANCIAL SERVICES

by Matthew Griffith and Jonathan Cary

Climate Financial Risk Forum publishes practical recommendations for firms

The Climate Financial Risk Forum (CFRF) has published a guide providing practical recommendations to firms of all sizes on the financial risks associated with climate change. The CFRF is a forum established by the PRA and the FCA in March 2019 to consider and advise on the UK financial sector's response to climate change.

The guide, along with earlier statements from the PRA and FCA, stress the significant impact that UK regulators expect climate change to have on the financial services sector and consumer

decision-making. The CFRF draws on the examples of climate risk on insurance (where failure to adequately plan for climate risks could increase the cost of insurance) and banking (where management of climate-related risks could affect a borrower or counterparty's credit rating).

For more information, please click [here](#).

[Back to contents >](#)

DB Transfers – the FCA's views on good and bad practice

FCA have published a guidance consultation document to meet requests from the industry to help advisers understand the FCA's expectations when advising on pension transfers and conversions. The document includes examples of the FCA's views of good and bad practice in the area of defined benefit pension transfers (DB transfers). The FCA expects firms providing DB transfer advice to read the document and once finalised it is intended that firms use it to identify any weaknesses in their existing processes.

The guidance refers to a number of areas including keeping management information, conducting triage services, recording a customer's financial circumstances including other assets and pensions, how to approach a customer's knowledge and

experience of DB transfers and investments, a customer's attitude to transfer risk and, separately, to investment risk and guidance on how to address such issues as the Pension Protection Fund, death benefits and insistent clients.

The key theme that comes through is the more detailed the record keeping and specific to the customer's personal circumstances the better.

For more information, please click [here](#).

[Back to contents >](#)

FCA publishes discussion paper on prudential regime for UK investment firms

The Financial Conduct Authority (FCA) is seeking industry views on a new prudential regime for UK investment firms. The FCA has published a discussion paper, marking the first step in introducing a set of prudential rules for investment firms that better reflect the risk of harm they pose to consumers and markets.

Christopher Woolard, interim Chief Executive of the FCA, said: "A new UK regime would represent a significant improvement in the prudential regulation of investment firms. For the first time, it would deliver a regime that has been designed with investment firms in mind."

Stakeholders will have until 25 September to respond.

For more information, please click [here](#).

[Back to contents >](#)

PROFESSIONAL SERVICES

by Rob Morris and Graham Reid

FRC announces principles for operational separation of audit practices

The Financial Reporting Council (FRC) has announced its principles for operational separation of the audit practices of the Big Four firms. The FRC considers that operational separation is desirable to ensure that audit practices are focused on the delivery of high-quality audits in the public interest. The FRC's desired outcomes include:

- Audit practices prioritise audit quality and protects authors from influences from the rest of the firm;

- The culture of the audit practice encourages ethical behaviour, openness and professional scepticism; and
- Auditors act in the public interest, working for the benefit of shareholders and wider society

Access the FRC's report [here](#).

[Back to contents >](#)

SRA consults on 2020-21 business plan

The Solicitors Regulation Authority (SRA) is consulting for the first time on its 2020-21 business plan and budget, as part of its commitment to accountability and transparency.

Key areas of work set out in the business plan include:

- The planned introduction of the Solicitors Qualifying Examination;
- Responding to the implications of Covid-19 for the legal sector;

- Understanding and supporting the adoption of technology; and
- Establishing an SRA office in Wales

The consultation will run until 26 August 2020.

Access this guidance [here](#).

[Back to contents >](#)

FRC reviews firms' going concern policies and procedures

The FRC has reviewed firms' audit policies and procedures in relation to going concern, in light of Covid-19. This covered the seven largest UK audit firms, as at May 2020. Auditors are required to audit in accordance with ISA (UK) 570, and firms need to ensure there are appropriate policies and procedures in place for this.

The FRC's key findings include:

- All firms reviewed had enhanced their audit policies and procedures relating to going concern from the end of March 2020, when the consequences of Covid-19 began to increase;

- Firms have focused on improving the consistency of execution in the audit of going concern, primarily through providing additional central support in light of increased uncertainty in the going concern assessments; and
- Increased central oversight was necessary as a number of audits were in an advanced state of completion when the UK lockdown was announced

Click [here](#) to read more.

[Back to contents >](#)

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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.
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