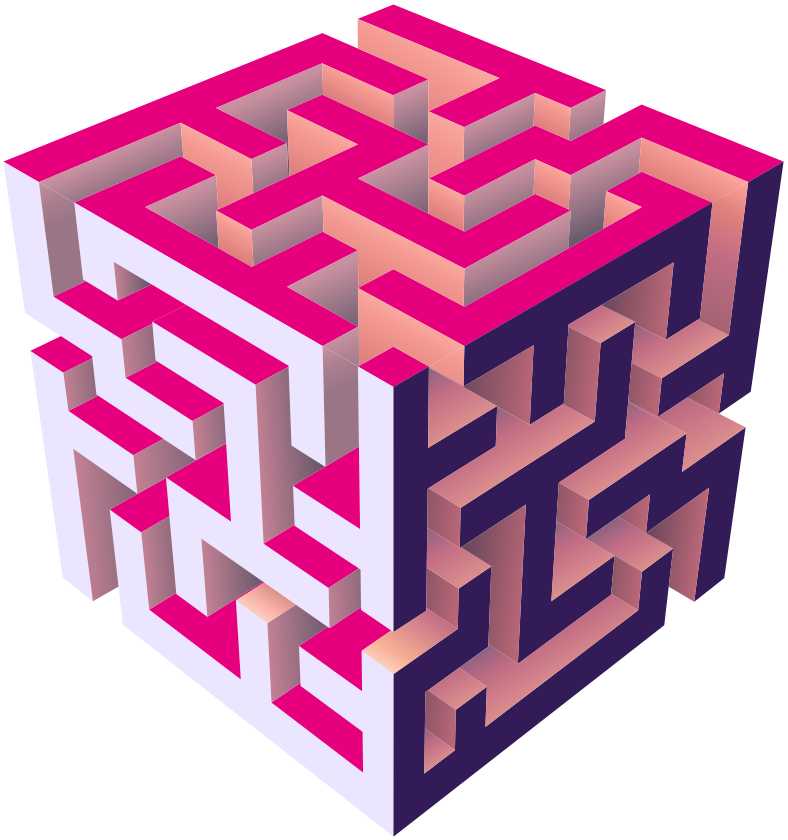
RPC

Regulatory update

December 2020



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

This edition covers some very interesting guidance introduced by the regulators, enforcement agencies and government. The SFO has published a comprehensive guide to its approach to DPAs, while the EDPB has released guidance for organisation on how to deal with Schrems II. HMRC has started consultations on the much-anticipated 'Making Tax Digital' for corporation tax rollout, and the Law Commission has been asked to review the effectiveness of law on corporate criminal liability.

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.

Gavin Reese
Partner, Head of Regulatory

White collar crime	Tax	Competition
Health, safety and environmental	Data and privacy	Advertising regulation
Financial services	Professional services	

KEY HEADLINES

WHITE COLLAR CRIME

by Sam Tate and Davina Given CONTACT

Law Commission reviews effectiveness of law on corporate criminal liability

The Government has asked the Law Commission to review the laws around corporate criminal liability, following concerns regarding the effectiveness of the regime. Doubts have been raised about the effectiveness of the laws in achieving convictions against corporate entities when they commit economic crime.

The Law Commission will draft an Options Paper, in which it will analyse how effective the laws are and where they can be improved. The long-standing "Identification Principle" will be the focal point of the review as it is the fundamental route to corporate criminal liability at present, where a company may only be held criminally liable through the individuals that represent its "directing mind and will".

There has, however, been some significant movement in the law on corporate criminal liability in previous years with the introduction of offences under the Bribery Act 2010 and the Criminal Finances Act 2017, which introduce offences of "failing to prevent" crimes being carried out by the corporate's associates.

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SFO publishes comprehensive guide to its approach to Deferred Prosecution Agreements

The Serious Fraud Office (SFO) has released guidance regarding its approach to Deferred Prosecution Agreements (DPAs) and how it engages with companies where a DPA is a prospective outcome. Entry into a DPA became possible on 24 February 2014, with the SFO the only UK law enforcement agency to have negotiated DPAs.

The key points to note from the guide:

- A company entering into a DPA is not required formally to admit guilt in respect of the offences charged in the indictment, albeit it will need to admit the contents and meaning of key documents referred to in the Statement of Facts that accompanies the DPA
- Cooperation with the SFO remains a key priority for the SFO in considering whether to offer a DPA
- The SFO may intend to move away from its previous habit of identifying individuals in DPAs, moving to an approach that maintains anonymity for third parties
- Calculating the profit made by a company as a result of the wrongdoing may not be a "straightforward exercise" and accountancy advice may be helpful to companies, and
- Any discount on a financial penalty under a DPA should be comparable to a fine imposed as a result of a guilty plea in a prosecution.

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Transparency International publishes report on enforcement of foreign anti-bribery convention

Transparency International (TI) has released its annual report on enforcement of the OECD anti-bribery convention. The report analyses enforcement in 43 of the 44 signatories to the Organisation on Economic Co-operation and Development's Anti-Bribery Convention, in addition to China, India, Singapore and Hong Kong.

Of the countries analysed, just four were given the highest classification of 'active' foreign anti-bribery enforcement. Nine were classed 'moderate', 15 'limited' and 19 'little or no', indicating a significant lack of substantial enforcement.

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TAX

by Adam Craggs CONTACT

HMRC consults on the much-anticipated 'Making Tax Digital' for corporation tax rollout

HMRC has recently announced its intentions to rollout 'Making Tax Digital' (MTD) for corporation tax (CT). HMRC intends to commence a voluntary pilot of MTD in April 2024, with a mandatory rollout expected from 2026.

If the proposed design and principles of HMRC's consultation are introduced, it is expected that companies that pay CT will need to:

- maintain their records digitally
- use MTD compatible software to provide quarterly updates on their income and expenditure
- submit an annual CT return using MTD compatible software.

The deadline for responding to the government's consultation is 5 March 2021.

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Furlough support extended to March 2021

The Coronavirus Job Retention Scheme (CJRS) has been extended until December, with furloughed employees to continue to receive 80% of their salary for hours not worked. The CJRS was due to have ended after it was scaled back in October, to cover 60% of furloughed employees' salaries.

Employers are only required to cover employer national insurance and pension contributions for hours not worked, and may elect to top up furloughed employees' salaries to the previously contracted amount.

The announcement, however, raises a number of questions. Employers in Scotland and Wales, which had been locked down for several weeks before England, will be wondering whether there will be any backdated financial support for them. All employers using the CJRS should maintain detailed records of workers' pay and hours worked as this will assist them when making a claim.

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HMRC performance suffers due to resourcing issues

HMRC data has revealed the extent to which service performance and compliance activity has been adversely impacted by the COVID-19 pandemic. This is largely due to a significant amount of resources being diverted to deliver COVID-19 support schemes.

Between April and September 2020, calls to HMRC were answered, on average, in 10 minutes and 19 seconds. This is a significant increase on the previous average time of 6 minutes and 39 seconds for 2019/20.

Compliance yield and debt levels have also been affected. HMRC's debt balance rose from £22.4bn in March 2020 to £69.5bn in September 2020. The increased debt balance is largely made up of VAT and self-assessment payments. Meanwhile, compliance yield has fallen from £21.0bn to £11.8bn in the same period.

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COMPETITION

by Lambros Kilaniotis CONTACT

A Timely Reminder of Jurisdiction

As the end of the Brexit Transition Period approaches, there have been two developments which highlight the long-established jurisdictional interaction between the European Commission and the UK Regulators.

The telecoms sector has been in the spotlight with the European Commission's announcement agreeing to the Competition and Market Authority's (the "CMA") request for the proposed merger between Telefonica's O2 and Liberty Global's Virgin Media to be referred back to it (under Article 9(2)(a) of the EU Merger Regulation) for review under UK competition law. In its referral request, the CMA raised concerns in relation to a number of UK telecoms markets and had reiterated that it would be well placed to review the transaction, given the forthcoming expiry of the Transition Period.

In the sphere of anti-trust investigations, the European Commission has announced that it has decided to close "for priority reasons" its investigation into alleged anti-competitive exchange of commercially sensitive information amongst insurance brokers active in aviation and aerospace insurance and reinsurance. Consequently, there is no finding as to whether or not there has been any anti-competitive behaviour. Originally, this investigation started in April 2017 with a series of dawn raids being carried out by the FCA, as a concurrent UK competition authority. Six months later, responsibility for the investigation had transferred to the European Commission.

Post the Transition Period, the CMA is anticipating a significant rise in the number of mergers which it will need to review; there will be many sizable mergers which traditionally would have fallen within the European Commission's sole jurisdiction, but which will going forward potentially attract scrutiny from both of these competition regulators. It is also inevitable that there will be allegations of cross-border cartel and other competition law breaches which will involve the UK as well as EU Member States and which will potentially result in parallel investigations by the European Commission and the CMA.

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An update on CMA Investigations

New Policy of Naming Companies under Investigation and RPM:

After the imposition of significant fines early in the year for various anti-competitive resale price maintenance or RPM practices, the CMA has continued to investigate alleged RPM. The announcement of the launch of its latest RPM investigation (into the supply of domestic lighting) is particularly notable for identifying the company under investigation at such an early stage. This marks a significant change of approach by the CMA and follows the publication of its revised guidance on competition investigation procedures in which it stated that, in the interests of transparency, it would "normally publish the names of the parties under investigation".

Focus on the Construction Sector:

In another area of focus for the CMA, namely the construction sector, it has announced a further infringement decision and fines of £9.5 million on two companies involved in the supply of rolled lead. The competition law infringements included price collusion, market sharing and the exchange of commercially sensitive information. The CMA also announced that it had closed its investigation into a third company.

Most Favoured Nation Clauses:

The CMA has announced the conclusion of its three-year investigation into the use of most favoured nation or MFN clauses by ComparetheMarket.com ("CTM"). In reaching its decision, the CMA has concluded that CTM's imposition of an extensive network of MFN clauses on home insurers infringed UK and EU competition law and has imposed a fine of £17.9 million.

According to the CMA, the use of these MFN clauses protected CTM (with a market share of over 50%) from being undercut by the prices quoted by home insurers on rival price comparison websites as the insurers could not offer lower prices on other websites. This reduced price competition between price

comparison websites and also between home insurers using these websites as well as restricted the ability of CTM's rivals to expand. CTM was able to secure the lowest prices, whilst increasing its commission fees from insurers. The CMA concluded that the use of these MFN clauses was therefore likely to have resulted in higher insurance premiums.

The CMA noted the strong incentive for insurers to comply with CTM's MFN provisions in order to ensure continued business as a result of the latter's monitoring and enforcement of compliance and its "importance as a trading partner". Despite numerous requests from insurers, CTM had refused to remove the MFN clauses from its contracts.

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Further competition developments

Cartel Prosecutions:

The CMA and SFO have entered into a new Memorandum of Understanding to support collaboration between them in relation to the cartel offence "to ensure effective and efficient investigation or prosecution". Noting their different legislative remits, priorities, constraints and confidentiality requirements, the two regulators "commit themselves to improve professional co-operation and to the systematic exchange of information in preventing dishonesty, corruption or serious fraud".

Digital Markets Unit:

In its published response, the Government has accepted, in principle, the recommendations made by the CMA in its final report of its online platforms and digital advertising market study for a new regulatory regime for platforms funded by digital advertising. The Government has confirmed that a Digital Markets Unit will be established within the CMA from April 2021 to introduce, operate and enforce a code of conduct for platforms funded by digital advertising and designated as having strategic market status ("SMS"). The CMA is currently leading the Digital Markets Taskforce which is due to report back before the end of the year with its advice for the design and implementation of the code of practice and approach to SMS designation.

National Security Intervention:

The new National Security and Investment Bill has been introduced into Parliament in order to strengthen the Government's ability to investigate and potentially intervene on national security grounds in a wider range of investments and transactions involving certain sectors than it can currently under the public interest grounds of the UK merger regime. The proposed national security screening regime will include mandatory notification and clearance requirements in certain circumstances without the application of any turnover or share of supply threshold. Sanctions for non-compliance will include imprisonment and large fines as well as the transaction being void.

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HEALTH, SAFETY AND ENVIRONMENTAL

by Gavin Reese CONTACT

Lockdown 2.0: what it means for employers

It's critical that employers take all reasonable steps to keep workers and visitors safe during the COVID-19 pandemic. Doing so will reduce the risks of co-workers being required to self-isolate if a member of staff tests positive for COVID-19.

From Thursday 5 November, employees were legally required to work from home unless it is not reasonably possible to do so. It is vital that employers play their part by making their workplaces as safe as possible (where working from home is not possible) and by supporting their workers when in self-isolation.

In no circumstances may employers knowingly allow an employee who has been asked to self-isolate to come into work or work anywhere other than their own home. Employers who are found to have done this may receive a fine starting from £1,000.

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HSE statistics show Great Britain is one of the safest places to work

Statistics just released show that Great Britain is still one of the safest places in the world to work, with the lowest number of deaths on record. The Health and Safety Executive's (HSE) annual report includes statistics for work-related ill health, workplace injuries, working days lost and the associated costs to Great Britain.

The statistics illustrate that for the 2019/2020 period in Great Britain there were:

- 111 fatal injuries at work
- 1.6 million working people suffering from a work-related illness, and
- 38.8 million working days lost due to workplace injury and work-related illness.

The estimated economic cost to Great Britain for this period totalled £16.2 billion, with 38.8 million working days lost.

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Government urged to publish a delayed consultation to tackle food waste reporting and reduction

Campaigners are urging the Government to crack down on companies who have failed to reduce food waste. 15 years have passed since the first UK food waste agreement, however a new report by Feedback indicates that less than 10% of major food businesses have committed to full transparency on their waste figures.

Feedback is calling for ministers to set a national binding target for businesses to reduce food waste by 50% from farm to fork by 2030. Other recommendations for the Government include:

- Bringing forward plans to make food waste reporting mandatory for all large businesses
- Implementing an enforcement regime to oversee the food industry, pursuant to the 'polluter pays' principle, and
- Conducting a post-COVID review of the groceries supply chain.

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DATA AND PRIVACY

by Jon Bartley CONTACT

The EDPB's guidance on how to deal with Schrems II

Following the CJEU's judgment in Schrems II, which found that organisations relying on the Standard Contractual Clauses (SCCs) may need to implement further safeguards, The European Data Protection Board (EDPB) have presented recommendations on measures that organisations should consider following. According to these recommendations data exporters would be required to verify, on a case-by-case basis if the law of the third country ensures a level of protection of the personal data transferred that is the equivalent to the level in the EEA. If not the data exporter should add measures that are supplementary to the SCCs to ensure effective compliance with that level of protection where the safeguards contained in SCCs are not sufficient

The recommendations include a 6-step process which include mapping out the data transfers and also identifying the transfer tools which are being relied on such as an adequacy decision or SCCs. To assist data exporters, the recommendations also contain a non-exhaustive list of examples of supplementary measures, such as implementing organisational and technical measures which may consist of internal policies.

The recommendations will be submitted to public consultation and will be applicable immediately following their publication

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The EU's revised SCCs for data transfer

The European Commission have published a draft of the revised set of Standard Contractual Clauses for the following scenarios:

1. controller to controller transfers
2. controller to processor transfers
3. processor to processor transfers, and
4. processor to controller transfers.

The SCCs which involve processors cover the requirements of GDPR Article 28, which states a list of provisions that must be written into a contract whenever a controller uses a processor to process personal data on the controller's behalf. The drafts also include provisions which address the concerns of the CJEU in the Shrems II case. As a result of the ruling, clauses such as mandating a multi-step assessment and the implementation of technical safeguards appear in the drafts.

Once the SCCs are finalised, which is expected to happen in 2021, organisations will have a one-year grace period to update their contracts that incorporate the current SCCs. During the one-year grace period, organisations may continue to rely on the current SCCs.

Many UK companies are implementing SCCs in order to safeguard data flows from the EU, given the risk that the UK will not receive an adequacy decision from the EU Commission before the Brexit transition period ends. The likelihood that a replacement set of SCCs will need to be entered into in due course should be borne in mind in the drafting of those agreements.

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Marriott and BA fined a combined £38.4m for data security failures

Following swiftly on from its decision to fine British Airways (BA) £20m, the Information Commissioner's Office (ICO) has now also fined Marriott International Inc £18.4million for failing to keep millions of customers' personal data secure.

The ICO found that BA had failed to protect the personal and financial details of more than 400,000 of its customers. The investigation found the airline was processing personal data without the proper security measures in place. This allowed BA to become the subject of a cyber-attack, which it failed to detect for more than two months.

With regards to Marriott, it is estimated that 339 million guests were affected following a cyber-attack on Starwood Hotels and Resorts Worldwide Inc in 2014. The attack was not detected until 2018, by which time the company had been acquired by Marriott. Following its investigation, the ICO concluded that Marriott failed to implement appropriate measures to protect the personal data in its systems.

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ICO publishes new detailed guidance on subject access requests

The ICO has published updated guidance on an individual's right of access. The right of access, otherwise referred to as subject access, gives individuals the right to obtain a copy of their personal data, in addition to other supplementary information.

Individuals are also entitled to receive the following from a controller:

- The controller's purposes for processing
- Recipients or categories of recipients the controller has or will be disclosing the personal data to
- The retention period for storing the personal data, and
- Safeguards the controller has put in place where personal data has or will be transferred.

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ADVERTISING REGULATION

by Oliver Bray CONTACT

ASA creates in-house data science team to improve online ads regulation

The Advertising Standards Authority (ASA) is investing heavily in AI and data science to improve its ability to regulate advertising on websites and social media.

The ASA has already utilised AI to monitor online content. Technology such as Brandwatch has enabled ASA to tackle gender presentations in advertisements and to identify unlabelled advertisements on social media influencers' posts.

As part of its new five-year strategy, the ASA intends to launch a new data science team, designed to ensure it can rise to the challenge of regulating the online sphere. Due to delays caused by COVID-19, the new data science team is expected to launch by the end of the year.

Regulation of social media influencers continues to be a key focus. The ASA intends to use technology to quickly identify posts that are not labelled #ad but appear to be paid advertisements.

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ASA publishes guidance on qualifications for non-broadcast media

The ASA has updated its guidance on qualifications to ensure non-broadcast media marketers can make their qualifications clear for the consumer to ensure their implications are fully understood. The guidance offers new advice on the differences between printed and non-printed media, helping the marketer determine how clear the qualifications are for the consumer depending on the medium.

For better clarity, the guidance recommends focusing on factors such as the size of the qualifying text, its orientation, and how it is designed (for example, a light font on a dark background is easier to read). The ASA also suggests using the 'ladder' model to ensure qualifications are clear. Breaking down an ad into its headline, sub-heading, body copy and footnote, the ladder allows the marketer to clearly assess where the clearest position is for the qualification.

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FINANCIAL SERVICES

by Jonathan Cary and Matthew Griffith CONTACT

Joint 'Dear CEO letter' on final preparations for the Brexit transition period

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have released a joint letter outlining final preparations for the end of the Brexit transition period. With the transition period ending at 11pm on Thursday 31 December 2020, it is imperative that firms continue to build on their preparatory work to ensure that they are ready for a range of scenarios.

Most risks to UK financial stability that could arise, should the transition period end without the UK and EU agreeing equivalence or other arrangements for financial services, have been mitigated. However, some market volatility and disruption to financial services, particularly to EU-based clients, could arise. Final steps by individual firms are required to ensure their preparedness for the end of the transition period.

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PRA sets out its proposals to revise its operational continuity in resolution policy

The PRA has released a Consultation Paper, setting out its proposals to revise its operational continuity in resolution (OCIR) policy. The objective of the proposals is to improve firms' resolvability and support the Bank of England's approach to resolution.

The proposals would amend the Operational Continuity Part of the PRA Rulebook and PRA OCIR expectations, and would lead to a new Supervisory Statement on OCIR. The PRA proposes that these changes would take effect from Saturday 1 January 2022.

The PRA is inviting feedback to this Consultation Paper.

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Implementation deadlines for the Certification Regime and Conduct Rules extended

The FCA has published its Policy Statement (PS) 20/12: Extending the implementation deadlines for the Certification Regime and Conduct Rules. The PS sets out the FCA's final rules and summarises the feedback received to Consultation Paper 20/10 and its responses.

The changes affect all FCA solo-regulated firms authorised to provide financial services under the Financial Services and Markets Act 2000. The changes do not apply to benchmark administrators.

The PS confirms that the FCA will extend the deadline for the following requirements correspondingly from 9 December 2020 to 31 March 2021 as consulted on:

- The date the Conduct Rules come into force, for staff who are not Senior Managers, Certification Staff or board directors
- The date by which relevant employees must have received training on the Conduct Rules
- The deadline for submission of information about Directory Persons to the Register, and
- References in the rules to the statutory deadline for assessing Certified Persons as fit and proper following agreement with the Treasury.

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PROFESSIONAL SERVICES

by Graham Reid and Robert Morris CONTACT

ICAEW releases new guidance on reporting misconduct

The Institute of Chartered Accountants in England and Wales (ICAEW) has updated its guidance on the duty to report misconduct. The fundamental principle – that it is in the public interest to report misconduct that if left unreported, could adversely impact the reputation of the profession – remains intact, but there are wholesale changes to the requirements and expectations of professionals to report misconduct.

Professionals are now required to make a report when another member has been charged with, or convicted of, a criminal offence. This requirement contrasts previous guidance, where professionals were only required to report on specific offences, such as dishonesty, fraud, cheating, or certain imprisonable offences. Previously, professionals were only required to report where there had been a conviction.

The guidance now also provides specific examples of misconduct. These include backdating documents, breaching AML requirements, and harassing a colleague or client. Such examples offer some backbone to reporting allegations, while also clarifying areas that professionals may not have realised can amount to misconduct.

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High Court criticises SRA in ruling against Tribunal decision

In a landmark ruling, the High Court has ruled against the Solicitors Disciplinary Tribunal's (SDT) findings against Ryan Beckwith in a high-profile sexual misconduct case. The Queen's Bench Division overturned the SDT's original findings that there had been a breach of principles two and six of the Solicitors Regulation Authority's code of conduct, requiring solicitors to 'act with integrity' and 'behave in a way that maintains the trust the public places in you and in the provision of legal services'.

The appeal considered whether the SDT had been in error by not first deciding whether or not Beckwith's actions amounted to 'professional misconduct'.

The High Court concluded that while 'seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services... the facts as found and assessed by the tribunal are not capable of supporting the conclusion that the appellant acted in breach of Principle 6.'

The court went on to comment that: 'Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit.'

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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.

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- **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.
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- **Professional practices**: Our team combines sector knowledge with regulatory expertise to provide comprehensive support and advice for professional services firms, covering all aspects of their regulated business.
- **Advertising and marketing**: Some of the world's largest corporates rely on us to keep their brand communications above board, from advertising standards to consumer regulation we help clients to simplify the complex.

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