Regulatory radar

2023

Welcome to this edition

Hello and welcome to the 2023 edition of RPC's bi-annual Regulatory Radar – a guide to the key regulatory changes worth having on your radar. We hope this will be a useful resource, helping you scan the regulatory horizon and highlight changes that could impact your business.

As ever the regulatory landscape in the UK remains complex and evolving. Many delayed regulatory developments are back on the agenda whilst businesses are trying to navigate the economic volatility, rapidly accelerating digital transformation and uncertainties around climate change.

In this issue we cover regulatory updates for financial services including the latest on Consumer Duty, crypto asset regulation and Audit reform. We comment on the hardening regulator approach to regulated professionals and the HSE's 10-year strategy with specific focus on mental health and stress at work. Further, we cover AI regulation updates from the European Commission and most recently the Government's AI White Paper. Finally, we summarise the highly anticipated Digital Markets, Competition and Consumer Bill and the failure to prevent fraud offence.

I hope you enjoy reading this update. Please do not hesitate to contact me, or your usual RPC contact, if you would like to discuss any of the topics highlighted.

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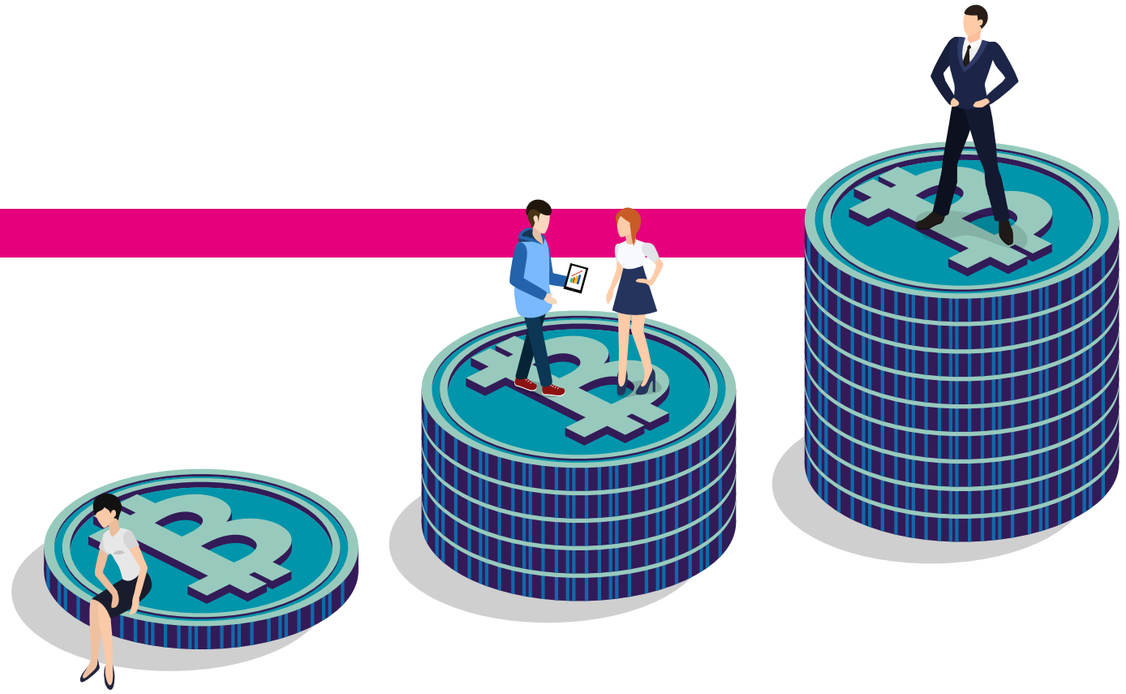
by Jonathan Cary



2023

WHAT IS HAPPENING?

Only discrete aspects of crypto assets and crypto-related financial services are currently regulated; financial promotion regulations and advertising standards apply to crypto asset promotions, and exchanges and custodian wallet providers must be registered with the FCA and comply with FCA regulations such as anti-money laundering legislation. However, many crypto-related businesses fall outside the FCA's remit.

The use of blockchain in financial services, or Decentralised Finance (DeFi), is also mostly unregulated and is not caught by the existing regulatory frameworks. Similarly, decentralised autonomous organisations do not have formal legal status and also fall outside regulatory regimes.

The UK government has recently announced a range of potential amendments to the regulatory landscape to regulate crypto-related financial services in the same manner as their non-crypto equivalents. The Bank of England is also conscious of the need for regulatory reform in relation to DeFi, and the Bank for International Settlements has called for greater regulatory supervision globally. The tax treatment of DeFi loans and staking is similarly unclear and inconsistent and requires reform.

In June 2023, the FCA announced its plans to incorporate cyptoassets into the UK's financial promotions regulatory regime. The FCA's regulations will take effect on 8 October 2023, with the FCA recently issuing a letter urging companies to comply.

WHY DOES IT MATTER?

The incomplete regulation of the cryptoasset industry creates challenges and uncertainty for service providers and consumers. The FCA has called for all cryptocurrency platforms to register with the FCA and comply with anti-money laundering legislation. However, only a limited range of crypto businesses are caught, such as those who offer specific types of tokens, for instance security tokens. It is also unclear where non-financial businesses such as retailers who wish to offer crypto products fall within the regulatory framework.

The UK government has therefore proposed to:

- consult on a "world-leading regime" for regulating trade in non-stablecoin cryptocurrencies;
- ask the Law Commission to consider the legal status of decentralised autonomous organisations;
- examine the tax treatment of DeFi loans and staking explore other ways of enhancing the competitiveness of the UK's tax system to encourage development of the market;
- establish a Cryptoasset Engagement Group that will be chaired by ministers and host members from UK regulators and crypto businesses to work more closely with the industry; and
- introduce a 'financial market infrastructure sandbox' to enable firms to experiment and innovate in particular by enabling Distributed Ledger Technology to be tested.

WHAT ACTION SHOULD YOU TAKE?

- There is a broad scope of crypto or blockchain-related products that may or may not fall within existing regulations, including cryptocurrencies, NFTs, cryptocurrency-backed loans, and DeFi products.
- Ensure you take careful regulatory and tax advice if you are considering offering or promoting a crypto or blockchain related product.
- Companies marketing to UK consumers including those overseas will need to comply with the FCA's promotion rules. The FCA intends to publish final guidance rules for businesses marketing crypto assets to UK consumers in Autumn 2023.

Horizon scanning (continued)

The FCA's Consumer Duty
by Whitney Simpson

2023

WHAT IS HAPPENING?

On 27 July 2022, the FCA published the finalised rules and guidance on how it intends to implement its new Consumer Duty. The new rules and guidance are due to come into force on 31 July 2023 and will apply to new products and services, and all existing products and services that remain on sale or are open for renewal. The deadline for implementation to all closed products and services is 31 July 2024.

WHY DOES IT MATTER?

The Consumer Duty will take the form of a new Principles for Business, Principle 12 as follows:

> "A firm must act to deliver good outcomes for retail customers."

For all impacted firms this new Principle will disapply Principle 6. The Consumer Duty will also be supplemented by the cross- cutting rules and four outcomes which represent the key elements of a firm consumer relationship in helping to drive good customer outcomes. The cross-cutting rules require firms to:

- act in good faith towards retail customers
- avoid causing foreseeable harm to retail customers, and
- enable and support retail customers to pursue their financial objectives.

The four outcomes that the FCA wants to see under the Consumer Duty relate to:

- products and services
- price and value
- consumer understanding, and
- consumer support.

The new Consumer Duty is intended to cover all financial services and products provided to retail customers, which is a broader concept than "consumers". The scope of "retail customers" will be aligned with the existing scope of the sectoral sourcebooks in the FCA Handbook. Therefore, this means that for certain sectors (e.g. insurance), the Consumer Duty will apply to some corporate entities such as SMEs, not just individuals.

Firms that don't have a direct relationship with consumers will also fall within scope if they are undertaking regulated activities as part of the distribution chain.

As to the Consumer Duty's application to existing products and services, it will apply on a forward-looking basis covering existing products and services including closed book products and services. Rules and accompanying guidance have been provided by the FCA to assist firms in the application of the Consumer Duty including the cross-cutting rules and the four outcomes.

In the process of implementing the Consumer Duty, firms will ned to consider the new rules and guidance, including interpreting new concepts such as "avoiding causing foreseeable harm" in the context of their business, carry out value assessments, decide whether their existing product governance assessment is adequate and see if customer-facing materials need to be reviewed.

Further the FCA has clearly stated that one of its focuses is on individuals and that in order to deliver good outcomes this must be supported by the Senior Managers & Certification Regime. A new Individual Conduct Rule 6 has been added that requires all conduct rules staff to act to deliver good outcomes for retail customers where the activities of the firm fall within scope of the Consumer Duty.

The FCA has made it clear that once the Consumer Duty is in force it will "prioritise the most serious breaches and act swiftly and assertively" where it finds any evidence of harm or risk of harm to consumers.

WHAT ACTION SHOULD YOU TAKE?

- Firms need to be in a position where any changes that need to be made are implemented by the end of July 2023 for new and existing products and services which remain on sale or open to renewal.
- The FCA has been sending information requests to firms to understand how their implementation plan is progressing but also to remind firms that if they are not due to meet the 31 July deadline to communicate this to the FCA as early as possible.

Horizon scanning (continued)

Audit reform
by Rob Morris

2023

WHAT IS HAPPENING?

Ever since a series of high profile corporate collapses four-five years ago, talk of significant audit and corporate governance reform has been rife. Concrete proposals, however, have been thin on the ground.

Last year, the government published its final proposals for reform, which took account (but did not include all elements) of previous independent reviews.

Much of the detail of the proposed reforms will still have to wait for future legislative changes and regulatory exposition. It had been hoped that the government might publish a draft bill setting out the necessary legislative changes before the end of last year. However, given recent political (not to mention constitutional) upheaval, the timetable for Audit Reform Bill continues to be unclear.

Nevertheless, there are elements of the proposed reforms that companies, directors and auditors can start to plan to account for with a degree of more certainty.

WHY DOES IT MATTER?

There are some substantial changes coming and those impacted would be wise to begin to prepare for them now. A new definition of Public Interest Entity (PIE) is expected to bring around 600 more companies and LLPs within the ambit of the new audit regulator (the Audit, Reporting and Governance Authority (ARGA)). As such, any company with more than 750 employees and £750m plus of annual turnover will need to start preparing for the increased regulatory burden.

It will be essential for directors and auditors of existing and newly caught PIEs to familiarise themselves with all the changes that are being proposed. The full breadth of the changes expected is outside the scope of this article, but in particular thought should be given to:

- the triennial Audit and Assurance Policy, explaining how the quality of information reported outside of the financial statements is assured;
- the annual Resilience Statement, disclosing how the company addresses areas of material challenge to the resilience of the business;
- disclosure of distributable reserves and explanation of the board's approach to the amount and timing of shareholder returns, as well as an explicit confirmation of the legality of dividends declared;
- changes to the UK Corporate Governance Code, likely to include a requirement for an explicit directors' statement about the effectiveness of the company's internal controls and the basis for that assessment, as well as requiring transparency (and encouraging expanding the breadth) of directors' remuneration withholding and clawback provisions; and
- ARGA's powers to consider the entire contents of the annual report and accounts so that it can review elements such as corporate governance statements, directors' remuneration and audit committee reports, and the CEO's and chairman's reports.

ARGA will have enforcement powers over directors of PIEs and will be able to impose substantive sanctions for breaches of duties relating to corporate reporting and audit. As such, directors have a very personal interest for keeping on top of these issues.

Given the wider definition of PIE and the need for FTSE350 companies to allocate at least a meaningful proportion of their audits to non-Big 4 accountants, many more audit firms will also need to get to grips with the existing and new PIE audit requirements. The additional regulatory burden of carrying out PIE audits (not to mention the need for firms and registered individuals to specifically register for PIE audit work) should not be underestimated.

WHAT ACTION SHOULD YOU TAKE?

Directors and companies should start planning now for their Audit and Assurance Policy. This has been said by some as critical, as it will encourage audit committees and investors to focus on the need for assurance in areas such as cyber security and environmental, social and governance reporting.

Given the increase in directors' responsibilities, thought should be given to the provision of training to ensure that any new competencies required are developed at an early stage.

Companies and their directors should also check their D&O insurance policies to ensure they remain fit for purpose.

It is inevitable that further guidance from the government, the FRC and ICAEW, in particular, will start to be published. Directors and audit firms will need to establish suitable processes to ensure this guidance is identified, considered and embedded in their businesses in a systematic way.

Fundamentally: don't wait for further clarity, which is likely to be piecemeal; start working now to meet the already declared requirements and to understand the reasoning behind them.

Horizon scanning (continued)

Navigating regulatory changes for regulated professionals
by Charlotte Thompson and Graham Reid

2023

WHAT IS HAPPENING?

Social media misuse, the personal life /professional boundary, workplace culture, harassment, discrimination and sexual misconduct: these are increasingly the focus of legal services (and other) regulators. The regulators' interest in these areas reflects wider societal and cultural shifts. However, a fierce debate continues concerning the proper role of regulators in these domains. The key messages for regulated professionals are to engage in the debate, effect organisational change, and don't get left behind.

WHY DOES IT MATTER?

Earlier this year, the SRA published a Workplace Culture Thematic Review, which found that there were concerns about the demands placed on solicitors, and the toxic environment in which some solicitors work. Soon after, the SRA held a consultation on proposed changes to its rules which would enhance powers to deal with risks to clients and the public stemming from toxic workplace culture. Firms would be well advised to monitor changes which follow the consultation.

On sexual harassment, the SRA published in September new Guidance on the subject, to clarify their approach to allegations, assist in identifying the boundary between an individual's behaviour in their private and professional life, and lay out firms' obligations in ensuring their culture does not tolerate sexual misconduct. This is a must-read for all compliance departments of solicitors' firms.

The SRA last wrote at length on social media in late 2019, but the Law Society has new guidance on the use of social media in the profession, and there have been examples in recent years of solicitors' misuse of social media platforms, which will surely require increased regulatory oversight.

The SRA is not the only regulator which is concerned about how its professionals interact with each other, and deal with social media.

In July 2022, the Bar Standards Board launched a three month consultation on the regulation of non-professional conduct, including barristers' use of social media. In the meantime, they have published interim Social Media Guidance, to be updated following the consultation. The BSB are seeking to clarify where boundaries should lie in the regulation of conduct that occurs in barristers' private and personal lives.

The GMC has also consulted upon a new version of their core guidance Good Medical Practice earlier this year, which included for the first time a duty for doctors to act, or support others to act, if they become aware of workplace discrimination, bullying or harassment. It also features updated guidance on doctors' use of social media, and inappropriate sexual behaviour between colleagues (the final version will be published in 2023).

WHAT ACTION SHOULD YOU TAKE?

- Understand these regulatory changes
- Communicate them within your organisation
- Review, and where needed improve, policies, processes and controls so as to reflect these changes

Horizon scanning (continued)

Product Liability Directive
by Andrew Martin and Gavin Reese

2023

WHAT IS HAPPENING?

The European Commission has published a new "Directive on adapting non-contractual civil liability rules to AI" ("AILD") and a new Product Liability Directive ("PLD"). These proposals have been introduced to modernise the existing product liability regime ensuring it is fit for purpose in the 21st century.

The feedback on both proposals was due by the end of 2022 and it will be interesting to see whether the proposals are introduced as drafted or if there are any changes made.

WHY DOES IT MATTER?

Technology continues to develop at a rapid pace with products becoming more complex and reliant on AI to function. If adopted in their current form the directives will have the following impacts:

PLD

- Term "producer" will be replaced with "manufacturer" and definition has been expanded to include providers of software, digital services and online marketplaces.
- Whilst the 10-year longstop will remain in place there is a proposal for a 15-year longstop in relation to some latent personal injuries with the limitation period to be restarted if a product is substantially modified.
- Manufacturers will be liable for defects caused as a result of changes they make to products already placed on the market, i.e. software updates or machine learning.
- Introduction of strict product liability claims for defective products that cause "loss or corruption of data."

These changes could lead to an increase in product liability litigation due to the broader scope and wider definitions of products to include software, digital services and AI systems.

AILD

- The creation of a rebuttable presumption of the causal link between the Defendant's fault and the output produced by the AI system.
- The directive will allow injured parties to request relevant information about a harmful AI system through the national Courts making it easier for Claimants' to pursue claims.
- Courts may order manufacturers to preserve relevant evidence as long as deemed necessary in an effort to increase transparency.

The AILD would potentially increase litigation risk for companies that design and/or deploy AI within their products and assist Claimants' in pursuing these claims.

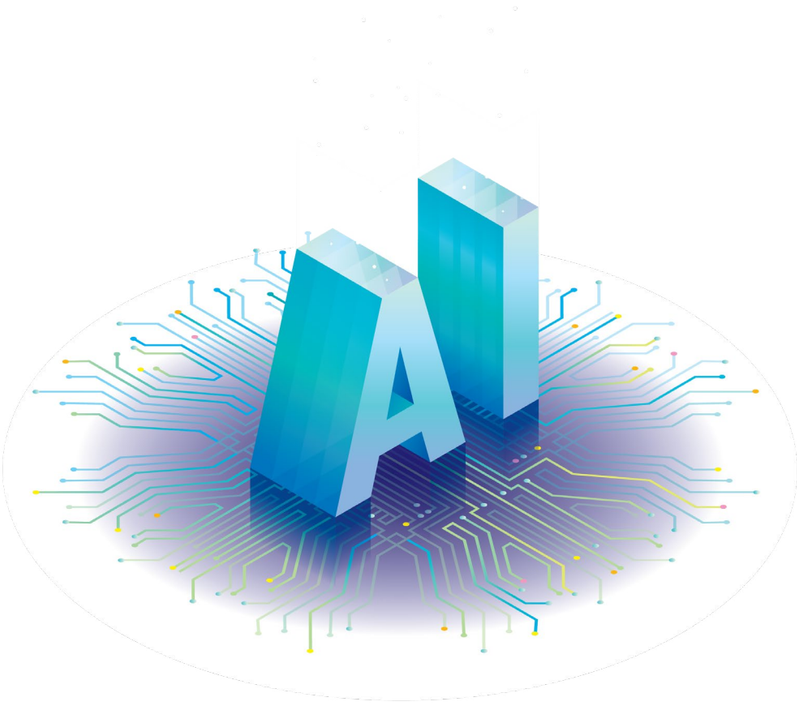
WHAT ACTION SHOULD YOU TAKE?

An explanatory memorandum was published by the UK government in October 2022 which acknowledged the EU proposals in respect of the PLD and confirmed there had no consultation on the proposed changes in the UK and that any decision made would have to benefit the UK interest.

Businesses in the UK should be considering:

- how they would comply with the relevant directives if they were to come into force
- how AI systems currently being developed fit within the potential new regime and whether they are fit for purpose before being placed onto the market so as to limit any future claims
- whether they have adequate and/or suitable insurance in place to provide cover in claims that may result from any problems with their AI systems or products that utilise those systems.

It will be interesting to see if PLD and/or AILD is adopted into UK law, in whole or part to avoid any significant divergence with the EU on issues related to product liability, especially given the importance of importing and exporting of goods between the UK and EU.



Horizon scanning (continued)

Digital Markets, Competition and Consumer Bill

by Ciara Cullen and Hettie Homewood

2023

WHAT IS HAPPENING?

It's been a little over a year in the making, and it's been one of the most hotly anticipated legislative updates since it was first announced in April 2022, but the first draft of the UK's catchily titled Digital Markets, Competition and Consumers Bill, is finally here.

The Bill marks the beginning of a new era of enhanced consumer protection, with a regulator that is set to cast off any previous reputation it may have picked up for having a bark that was worse than its bite. Here, we take a first look at the draft Bill and consider its likely impacts on consumer brands and retailers.

The bigger picture

As well as signalling changes to the consumer protection landscape (explored further below), the Bill contains important new provisions relating to digital markets and competition law. It gives the CMA powers to regulate, investigate and impose conduct requirements on digital businesses with strategic market status (think: Big Tech), with fines for non-compliance of up to 10% of global annual turnover (see our update on this here). And it reforms the UK competition law regime more widely (also see our update on that here).

The Bill is born into a world where the EU has already set in motion a major, modernising uplift to the consumer, digital and competition landscape, with the Omnibus Directive (enhancing consumer protection for the digital world), and the Digital Markets Act and Digital Services Act (aimed at creating fair and open markets and better user safety and content moderation, respectively). From a UK perspective, it will join the ranks of legislation such as the Online Safety Bill (which has recently been saved from lapsing from the parliamentary legislative agenda), that work towards curating a legislative backdrop fit for the modern day and the increasingly digital and online lives we lead.

WHY DOES IT MATTER?

Direct enforcement powers for the CMA. Under the Bill, the CMA will be able to directly enforce consumer protection law avoiding the need to go through the court system. Such powers may prove to be a meaningful deterrent for businesses who repeatedly breach consumer protection law but have to date, managed to avoid sanctions because of the timeframes and process involved in the CMA taking court action. It should also help to "level the playing field", a bonus for law-abiding businesses that may previously have had to watch their less well-behaved competitors enjoy an extended competitive advantage whilst enforcement action proceedings trundled slowly through their process.

Power for the CMA to issue fines. The Government has itself acknowledged that the UK is the only G7 country not to have any civil penalties for common consumer protection breaches. To address this, the Bill grants the CMA the ability to make determinations on whether breaches of consumer law have occurred, and to impose monetary penalties directly (similar to the ICO in their enforcement of data protection legislation). There are several tiers of possible fines, but for the most serious breaches, the CMA may impose penalties of up to £300,000 or 10% of global annual turnover (if higher). The CMA will also be able to issue fines for breaches of undertakings, non-compliance with notices given by a consumer protection officer and breaches of an administrative direction given by the CMA.

The CPRs v2.0. The Bill revokes and then restates, with some tweaks, the provisions of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). In terms of call outs, there is a newly created "omission of material information from an invitation to purchase" offence which joins the list of offences that we have been used to since the CPRs came into force in 2008 (misleading acts, misleading omissions, aggressive practices, blacklisted practices and practices contravening the requirements of professional diligence). The "blacklist" of practices which are in all circumstances considered unfair remains intact, and appears at Schedule 18 to the Bill (with a couple of tweaks to the ordering and certain instances where practices have been reframed to be clearer and/or broader).

What about fake reviews? We were also expecting to see provisions in the Bill adding certain fake review activities to the famous blacklist. These have been noticeably absent from the first draft of the Bill, but this doesn't mean they won't be coming. The Bill enables the list of blacklisted practices to be updated speedily by Parliament through secondary legislation, in order to reflect new business practices and emerging consumer harms. The government has also confirmed that, during the passage of the Bill through parliament, it plans to consult on adding the following 'fake review' practices to the blacklist: (a) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services; (b) hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine; and (c) offering or advertising to submit, commission or facilitate fake reviews.

Subscription traps. As expected, the Bill will also give new rights to consumers entering into subscription contracts. Businesses will now need to provide certain pre-contract information prominently and clearly. They will also need to allow both an initial 14-day cooling off period and further 14-day renewal cooling off periods whenever a subscription is renewed (during which time subscribers may cancel). The protections are further reinforced by requirements to remind consumers when any free or discounted trial period is ending, and/or where the subscription is about to renew, and to make it easy for subscribers to exit their subscriptions (ie via a single communication).

Insolvency protection for consumer saving schemes. The Bill sets out requirements on traders operating certain consumer saving schemes (such as Christmas saving clubs, which are not, by their nature, FCA-regulated or protected by the Financial Services Compensation Scheme) to make insurance and trust arrangements to protect consumer pre-payments in the event of the trader becoming insolvent.

Alternative Dispute Resolution (ADR). Finally, the Bill will help to empower consumers to be able to resolve disputes directly with businesses by the introduction of ADR provisions. These include a duty on businesses to notify consumers about any ADR arrangements applicable to the business where a consumer is dissatisfied with the outcome of any complaint, and imposes obligations on ADR providers (including a prohibition on acting as an ADR provider without accreditation, unless exempt, and a prohibition on charging fees to consumers).

WHAT ACTION SHOULD YOU TAKE?

The Bill itself runs to almost 400 pages and covers a plethora of new and updated law and consequential legislative amendments on its core topics: digital markets, competition law and consumer protection. We will be keeping a close eye on the Bill's progress through parliament and will publish further, more detailed commentary on specific areas of the Bill as it makes its journey towards Royal Assent and coming into force.

See our other articles covering the UK Digital Markets, Competition and Consumers Bill here and here.

Horizon scanning (continued)

Failure to prevent fraud offence
by Kate Langley and Sarah Barrie

2023

WHAT IS HAPPENING?

As of early 2023, there appears to be real parliamentary appetite to legislate for a corporate failure to prevent fraud offence. In late January, a failure to prevent fraud offence was included as an amendment to the Economic Crime and Corporate Transparency Bill (the 'Economic Crime Bill'). The amendment was subsequently withdrawn following ministerial assurances that the new offence would be discussed in the House of Lords. It is anticipated that following debate within the House of Lords, this offence will be reintroduced into the Economic Crime and Corporate Transparency Bill. In February 2023 a proposed amendment was made to the Financial Services and Markets Bill adding a similar offence that would impose legal obligations on entities and individuals in the regulated sector to prevent fraud.

WHY DOES IT MATTER?

While introducing a new offence has been on the agenda for many years, there is new impetus to legislate given the epidemic of fraud in the UK (which resulted in reports of a rise in the value of fraud prosecutions from £137.4m in the first half of 2021 to £532.6m in the first half of 2022) and the end of the Law Commission's review into the topic in June 2022.

Corporate liability for criminal activity normally requires satisfaction of a mental element from the organisation's most senior management. However, it is often challenging to attribute a particular state of mind to a corporation. Specifically, in English law under the identification doctrine, 'a corporation will only be liable for conduct of a person who had the status and authority to constitute the body's "directing mind and will."' In the context of large global corporations, determining which individuals comprise the 'directing mind and will' of the company and showing their specific intention is a difficult and often impossible task.

In late January 2023, a series of amendments were added to the Economic Crime Bill, including a failure by a corporation to prevent fraud, money laundering and false accounting. The amendments also included a related clause introducing individual criminal liability for corporate officers whose decision (or failure to make a decision) results in the corporate committing an offence. A proposal was also made during the third reading in the House of Commons to reform the identification doctrine so a corporate would commit an offence if that offence was committed with the consent, connivance or negligence of a senior manager.

WHAT ACTION SHOULD YOU TAKE?

Should they be introduced, the "failure to prevent" offences could represent the most significant legislative changes in the fight against economic crime in over a decade. With the proposed amendments withdrawn, we await further clarity, but there seems now to be real parliamentary interest in legislating in the area of corporate criminal liability. Sectors such as technology, finance and telecommunications may feel particular impact if these offences are introduced.

Companies should begin the process of reviewing their internal frameworks to assess whether they are sufficiently robust to ensure compliance with these proposed new expectations.

Read our latest article on the failure to prevent fraud offence, which gives valuable insights on how the new offence may operate and practical guidance to companies on how they can start to prepare here

Horizon scanning (continued)

The UK's Subsidy Regime
by Melanie Musgrave

2023

WHAT IS HAPPENING?

The UK's Subsidy Control Act 2022 received Royal Assent in April 2022and began on 4th of January.

The new regime has replaced the interim subsidy control arrangements which have been in place since the end of the Brexit transition period when the EU state aid rules ceased to apply. These interim arrangements are based on the UK-EU Trade and Cooperation Agreement, the Northern Ireland Protocol and the WTO subsidy rules.

In contrast with the more prescriptive EU state aid regime, the UK's new regime is principle-based and provided that a subsidy complies with these principles, it is permitted without the need for formal approval prior to it being granted. The new regime also goes beyond the UK's international obligations so as to cover subsidies which could have a domestic effect on competition or investment, i.e. within the UK, as well as those which could have an effect on trade or investment between the UK and other jurisdictions.

Secondary legislation and finalised statutory guidance are currently still awaited in order to provide further details of how the regime will operate.

WHY DOES IT MATTER?

A subsidy is financial assistance which is given directly or indirectly from public resources by a public authority and which confers an economic advantage to one or more enterprises (and benefits only that specific enterprise or group of enterprises rather than more widely) and has, or could have, an effect on competition or investment in the UK or on trade or investment between the UK and a jurisdiction outside the UK. All public authorities need to assess the proposed grant of subsidies to ensure that they are permitted.

The legislation prohibits outright certain types of subsidies, such as unlimited guarantees to businesses, and also sets out certain subsidies which will be exempt from the regime, including de minimis levels of financial assistance as well as subsidies for natural disasters, UK or global economic emergencies and national security. The legislation also enables the Government to create 'Streamlined Routes', potentially similar to the EU state aid block exemptions, in order to simplify and speed up the process of granting some subsidies.

There are seven general principles which apply to subsidies, namely the subsidy should:

- pursue a specific policy objective (an "SPO");
- be proportionate to the SPO;
- be designed to change the recipient's economic behaviour in order to achieve the SPO;
- not compensate for costs which the recipient would have funded in the absence of the subsidy;
- be appropriate for, and the least distortive means of, achieving the SPO;
- be designed to minimise any negative effects on competition and investment in the UK; and
- be designed so that its beneficial effects outweigh any negative effects.

There are further principles which apply to energy and environmental subsidies.

Secondary legislation, currently in draft form, sets out two categories of subsidies, Subsidies of Particular Interest and Subsidies of Interest, where the former must be referred and the latter may be voluntarily referred to the Subsidy Advice Unit (the "SAU") within the Competition and Markets Authority (the "CMA"). The SAU will provide a report on the subsidy, but this will not be binding on the public authority. The Secretary of State will also be able to require that a public authority requests a report from the SAU or directly obtain a report from the SAU on a granted subsidy.

Unlike the European Commission under the EU state aid regime, the SAU/CMA do not have investigatory and enforcement powers. In general, an aggrieved party will only be able to challenge a subsidy decision (the grant of a standalone subsidy or the creation of a subsidy scheme through which subsidies will then be granted) by seeking a review on a judicial review basis by the Competition Appeal Tribunal (the "CAT"). Challenging a subsidy granted under a subsidy scheme would need to be in the High Court (or Court of Session). The CAT will have the power to annul public authorities' decisions to grant subsidies and to make orders requiring the recovery of the subsidies where it finds that the subsidies are unlawful.

WHAT ACTION SHOULD YOU TAKE?

BEIS is inviting public authorities to in-person and online events to explain the main features ad principles of the new regime before it takes effect at the beginning of 2023. It is important that public authorities familiarise themselves with the requirements and processes under the new regime.

As set out above, there is a risk for subsidy recipients of being required to pay back the financial assistance granted, if the subsidy is not permitted under the Subsidy Control Act. Therefore, it is also important for such businesses to understand the scope of the new regime and to conduct some due diligence before accepting a subsidy.

Those, who may be adversely affected by a grant of a subsidy to a third party, should regularly review the BEIS database for information, given the short timeframe within which the subsidy can be challenged.

Horizon scanning (continued)

HSE's 2022-2032 strategy
by Rashna Vaswani and Gavin Reese

2023

WHAT IS HAPPENING?

The HSE's new ten-year strategy for 2022 to 2032 is labelled 'Protecting People and Places' and it has confirmed that reducing work related ill health with a specific focus on mental health and stress as one of its key strategic objectives.

WHY DOES IT MATTER?

The HSE recognises that Great Britain has one of the lowest rates of fatal and non-fatal work-related injury across Europe, but that this isn't the same for work-related ill health. The most commonly reported causes in Great Britain are now stress, depression and anxiety: statistics published by HSE show in 2020/21 of the 1.7 million workers suffering from a work-related illness, 822,000 were due to stress, depression or anxiety and 2021/22 statistics published recently show that of the 0.4 million increase in work-related ill-health cases, 0.3 million related to mental health issues.

The introduction of flexible-working policies and the return to 'office' working environments places further emphasis on the importance of mental health. It is considered to be only a matter of time before prosecutions for causing work-related stress occur. There have already been examples of such cases abroad, such as in France where a spate of suicides among employees led to a prosecution against the employer, France Telecom.

Mental health has clearly already been key focus of the HSE for the last couple of years, demonstrated by its continued work on its Working Minds campaign (launched in November 2021) by joining forces with the Burnt Chef Project in April 2022, who provide mental health support for the UK hospitality trade and the International Stress Management Association (ISMA), in November 2022.

WHAT ACTION SHOULD YOU TAKE?

It is imperative for organisations to have clear processes in place to demonstrate that they can identify and appropriately support employees who are suffering from work-related stress or anxiety.

Horizon scanning (continued)

The FSA/FSS's Call for Evidence: plastic food contact materials

by Rashna Vaswani and Gavin Reese

2023

WHAT IS HAPPENING?

Businesses have been told they should not be selling products containing plastic composites such as bamboo and other plant-based materials e.g. rice husks, wheat straw and hemp. The FSA have listed examples of products including many kitchen items such as cups, plates, bowls, tableware, cutlery, lunchboxes and chopping boards. Some crockery is specifically aimed at children.

This is because little is known about the effects of using these products as their use in plastic has not been assessed. The Committee of Toxicity (COT) carried out a review of the use of bamboo in plastic composites but could not complete a thorough risk assessment due to a lack of data. The COT found that formaldehyde and melamine in bamboo composite cups may pose a concern to human health.

The Food Standards Agency (FSA) and Food Standards Scotland (FSS) have therefore launched a "call for evidence" in order to collect further information for a full risk assessment.

WHY DOES IT MATTER?

In order to sell products containing these "plastic food contact materials", in Great Britain and Northern Ireland, authorisation is needed. At present, it has not been possible to assess whether these plant-based materials are safe to use in plastic in the long-term. Such products are currently not authorised under retained (EU) Regulation 10/2011 for use in plastic food contact materials (applicable in England, Wales and Scotland), or Commission Regulation (EU) No 10/2011 (applicable in Northern Ireland).

Without further data, the FSA and FSS say the relevant scientific committees will find it difficult to carry out individual assessments needed as part of the application process for authorisation. There is also a lack of reference documentation in order to draw a comparison and they may struggle to formulate any further criteria needed for assessments.

Terms used to sell such products include "eco-friendly" and "biodegradable". This is considered misleading under the Materials and Articles in Contact with Food Regulations 2012.

Given the concerns raised in the COT interim report, including the transference of formaldehyde and melamine from bamboo composite cups, further research is needed e.g. on composition and exposure. Further test data is needed for this and the FSA and FSS are interested in:

- safety assessment data eg toxicological testing
- stability of plastic testing
- history of the material used
- ingredients
- how the products are manufactured
- any other relevant information.

The COT will review the data received which will form part of their wider consideration. The evidence collected will be used when assessing future regulated product applications to sell products containing plastic food contact materials.

WHAT ACTION SHOULD YOU TAKE?

- Remove products containing plastic food contact materials containing bamboo and other plant-based materials from sale until the FSA and FSS have completed their risk assessment.
- Consumers should refrain from using these products until the review is complete.
- Businesses with such products to sell will no doubt want to make applications for authorisation. Be prepared for rejection/long wait due to the current lack of knowledge.
- Send information you currently hold which may help to: plastic-composites@food.gov.uk to enable the FSA and FSS to carry out a risk assessment on the safety of long-term use of the plastic containing plant-based materials.

The deadline to submit any data is 12 December 2023.

Further information can be found here.

Horizon scanning (continued)

The "Unicorn Kingdom's" AI White Paper

by Helen Armstrong, Ricky Cella and Joshy Thomas

2023

WHAT IS HAPPENING?

The UK's pro-innovation AI White paper has been published. It landed almost simultaneously with an open letter from the Future of Life Institute which called for a six-month halt in work on AI systems more powerful than the generative AI system: GPT-4.

WHY DOES IT MATTER?

Such systems are now being referred to as having human-competitive (rather than human-like) intelligence and the proposed pause is to allow for the joint development and implementation of a set of shared safety protocols for advanced AI design and development that are audited and overseen by independent outside experts.

Since then, leading scientist Geoffrey Hinton, who developed the foundations of modern machine learning, has decided to step away from developing AI and into a role warning about the dangers of its technology in terms of the potential for widespread job losses and use by 'bad actors' and to urge responsible investment in safety and control of AI that is developing at a spectacular rate.

The AI White Paper claims that the UK is third in the world for AI research and development, and that it is home to a third of Europe's total AI companies—twice as many as any other European country. The UK's approach to regulating AI is undoubtedly of key interest not just to UK AI and non-AI focussed businesses, but also to Europe, the US and the rest of the world. Given the concerns being raised by those closest to the most advanced generative AI developments, no doubt many will be asking: does the White Paper go far enough?

The unicorn approach in a nutshell

The UK's AI White Paper is pro-innovation and, it's fair to say, light on regulation. There's no surprise in this as it follows the UK's National AI Strategy and the principles of the Plan for Digital Regulation. There is no intention to introduce legislation—the framework will be principles-based and will progress iteratively with a wait and see approach to the detail to allow "getting regulation right so that innovators can thrive and the risks posed by AI can be addressed". In this respect, the government has given itself monitoring functions to provide real time assessments of how the regulatory framework is performing. This monitoring will include test beds and sandbox initiatives, conducting and asking convening industry to conduct horizon scanning, and promoting interoperability with international regulatory frameworks. In addition, the framework will be supplemented by assurance techniques, voluntary guidance and technical standards, in collaboration with bodies such as the UK AI Standards Hub and the AI Council.

No AI regulator to mind the gaps

There are no plans to appoint an AI regulator, instead the plan is that existing sectoral regulators will incorporate AI into their normal responsibilities. Following an initial period of implementation, the government anticipates introducing a statutory duty on regulators requiring them to have 'due regard' to the principles. This statutory duty won't be introduced if the government's monitoring of the framework shows that implementation is effective without the need to legislate. While the duty to have due regard will require regulators to demonstrate that they had taken account of the principles, the government recognises that not every regulator will need to introduce measures to implement every principle.

In the AI White Paper, the government recognises that AI risks arise across, or in the gaps between, existing regulatory remits. Unless the various sectoral regulators' approaches to regulating AI are aligned, businesses may end up being caught by complex rules and confused by inconsistent enforcement across regulators who have limited capacity and access to AI expertise. This may disproportionately impact small businesses.

Aside from acknowledging that regulatory coordination will be key through existing formal networks such as the Digital Regulation Cooperation Forum (this has already published its vision for a joined up approach to digital regulation and has established a multi-agency advice service), the government is planning cross-sectoral risk assessment activities. These include: developing and maintaining a cross-economy, society-wide AI risk register to support regulators' internal risks assessments; working with regulators to clarify responsibilities in relation to new risks or areas of contested responsibility; sharing risk enforcement best practices and supporting join-up between regulators.

Definition of AI

There is currently no widely accepted worldwide definition of what is meant by AI. The UK government has therefore decided against a rigid legal definition and has decided to define AI by reference to the two characteristics that generate the need for a regulatory response: its adaptivity and autonomy. The reasoning behind this is that the combination of AI's adaptivity and autonomy makes it difficult to explain, predict, or control the outputs of an AI system, or the underlying logic by which they are generated. It can also be challenging to allocate responsibility for the system's operation and outputs. Within the framework, the government will retain the ability to adapt its approach to defining AI, alongside its ongoing monitoring obligations.

Regulating use via non statutory principles

The UK is proposing a non-statutory framework that existing regulators will be expected to implement. The framework is underpinned by five, now familiar, principles to guide and inform the responsible development and use of AI in all sectors of the UK economy:

- safety, security and robustness
- appropriate transparency and explainability
- fairness
- accountability and governance, and
- contestability and redress.

The UK aims to regulate the use of AI, not the technology itself – focussing on the context in which AI is deployed rather than specific technologies. An example given is that an AI-powered chatbot used to triage customer service requests for an online clothing retailer should not be regulated in the same way as a similar application used as part of a medical diagnostic process.

Regulators are expected to issue guidance or update existing guidance on the principles and will be encouraged to publish joint guidance on AI use cases that cross multiple regulatory remits.

UK alignment with international jurisdictions

The government is proposing that this is done centrally by monitoring alignment between UK principles and international approaches to regulation, assurance and/or risk management, and technical standards. It will also aim to support cross-border coordination and collaboration by identifying opportunities for regulatory interoperability.

Currently, the UK's apparent 'light touch' approach sits apart from the US and EU's risk-based focus, particularly when it comes to foundation models. Last year's release of ChatGPT has prompted recent revisions to the EU AI Act draft legislation, honing in on foundation models. In a slight departure from regulating use rather than specific systems, the revisions seek to impose specific obligations on providers of general-purpose foundation models for example to mitigate against use for high-risk purposes such as deepfakes.

In a similar vein, while there is currently no comprehensive federal legislation regulating AI systems in the US, recent commentary suggests that the US (again prompted by ChatGPT) is shifting from a wholly voluntary framework towards the idea of more formal, risk based, state and federal level governance of AI.

Practical issues

Big tech

It seems like some of the big tech firms don't yet want to launch their chatbots, but don't feel they have a choice if they are to remain competitive in this area. As a result, tech firms, and their executives, may end up with enormous responsibility and liability if things progress in a way that is harmful to humans.

Horizon scanning (continued)

The "Unicorn Kingdom's" AI White Paper (continued)

by Helen Armstrong, Ricky Cella and Joshy Thomas

2023

WHY DOES IT MATTER? (CONTINUED)

AI supply chains

The complexity and opaqueness of AI supply chains makes allocating risk within the supply chain challenging. Under the UK's current legal frameworks there is a real chance of getting it wrong in terms of inappropriate allocation of liability as between businesses using (but not developing) AI and businesses developing foundation models for use by third parties.

The government is not yet clear on how responsibility and liability for demonstrating compliance with the AI regulatory principles will be or should ideally be allocated and it is not proposing to make changes to life cycle accountability at this stage. Going forward, it plans an agile approach—with targeted measures deployed if necessary. In the meantime, it plans to rely on assurance techniques (aiming, in collaboration with industry, to launch a Portfolio of AI assurance Techniques shortly) and technical standards (including through the UK AI Standards Hub) to support supply chain risk management.

Foundation models

There are a small number of organisations supplying foundation models and a proportionately larger number of businesses integrating or otherwise deploying foundation models elsewhere in the AI ecosystem. The government is again looking to assurance techniques and technical standards (particularly important for bias mitigation) to regulate foundation models and will be supported by the UK's Foundation Model AI Taskforce to help build capability in this area.

The government is also expecting regulators to build capability in their sectors. In line with this, the Competition and Markets Authority (CMA) announced, on 4 May 2023, a review of AI foundation models. The review seeks to understand how foundation models are developing and will produce an assessment of the conditions and principles that will best guide the development of foundation models and their use in the future. As well as exploring the opportunities and risks these models could bring for competition and consumer protection, the review aims to produce guidance.

Intellectual property

The AI White Paper doesn't address how the government plans to balance the rights of content producers and AI developers. It refers to its response to Sir Patrick Vallance's Pro-Innovation Regulation of Technologies Review recommendations, published earlier in the Spring. In its response, the government proposed that the Intellectual Property Office will produce a code of practice by the summer that will provide guidance to support AI firms in accessing copyright protected works as an input to their models. For further detail on the practical points relating to the UK's approach to AI and intellectual property rights see our earlier article.

The regulators

Busy and already under-resourced regulators are, at least at some point, likely to be overwhelmed with the technical aspects of AI. Fact—it's incredibly difficult to understand. For example, they may lack the expertise to consider properly the application of the principles to the entirety of their sector, or they may ask for evidence as part of their investigations and simply not understand it when it arrives. There is also a risk that some regulators could begin to interpret the scope of their remit broadly to fill the gaps in ways not originally envisaged or expected.

WHAT ACTION SHOULD YOU TAKE?

The government is currently consulting on the AI White Paper (the consultation closed on 21 June 2023). Further details about the implementation of the regulatory framework will be provided through an AI regulation roadmap, which will be published alongside the government response to the consultation on the AI White Paper. Thereafter it has set out a plan that covers the next year and beyond (playing out during a general election).

In the next six months it is planning to, among other things, publish the government's response to the AI White Paper consultation and issue cross-sectoral principles to regulators, together with initial guidance, as well as design and publish an AI Regulation Roadmap with plans for establishing its central functions.

During the following 6 months it will encourage key regulators to publish guidance on how the cross-sectoral principles apply within their remit and design a monitoring and evaluation framework. The CMA's review of AI foundation models, referred to above, closed in June and the CMA is looking to publish a report which sets out its findings in September 2023.

In the longer term the government will provide detail on central functions, prompt regulators who have not produced guidance to do so, publish a draft central, cross-economy AI risk register for consultation and develop the regulatory sandbox or testbed.

The UK government is clearly not wishing to rush in when it comes to regulating AI and there are some benefits to its proposed iterative approach. AI is, however, here and interacting with humans now. Consequently businesses, large and small, operating in the UK's AI landscape do require more immediate regulatory parameters to protect them and allow them to deal safely with the enormous opportunities presented by digital superintelligence as well as what Geoffrey Hinton describes as an incoming flood of misinformation, job losses and even an existential threat to humanity.

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Your dawn raid survival toolkit

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

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

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

Key features of the toolkit include:

- Live report incident button which instantly connects to RPC's specialist lawyers
- Interactive step-by-step guide on how to manage a dawn raid
- Task list has a date and time stamp along with space for comments which can be used for evidential purposes
- Ability to upload photos of key documents e.g. search warrant
- Ascertain status of employees
- Detailed Resources Library including FAQ's

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

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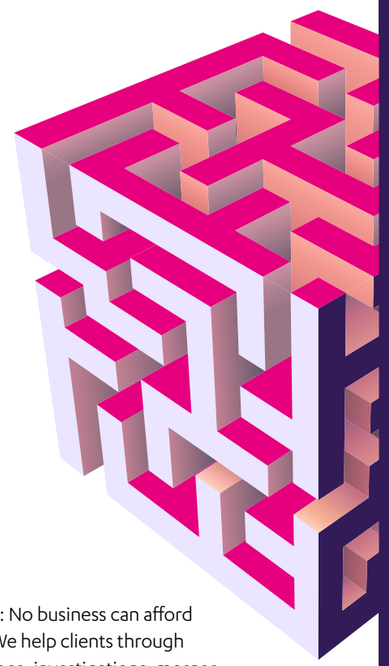
Navigating the maze



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.
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- **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.
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