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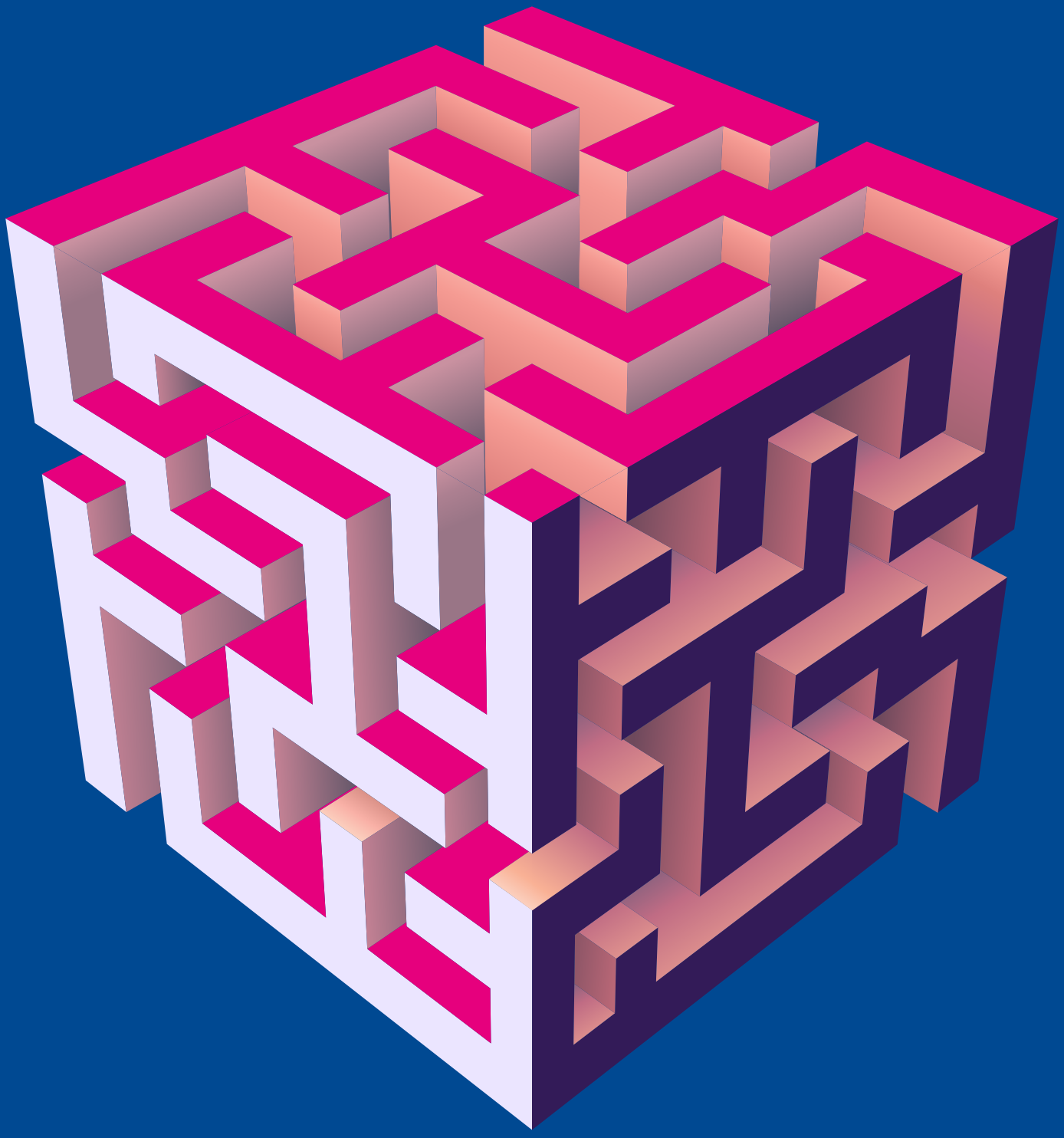

Regulatory Roundup: Q1 2020

Helping you to navigate the regulatory maze

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

Regulatory Roundup: Q1 2020

Spring 2020

Welcome to the Spring edition of the Regulatory Roundup, which aims to pull together the key developments across regulatory regimes – and help you to navigate the maze.

With the world grappling with COVID-19, the UK's regulators have been developing their guidance and expectations for businesses in response to this pandemic. While this has caused a significant shift in the regulatory landscape, there are several other key regulatory developments you need to be aware of.

So, in response to client requests, this roundup pulls together some of the key developments over the past few months from across the UK regulators to help you join the dots and successfully navigate the regulatory maze.

Some of the topics included in this edition are:

- the SFO's guidance on corporate cooperation and compliance programme evaluation
- changes to National Minimum Wage obligations
- EU smarter food safety rules and eco-design regulations, and
- the new task force set up to tackle waste crime.

I hope you enjoy reading this Roundup. 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.

If you would like to receive our monthly Regulatory Updates, please sign up here.

Gavin Reese
Partner, Head of Regulatory

White collar crime	Tax	Health and safety
Environmental	Product regulation	Competition
Data protection and privacy	Advertising and marketing	Insurance & financial services regulation
Professional practices regulation		

HEADLINES

WHITE COLLAR CRIME

by Sam Tate and Davina Given CONTACT

Implementation of the 5th EU Money Laundering Directive (5MLD)

January saw the UK's implementation of the EU's Fifth Money Laundering Directive (5MLD). While Brexit may be upon us, it is very unlikely that the UK's departure will have any material impact on the UK's continued application of these directives, not least since they also reflect the requirements of the international body, the Financial Action Task Force.

For those business already subject to money laundering regulations, the updated rules largely focus on refining current policies and procedures. However, the new rules have significantly widened the definition for business types within scope. Now crypto asset exchange providers, custodian wallet providers, art market participants and letting agents must ensure they put in place extensive internal controls to prevent money laundering, and report any knowledge or suspicion of money laundering by others that they come across in the course of business.

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Serious Fraud Office issues Corporate Co-operation Guidance

The Serious Fraud Office (SFO) has published revised Corporate Co-operation Guidance to assist in assessing co-operation from organisations. Co-operation is a relevant consideration in the SFO's charging decisions, as outlined in the Deferred Prosecution Agreements Code of Practice and the Guidance on Corporate Prosecutions.

As seen by the SFO, co-operation involves providing assistance to the SFO and includes: identifying suspected wrong-doing or criminal conduct, reporting this to the SFO and promptly providing evidence. It advances the interests of justice by allowing the SFO to understand the facts, obtain admissible evidence and progress investigations. Most controversially, the SFO places considerable weight on the waiver of privilege.

The Corporate Co-Operation Guidance provides advice on preserving and providing material including hard-copy or physical evidence, digital evidence and devices, financial records and analysis, and industry and background information.

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National Crime Agency publishes annual report on Suspicious Activity Reports

The National Crime Agency (NCA) has issued its annual Suspicious Activity Reports (SARs) report, and there are some interesting points to come out of it.

The UK Financial Intelligence Unit (UKFIU) received a record number of SARs (478,437), and a 52% increase in requests for consent. As a result of the consent requests, over £130m of potential criminal property was restrained or frozen in the past year (up considerably from the previous year, when only £51.9m was restrained). However, less than 5% of these requests for consent were actually refused – a comforting statistic for businesses!

The pattern of reporting is also changing. While the number of reports from lawyers and accountants remains low, there was increased reporting from the challenger banks and fintech sectors. This probably reflects the increasing sophistication of both their operating models and technology used to identify suspicious activity.

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SFO guidance: Does your compliance programme meet expectations?

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

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

1. what stages the SFO may consider a business's compliance programme
2. how the assessment will fit into the investigation process, and
3. the principles the SFO will use as part of any assessment.

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

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TAX

by Adam Craggs CONTACT

Taxation of corporate cryptoasset transactions

Cryptoassets have become more prevalent in recent years, and the tax treatment of these assets continues to develop as technology evolves. Now, HM Revenue and Customs (HMRC) has published a policy paper on the taxation of transactions undertaken by companies and other businesses using cryptoasset exchange tokens. For the purpose of filing tax returns, the calculation of taxable profits will be undertaken in pounds sterling. For transactions which do not have a pound sterling value, the appropriate exchange rate at the time must be used in order to convert the value to pounds sterling.

The policy paper provides guidance on how transactions of exchange tokens are to be treated in respect of Corporation Tax, Chargeable Gains Tax, VAT, Income Tax, National Insurance and Stamp Duty Land Tax (SDLT). It also confirms HMRC's view that the transfer of exchange tokens would not be subject to stamp duty (SD) or Stamp Duty Reserve Tax (SDRT) because exchange tokens are unlikely to meet the definition of stock or marketable securities and that tokens given in consideration for stock or marketable securities or land would be considered money's worth for SDRT and SDLT purposes. For SD purposes, cryptoassets do not constitute money, stock or marketable securities, but could constitute chargeable consideration in the form of debt.

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Tax report to G20 finance ministers released

The Organisation for Economic Co-Operation and Development (OECD) secretary-general has published his tax report to G20 finance ministers. The report outlines the latest proposal for taxation of multinational enterprises and provides an update on tax transparency.

Part 1 of the report covers a proposal for a unified approach to an international solution to the challenges of the digital economy.

Part 2 considers tax transparency challenges arising from new technologies. The OECD is currently developing a standardised reporting and exchange framework for participating jurisdictions.

Seven jurisdictions have been identified as failing to comply with tax transparency standards: Brunei, Darussalam, Dominica, Montserrat, Niue, Sint Maarten, Trinidad and Tobago and Vanuatu.

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

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

The threshold has been increased, meaning that businesses that owe arrears of more than £500 in minimum wage payments will be named. Previously, the threshold was set at £100. Businesses that underpay staff by less than £100 will have the chance to correct their mistakes without being publicly named. However, they will still face fines of up to 200% of the arrears.

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HMRC publishes further guidance following Sir Amyas Morse's review

In September last year, the Chancellor commissioned Sir Amyas Morse to lead an independent review into the disguised remuneration loan charge.

Sir Amyas was asked to consider whether the policy is an appropriate response to concerns regarding perceived tax avoidance, and whether the changes the government announced to support individuals to meet their tax liabilities have addressed any legitimate concerns raised.

With the review concluding late last year, HMRC published guidance setting out what this means for those affected. In January, HMRC published further detailed guidance on this contentious area including information on accelerated payment notices, inheritance tax and disclosure. The updated guidance also includes information about filing self-assessment tax returns, late payment interest and payments on accounts.

Of particular note is that the loan charge will not apply to any disguised remuneration loans made before 9 December 2010. Guidance on the position regarding later years can be found here.

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HEALTH AND SAFETY

by Gavin Reese CONTACT

Display screen equipment safety guidance issued to employers

The Health and Safety Executive (HSE) has issued advice to employers whose workers use display screen equipment (DSE), such as laptops, computers, smartphones and tablets. The Health and Safety (Display Screen Information) Regulations set out what employers need to do to protect their employees from any risks associated with the use of DSE.

The Regulations apply to employers whose workers use DSE daily, for an hour or more at a time. This includes employees who hot-desk or work from home, in addition to those who work at a fixed workstation.

In order to comply, employers must conduct a DSE workstation assessment, provide training and information for workers, provide an eye test if requested, and ensure workers take regular breaks from DSE work.

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New animal and plant health safety rules coming into force

A set of three EU regulations collectively, known as the smarter rules for safer food (SRSF) package, will be introduced in the UK. The aim of the SRSF package is to improve existing health and safety standards across the agri-food chain by modernising protections against animal diseases and plant pests.

The new regulations will simplify legislation by replacing over 70 existing European directives and regulations. They will take a risk-based approach to animal, plant and public health protection, introducing more efficient pest and disease control measures.

Two of the most significant changes the SRSF will bring in include the requirements to use an IT system TRACES (NT) to log imports of animal products, and a large increase in the number of plant passports that will be required.

While these are EU led regulations, the new regulations will continue to apply while we are a member of the EU and during any transition period.

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UK allergy-related food recalls jump 16% in a year

As concerns continue to rise over the dangers of poorly labelled foods, food recalls relating to allergens have jumped 16% in the past year – with over 127 food products withdrawn from the market in 2018/19, compared to 110 in 2017/18.

Allergen recalls occur when a food product is found to contain undeclared traces of allergens, which could prove harmful, even fatal, to some people. The rise in recalls related to food allergies following EU legislation that came into effect in December 2014, requiring all food labels in shops to display information on 14 different allergen types.

Natasha's Law, named after the teenager who died after eating a baguette from a sandwich chain that contained undeclared sesame, will require all businesses that sell food prepared and packed on the premises where sold to print a full list of ingredients with effect from October 2021.

This may lead to further allergen related issues if mislabelled products find their way into fast food and casual dining chains.

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Updates to the FSA's guidance on food allergen labelling

From 1 October 2021 new legislation will come into force, changing the way in which food businesses in England must provide allergen information on prepacked for direct sale food.

The FSA has conducted a consultation into proposed updates to the existing Technical Guidance on Food allergen labelling and information requirements, to seek the views of stakeholders and affected parties.

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FSA imposes deadline for CBD industry to provide product information

The Food Standards Agency (FSA) has imposed a deadline for businesses trading in Cannabidiol (CBD) to submit applications for authority to market their CBD products and contents.

CBD extracts are derived from hemp and cannabis plants. The FSA have said that the CBD industry must provide information about the safety and contents of their CBD products by 31 March 2021. Following this date, only products which have submitted the appropriate application will be permitted to remain on the market. This is to ensure novel foods meet legal standards so as to reassure consumers.

The FSA is advising vulnerable groups not to take CBD, and for healthy adults to consume no more than 70mg a day, unless under medical direction. CBD was confirmed as a novel food product in January 2019. Under the current regulations, any foods with no history of consumption before May 1997 should be evaluated before being placed on the market.

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ENVIRONMENTAL

by Gavin Reese CONTACT

Queen's Speech: Environmental protection a key priority

The Queen's speech set the tone for environmental policy moving forward, with the announcement of a landmark Environment Bill. For the first time, environmental policies will be enshrined in law, with air quality and plastic pollution key priorities.

The government has indicated that a new plastic tax will be enforced, introducing charges for specified single-use plastic items. This comes following the success of the government's 5p charge on single-use carrier bags back in 2015, which reduced single-use bag sales by 90%.

The government plans to fight air pollution by setting a legally binding target to reduce fine particulate matter, PM2.5, and by increasing local powers to address sources of air pollution.

A new independent Office for Environmental Protection will be established to investigate complaints and take enforcement action against public authorities.

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Government responds to climate change recommendations

The government has set out its plans to tackle climate change, in response to recommendations from the Committee on Climate Change (CCC). Key objectives include accelerating the decarbonisation of transport and improving the energy performance of rented commercial buildings.

There are also plans to strengthen governance to galvanise the government to do more to tackle climate change. The government's response comes four months after the UK became the first major economy to legislate for net zero emissions by 2050.

The new Environment Bill was introduced in Parliament, outlining ambitious proposals to strengthen the UK's environmental protections.

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EU Commission introduces measures to improve eco-design of white goods

After a consultation process, the EU Commission has adopted 10 ecodesign implementing regulations setting out energy efficiency and other requirements for household appliances in a long running effort to improve Europe's carbon footprint.

These latest developments concentrate on eco-design measures for white goods such as refrigerators, washing machines, dishwashers and televisions. This is the first time that requirements have been introduced that specifically focus on contributing to the circular economy objective of the EU's "Energy efficiency first" principle, and will require products to ensure greater repairability and recyclability and waste handling of appliances.

European Commission Vice-President for Jobs, Growth, Investment and Competitiveness Jyrki Katainen said: "Whether it is by fostering repairability or improving water consumption, intelligent eco-design makes us use our resources more efficiently, bringing clear economic and environmental benefits."

The Commission estimates that these measures will deliver 167 TWh of final energy savings per year by 2030 and that these measures can save European households on average €150 per year.

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New taskforce launched to tackle waste criminals

For the first time, environmental regulators, HMRC, the National Crime Agency and law enforcement will band together to form the Joint Unit for Waste Crime (JUWC).

The unit is a product of the UK Government's Resources and Waste Strategy, and is tasked with tackling serious and organised waste crime, such as dumping hazardous materials on private land and falsely labelling waste so it can be exported abroad to unsuspecting countries.

Such activities have been estimated by the Home Office to cost the UK economy in excess of £600 million per annum, as well as often being linked to other serious organised crime such as large-scale fraud and even modern slavery. The formation of JUWC is intended to make it easier for partner agencies to share their intelligence and resources to take swifter action when investigating criminal waste operations.

The new unit will conduct site inspections, make arrests and prosecutions and, upon conviction, push for heavy fines and custodial sentences. Its aim is to build on the Environment Agency's (EA) efforts in 2019 when illegal waste activity was stopped at 912 sites in the UK. As a result of prosecutions taken by the EA, businesses and individuals were fined almost £2.8 million for environmental offences in 2018.

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COMPETITION

by Lambros Kilaniotis CONTACT

Damages for competition law infringements

Follow-on competition law damages claims are becoming an almost inevitable consequence for those found to have illegally participated in cartels, and there is ever increasing activity in this area before the High Court and the Competition Appeal Tribunal. The Court of Appeal has recently given judgment in a (*BritNed Development Limited v ABB AB and Another*) cross-appeal by both the claimant and the defendant in a damages action which has again highlighted the compensatory rather than punitive nature of competition law damages, concluding, inter alia, that:

"the award of damages on the basis of savings made by the cartelist, rather than loss to the victim of the cartel as a result of having paid a price which was inflated by the conduct of the cartel, is based upon an error of law and must be set aside."

In 2014, the European Commission issued a cartel infringement decision against various underground and submarine high voltage power cable-makers, including ABB, the successful leniency applicant. BritNed is a joint venture operating the electricity interconnector between the UK and the Netherlands and had asked ABB to tender for the cable element of this interconnector. ABB also quoted for the converter and, ultimately, BritNed purchased both elements from ABB.

Following the infringement decision, BritNed sought follow-on damages from ABB before the High Court and was awarded €11.7 million. Both BritNed and ABB appealed and the award has now been reduced by almost €5 million on the basis that the High Court erred in taking into account cost savings for ABB.

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Minority investment stake gives rise to potential harm

A subsidiary of Amazon.com, Inc. led the $575 million funding round in May 2019 in Roofoods Ltd, which is well-known by its trading name, Deliveroo, in exchange for a minority shareholding and certain other rights. The CMA's view is that this investment may give Amazon the ability to exercise 'material influence' over Deliveroo so as to trigger the UK merger rules. The CMA considered that, inter alia, Amazon's 'substantial expertise' in operating online marketplaces, logistics networks and subscription services, could enable it to influence the other Deliveroo shareholders and board members.

On completing its Phase I merger review, the CMA announced on 11 December 2019 that, unless suitable undertakings in lieu were offered, it would make a Phase II reference. As none were forthcoming, the Phase II reference was made on 27 December with a statutory deadline for the CMA's final report of 11 June 2020.

The CMA is concerned that there is a realistic prospect of the merger leading to a substantial lessening of competition in both the online restaurant food delivery market and the emerging market for online convenience grocery delivery, i.e. for ultrafast same-day delivery. In relation to the former, Amazon had exited the highly concentrated market in November 2018, leaving three large suppliers in the UK: Deliveroo, Just Eat and Uber Eats. The CMA examined large volumes of Amazon's internal documents and interviewed senior management and considered that Amazon had "a strong continued interest in the restaurant delivery sector" and, absent its strategic investment in Deliveroo, might have re-entered the supply of online food platforms in the UK.

With regard to the ultrafast delivery service, the CMA considered the parties to be two of the largest and best established suppliers, albeit acknowledging differences between their current service offering. The CMA examined the parties' internal planning and strategy documents, external analyst reports and obtained third party evidence to assess how future competition between the parties might evolve and concluded that they both have major expansion plans which would bring them in closer competition in the future.

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The CMA takes tougher stance over information requests in merger investigations

The Competition & Markets Authority (CMA) issued a penalty of £20,000 on Sabre Corporation ("Sabre") for failing 'without reasonable excuse' to comply with two compulsory information notices which it had issued under s109 Enterprise Act 2002 ("s109 Notices") as part of its investigation into Sabre's acquisition of Farelogix, Inc.

This was the third penalty in 2019 for failure to comply with S109 Notices and demonstrates the CMA's stricter approach to compliance in merger investigations, a growing trend amongst competition authorities generally. Requests for information and documents are a 'key tool' for the CMA to collect the information it requires in order to carry out its merger investigations and reach evidence-based decisions within its statutory timetable.

Sabre had failed to comply with the two S109 Notices by submitting a substantial number of responsive documents about two months after the statutory deadline. These documents had previously been withheld or redacted as a result of incorrectly being designated as being legally privileged. Parallel US merger proceedings had been taking place. Sabre had relied on the search methodologies for these US proceedings in responding to the Notices and had not put in place a quality control process to ensure compliance with the requirements of the s109 Notices.

It is always advisable to check carefully whether any information request received from the CMA is voluntary in nature or is a S109 Notice and is, thus, compulsory. If the request is voluntary, it should be borne in mind that the CMA can decide to issue a S109 Notice in the absence of a response. Irrespective of the nature of the request, any information provided must be accurate and must not be misleading.

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PRODUCT REGULATION

by Gavin Reese CONTACT

Government releases plans to regulate new technologies

The Government has released its White Paper on Regulation of the Fourth Industrial Revolution, setting out its plans to regulate technological innovations. The Paper outlines a host of initiatives designed to make the existing regulatory framework more effective and efficient for innovation.

New technologies including artificial intelligence and driverless cars continue to move rapidly, and the Government has struggled to legislate at the same pace. The Paper aims to ensure the regulatory framework is proportionate, targeted and transparent, providing businesses with sufficient certainty to innovate. It also seeks to provide consumers with adequate protections.

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Whirlpool recall following intervention by regulator

Following action by the Office for Product Safety and Standards (OPSS), Whirlpool had to recall and replace an estimated 500,000 washing machines.

A number of fires were reported across the UK and Ireland and attributed to a significant fault where the doors of certain machines would lock and catch fire after overheating during the locking process. While there have been no serious injuries there has been property damage on a number of instances. Under the terms of the recall, Whirlpool will arrange free collection of affected machines and a replacement at no cost.

Whirlpool have launched an online tool for customers to check whether their machine is affected, and in addition to providing this and a dedicated helpline they also encourage concerned customers to message through the company Twitter account.

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CAA introduce new drone regulations

The Civil Aviation Authority (CAA) have introduced drone registration and remote pilot competency requirements.

From 30 November 2019, drone operators with a drone weighing more than 250 grams are required to register online with the CAA — the registration applies to the drone operator, not the drone. Remote pilots will be required to complete an online safety test.

Previously, drones operating within the restrictions of the Air Navigation Order 2016 (ANO) for non-commercial or hobby purposes did not require any specific licence or authorisation. Drones for commercial operations did require the permission of the CAA, and the ANO defines which drones are captured under this category.

In July 2020, further EU Regulations will be introduced that apply to the operation of drones, including the requirement for operators to register in their member state.

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DATA PROTECTION AND PRIVACY

by Jon Bartley CONTACT

ICO seeks new powers under POCA

In recognition that personal data now has a significant monetary value and is increasingly being treated as a commodity which is stolen and traded for financial gain, the Information Commissioner's Office (ICO) is seeking new powers under the Proceeds of Crime Act 2002 (POCA).

While the introduction of the General Data Protection Regulation has enabled increased financial penalties for civil breaches of the Data Protection Act 2018, the only sanction available following a criminal conviction is a fine. This fine can often be much less than the financial gains made by the offender. So, in order to tackle the potential disparity between the risk and reward, the ICO wants to utilise POCA powers.

If granted, the powers under POCA will enable the ICO to undertake financial and confiscation investigations and apply to the court for restraint or confiscation of any asset when there is evidence to show that a defendant in criminal proceedings has benefitted from their conduct.

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New guidance on special category data

The ICO issued new guidance to organisations on how to comply with GDPR and the Data Protection Act 2018 (DPA) when processing "special category data".

Under the GDPR, special category data is personal data that concerns a person's:

- health
- sex life or sexual orientation
- racial or ethnic origin
- political opinions
- religious or philosophical beliefs
- membership of trade union
- genetic or biometric identification data

The guidance reminds organisations that, not only do they need a lawful basis under Article 6 of GDPR to process personal data, but where the data is special category data, they additionally need to satisfy one of ten conditions under Article 9 (eg explicit consent, necessary to carry out obligations under employment law).

The ICO advises that, in situations where information regarding an individual's health or ethnic origin (for example) can be inferred from the data, the rules applicable to special category data would only be triggered if there was a reasonable certainty of being able to make a correct inference and if the controller was deliberately drawing the inference (eg a list of names which might indicate ethnic origin would not be special category data just by reason of being on the list, if the controller has no intention to take any action by reference to the ethnicity).

The guidance explains the need to satisfy further conditions in Schedule 1 of the DPA in relation to certain Article 9 conditions and how, for some of the Schedule 1 conditions, the controller needs to establish why it is not possible to obtain explicit consent from the data subject.

For many of the "substantial public interest" conditions for processing special category data, a policy document is mandatory under the DPA, and the guidance helpfully provides a template policy document to assist organisations in complying with this requirement.

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ADVERTISING AND MARKETING

by Olly Bray CONTACT

ASA uses child avatars to tackle irresponsible ads targeted at children

The Advertising Standards Authority (ASA) is proactively using avatars (which mimic child-like behaviour) to identify when age-restricted ads (gambling, alcohol, food high in fat, salt and sugar (HFSS) etc) are being irresponsibly targeted at children. The introduction of this new technology has already had an impact on ad monitoring and enforcement.

Retailers of products which are subject to advertising age restrictions (gambling, alcohol, HFSS etc) must make sure that their business or any company which their business uses to place their ads takes sufficient measures to keep ads which promote these products from being directed at children. This is the case even if the ad is not offensive and is therefore unlikely to attract a complaint – the introduction of avatars means that no wrongly placed ad is safe from the watching eyes of the ASA's avatar operators!

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What you need to know about extended warranties

The Competition & Markets Authority (CMA) has published guidance on extended warranties, and what consumers need to consider before purchasing one. Extended warranties provide extra protection for a new product in addition to a standard warranty, and cover the cost of repair or replacement.

There is no obligation to purchase an extended warranty and products typically come with a manufacturer's warranty which may be sufficient for a consumer's needs. Regardless of whether a customer buys an extended warranty, they are still entitled to their statutory rights, which may include a repair, refund or replacement if the good is faulty.

Businesses selling extended warranties must ensure they do not give false information or present information in a misleading way.

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The AdTech and the data protection debate

Following a six-month period of looking into the AdTech industry, the Information Commissioner's Office (ICO) have published an article on the data protection issues surrounding the rapidly evolving use of real-time-bidding (RTB).

The ICO has significant concerns about the lawfulness of the processing of special category data used in RTB, and specifically the lack of explicit consent. It also expressed concerns about whether reliance on contractual clauses to justify onward data sharing is sufficient to comply with the law and suggested that, so far, it has not seen any case studies that appear to support this.

While pleased that its discussion with businesses "has evolved from 'it's too complicated' to practical consideration of potential solutions that combine innovation and privacy", the ICO has urged all organisations involved in RTB to review their processes, systems and documentation.

At the same time, the CMA has released an interim report on the digital advertising market and has hinted that the outcome of its final report will likely be recommendations to the Government to develop a new regulatory regime.

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INSURANCE & FINANCIAL SERVICES REGULATION

by Matthew Griffith and Jonathan Cary CONTACT

Treasury Committee reports on IT failures in the Financial Services sector

The House of Commons Treasury Committee has released its second report of 2019/20 outlining IT failures within the Financial Services sector. The inquiry aimed to understand why IT failures were continuing to happen, and how the industry and Regulators could have prevented such incidents.

Although the Committee acknowledges that some IT failure is inevitable, it believes that the current level and frequency of disruption is unacceptable. The Committee notes that Regulators must not allow firms to set their own tolerance levels for disruption too high, and that firms and individuals within firms must be held to account for their failures.

The Committee holds concerns that there may be evidence of an ineffective enforcement regime. So far, there have been no successful enforcement cases under the Senior Managers Regime following IT failures, and the Committee is urging the Regulators to consider whether there are any barriers to its effective operation.

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Prudential Regulation Authority sets out areas of focus for 2020

The Bank of England Prudential Regulation Authority has set out its priorities for the general insurance sector over the coming year. The primary areas of focus include:

- Reserve adequacy and associated reserving governance and controls
- Emergency risk trends and experience in firms' exposure management practices
- Understanding UK retail general insurers' responses to the FCA's pricing practices review and
- Ensuring firms develop a culture where staff feel able to speak up and raise concerns

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Government position on equivalence for financial services post-Brexit confirmed

The House of Commons European Scrutiny Committee (ESC) published a report in October on the UK's access to the EU financial services markets following Brexit. Post-Brexit the current automatic right of market access (known as "passporting") will automatically fall away. However, if the UK is able to achieve "equivalence" with the EU, UK regulated firms will be allowed to continue to operate much as before.

The Department for Leaving the European Union also published a letter from John Glen, Economic Secretary to the Treasury, responding to the ESC's request for clarification on the Government's plans for seeking equivalence.

Mr Glen's letter confirms that Government is seeking equivalence under EU law in the financial services sector post-Brexit as part of a deep and comprehensive future relationship with the EU.

The Government does not seek any changes to the financial services text in the revised Political Declaration, and both the UK and EU are committed to start assessing equivalence under existing frameworks, aiming to conclude these assessments by the end of June 2020.

However, the government is still yet to identify which pieces of EU legislation it will prioritise for equivalence processes. And, regardless, this will be of limited use for insurance brokers as there's currently no concept of equivalence in IDD which governs insurance distribution across the EU.

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"Dear CEO" letter sets out the FCA's expectations on nonfinancial misconduct

The Financial Conduct Authority (FCA) has sent a "Dear CEO" letter to wholesale general insurance firms setting out its expectations of firms and Senior Managers in tackling nonfinancial misconduct.

The FCA emphasises the potential detriment of non-financial misconduct (which includes victimisation and bullying, harassment and discrimination, etc.) to employees, markets and consumers. It references recently publicised incidents of nonfinancial misconduct and states that poor culture was a key cause in conduct failings within the industry.

The FCA sees SM&CR as a catalyst and opportunity to transform culture in financial services and expects senior managers to embed positive cultures through proactive identification and modification of the key drivers of their culture. The letter suggests that the FCA, working with the PRA, will work to improve standards of behaviour and therefore begin supervising and potentially acting against instances of non-financial misconduct.

All firms are expected to consider the letter, identify any gaps between its practices and the FCA's expectations, and to take appropriate steps to remedy such shortcomings.

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PROFESSIONAL PRACTICES REGULATION

by Graham Reid and Robert Morris CONTACT

Sir Donald Brydon's report into the audit market

Following on the heels of last year's damning review of the regulation of the audit market by John Kingman, Sir Donald Brydon's review of the audit market has called for sweeping changes.

If implemented, many of Sir Donald's suggested reforms will have a seismic effect on the audit profession. He calls for audit arms to be separated from the other divisions of accountancy firms, and to have a specific licence to operate. He suggests the definition of an audit should be widened from focusing on financial statements. Auditors would be expected to examine whether companies truly have sufficient distributable reserves to support their proposed dividends and acting as "bloodhounds" to sniff out fraud. He recommends that auditors be made to undergo mandatory training in forensic accounting and have to report on the actions they have taken to detect corporate fraud.

The Financial Reporting Council responded to the review, saying: "We have already implemented a number of the recommendations of the independent review of the FRC and anticipate being involved in delivering the broader reforms to the UK audit market that the government has initiated."

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20 per cent of law firms fail on money laundering compliance

A review conducted by the Solicitors Regulation Authority (SRA) has concluded that one fifth of law firms reviewed don't have the required firm risk assessment. In March 2019, the SRA wrote to 400 firms asking them to demonstrate compliance with the 2017 Money Laundering Regulations. Of the 400 responses received, 21 per cent (83) were not compliant.

The SRA has warned that strong action will be taken against those who continue to fall short. The regulator plans to increase checks on firms and will shortly be writing to the 7,000 firms that fall under the scope of the Regulations, asking them to confirm they have a risk assessment in place.

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New SRA Standards & Regulations

The Solicitors Regulation Authority introduced the new SRA Standards & Regulations (STaRs) with effect on 25 November 2019. This is the biggest change in the regulation of solicitors since 2011, when the SRA Handbook came into force.

Arguably, the most significant aspect of STaRs is its introduction of two new forms of practice for solicitors. First of all, solicitors will be able to provide their services to the public as 'freelancers', without the formalities of full regulation by the SRA as a sole practitioner. Although not quite identical there are strong similarities between this new concept of the freelancer solicitor and the self-employed Bar.

The second change is to unleash the in-house solicitor. Now, a solicitor employed in-house by an employer who is not regulated by the SRA will be able to sell his or her legal services to the public without the restrictions currently imposed on in-house solicitors, and provided s/he avoids providing "reserved legal activities". This allows the in-house solicitor to become a source of revenue for his or her employer.

These changes may well usher in a revolution in the way legal services are sold.

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Court of Appeal decision on FRC privilege challenge

The Court of Appeal has allowed a landmark appeal regarding the provision of privileged information to the Financial Reporting Council (FRC).

The court held that the recipient of a request made under the Statutory Auditors and Third Country Auditors Regulations 2016 (SATCAR) by the FRC is not legally required to produce privileged documents. The decision, which reverses a previous High Court decision, applies whether the person entitled to the privilege is the audited entity or the auditor under investigation.

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

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FRC announces plan to speed up pace of Enforcement investigations

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

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

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

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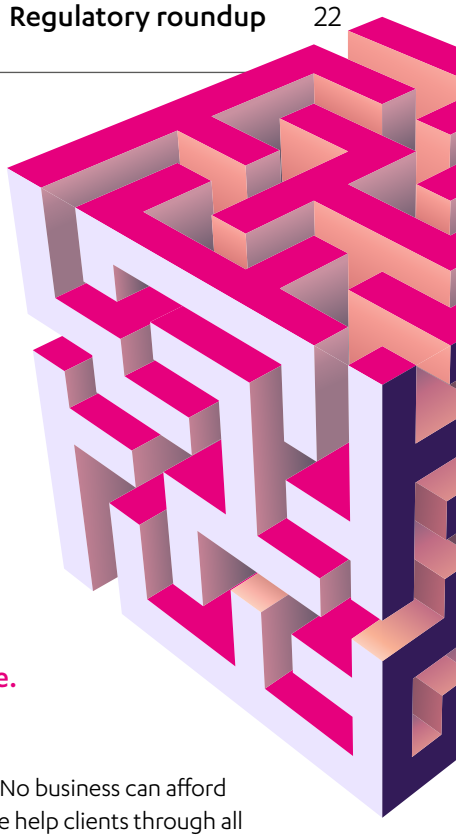

NAVIGATING THE MAZE

From the world's largest financial, corporate and professional services firms, to highly successful entrepreneurs and individuals, many turn to our specialist Regulatory team to navigate the maze. They do this because they know we don't sit on the fence, we work with our clients to ask the tough questions and challenge conventions; ensuring they continue to thrive in a rapidly evolving regulatory world.

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

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

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