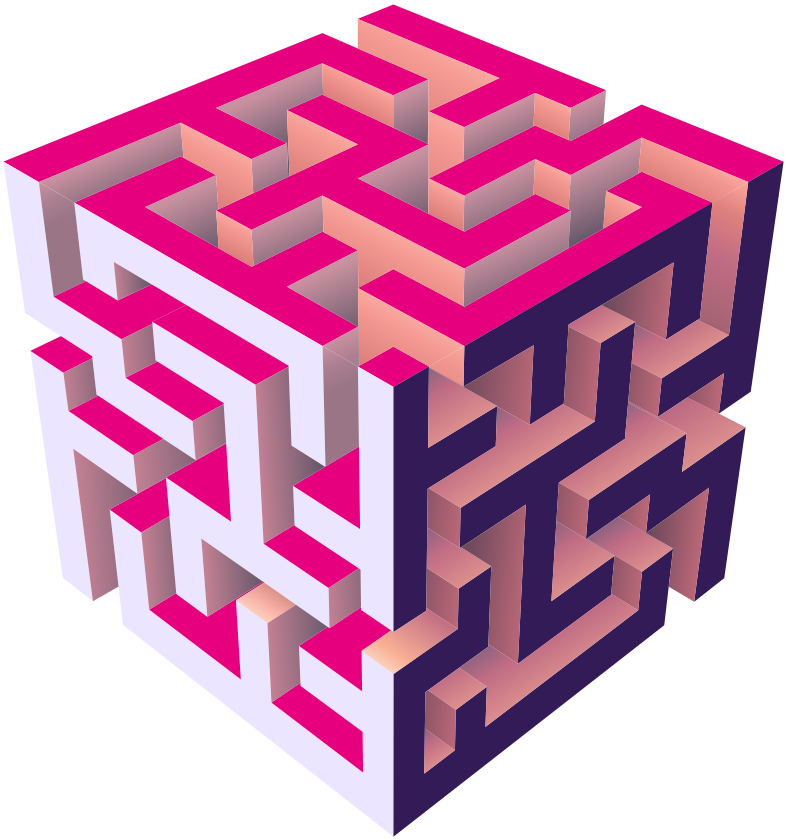
RPC

Regulatory update

February 2020



Welcome to the February edition of our monthly Regulatory Update, which aims to pull together key developments from the past month across the various UK regulators – and help you to navigate the regulatory maze.

The start of a new decade has already seen Regulators busy with the implementation of new (or revised) regulations and guidance on the future direction of travel. From the SFO's useful guidance on compliance programmes, to the new task force set up to tackle waste crime and the ICO's Code published to protect children's privacy online, 2020 looks set to be a busy year!

Click on the sections below to read more about each of them.

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
- Health, safety and environmental
- Product regulation
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- Insurance and financial services
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JANUARY HEADLINES

WHITE COLLAR CRIME

by Sam Tate and Davina Given CONTACT

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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UK's "freeze and seize" powers upheld in first contested account forfeiture application

The case of *National Crime Agency (NCA) v Vlad Luca Filat* represents the NCA's first contested account forfeiture application through an Account Freezing Order (AFO).

Given that AFOs were only introduced in January 2018, through POCA 2002, and the maximum period of freezing is two years before the law enforcement agency must decide whether to unfreeze or pursue forfeiture, this year will see more and more AFO decisions battle out in the courts.

In this case a sum of money held in Filat's name was claimed by the NCA to have been derived from bribery and corruption (Filat's father was the convicted former Prime Minister of Moldova).

In 2018, the NCA was granted account freezing orders over bank accounts under the Proceeds of Crime Act 2002 (POCA 2002) allowing the agency to investigate the origin of the funds. Later that year, the NCA applied for forfeiture of the money on the grounds that, on the balance of probabilities, it was recoverable property. In response to this ruling, Filat appealed to the Crown Court, who has now ruled against Filat and upheld the original forfeiture.

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TAX

by Adam Craggs CONTACT

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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Proposed changes to the tax rules for call-off stock arrangements

HMRC has published new guidance on the proposed changes to the VAT treatment of call-off stock provided for by Council Directive (EU) 2018/1910 (the Directive) and Council Implementing Regulation (EU) 2018/1912.

Call-off stock arrangements refer to goods that are transported by a supplier from one member state to a customer in another, in circumstances in which the supplier already knows the identity of the person to whom the goods will be supplied. Currently, the rules applied by member states differ across the EU. Although the UK allows the customer to account for the acquisition when the goods first arrive into the UK and before being called-off, some member states require the supplier to register for VAT and account for the acquisition and subsequent supply to the customer.

The changes to EU law are intended to simplify the position and avoid the need for the supplier to register for VAT in the destination member state. Instead, subject to certain conditions, the new rules will treat the intra-community supply of the goods as occurring when the goods are called-off and the final supply is made to the customer.

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HMRC seeks views on off-payroll working draft rules

With just a few short months to go before the reform of the off-payroll working rules comes into effect in April, HMRC has published draft secondary legislation for technical comment.

The IR35 changes will, where applicable, shift responsibility for operating the rules from the worker's company to the organisation they work, extending the rules that already apply to the public sector.

The rules are designed to make sure that workers, who would be employees if they were providing their services directly to the client, pay the same tax and National Insurance as those employed directly by the company.

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HEALTH, SAFETY AND ENVIRONMENTAL

by Gavin Reese CONTACT

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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FSA confirms approach to future trade negotiations post Brexit

The Food Standards Agency has considered how it will deal with the likely influx of requests for changes to current food and feed safety regulations, and product approvals, following UK's exit from the EU.

There are likely to be three main routes to trigger changes to authorisations, which are:

1. The terms of trade agreements agreed by UK Government could bring currently unapproved products or processes into scope
2. Individual businesses, in the UK or internationally, could make an application for product approval direct to the FSA, as could trade associations or foreign governments
3. The outcome of a dispute at World Trade Organization level over a particular product might trigger a change.

The FSA has stated that preparations are on track for its risk analysis process to accommodate all of these eventualities to enable it to continue to manage food and feed risks post-Brexit.

The FSA has also set out key objectives to ensure that public health protection and consumers' interests are put first during the UK Government's negotiations. These are to:

- ensure there is no reduction in public health protection for UK consumers, including maintaining and upholding the current regulatory regime;
- enable improvement of public health protection for UK consumers, where appropriate; and
- safeguard consumer confidence and interests by putting the consumer first.

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PRODUCT REGULATION

by Gavin Reese CONTACT

"Track and Trace" for cigarettes and hand-rolling tobacco products

The introduction of the Tobacco Products (Traceability and Security Features) Regulations 2019 means that from 20 May 2020 retailers selling cigarettes and hand-rolling tobacco will only be permitted to sell these products if they are "Track and Trace" compliant as per the changes in the regulations.

In order to satisfy the above, all packets of cigarettes and hand rolling tobacco manufactured or imported in the UK (except for stock manufactured or imported before 20 May 2019) must:

- have unique identifiers (UIDs) on the packaging
- have five specific security features applied to the packaging, and
- be scanned at certain points in the supply chain.

Failure to comply with the regulations on three occasions within a 12 month period could result in the deactivation of the Economic Operator Identifier Code, preventing the affected retailer from purchasing and making further tobacco sales. Importantly, any products that are found to not have UIDs will be liable to forfeiture and seizure by HMRC, which would prove costly for both large and smaller retailers alike.

Retailers can continue to sell tobacco products without security features or UIDs up until 20 May 2020 only if they were manufactured in, or imported into, the UK before 20 May 2019.

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DATA PROTECTION AND PRIVACY

by Jon Bartley CONTACT

ICO guidance on protecting children's privacy online

As Elizabeth Denham says, we are now in "an age when children learn how to use an iPad before they ride a bike". It seems timely that the Information Commissioner's Office (ICO) has published the final version of its Age Appropriate Design Code.

The code, made up of 15 standards, sets out the ICO's expectations for those responsible for designing, developing or providing online services likely to be accessed by children and process their personal data (such as apps, connected toys, social media platforms, online games, educational websites and streaming services).

The code will require such service providers to ensure there is automatically an in-built baseline of data protection for children whenever they download a new app or game, or visit a website. Services providers will need to ensure privacy settings are set to high and location settings are switched off by default. Data collection and sharing should also be minimised and profiling that can allow children to be served up targeted content should be switched off by default too.

The Secretary of State will now need to lay the code before Parliament for its approval as soon as is reasonably practicable. Once the code has been laid it will remain before Parliament for 40 sitting days. If there are no objections, it will come into force 21 days after that. The code then provides a transition period of 12 months, to give affected businesses time to conform.

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COMPETITION

by Lambros Kilaniotis CONTACT

Manufacturer/retailer relationships: online sales bans and online pricing restrictions in the spotlight

This month has seen certain retail practices in the spotlight again and has provided a further reminder for both manufacturers and retailers that participation in either an absolute online sales ban or in minimum or fixed retail pricing arrangements (RPM) are illegal under the UK and EU competition rules.

Absolute Online Sales Bans:
The Court of Appeal (the CoA) has now issued its judgment, dismissing Ping's further appeal against the CMA's 2017 competition law infringement decision and the imposition of a £1.25 million fine and confirming that Ping's absolute online sales ban does infringe competition law. Although Ping's original appeal to the Competition Appeal Tribunal had resulted in a £200,000 fine reduction, the CMA's substantive infringement finding had been upheld.

Ping, the manufacturer and distributor of golf clubs and other golfing equipment and clothing, operates a selective distribution network throughout the UK. Under Ping's Internet Sales Policy (the "ISP"), its authorised retailers have been prohibited from selling its golf clubs online. Ping has argued that its ISP had an objectively legitimate and pro-competitive aim of promoting the custom-fitting of its golf clubs, which ensured that customers bought the most suitable golf clubs to optimise their game and, thus, improved the quality of the product purchased and protected the Ping brand.

However, the CoA has upheld the CMA's finding that Ping's ISP amounted to a restriction of competition "by object" under Chapter I of the Competition Act 1998 and Article 101 of the TFEU (which negates the need for an analysis of the actual effect on competition before determining that there is an infringement) and that, having taken into account the economic and legal context in which Ping's ISP operated, including its selective distribution system, there was no objective justification for the absolute online sales ban which would negate this 'by object' conclusion. Although Ping had been pursuing its legitimate commercial aim of promoting custom-fitting, this could have been achieved through less restrictive means than implementing an absolute online sales ban.

Resale Price Maintenance or RPM:
On 22 January 2020, the CMA announced that it had fined Fender, the guitar manufacturer, £4.5 million for illegal RPM practices.

From 2013 to 2018, Fender had required retailers to sell its guitars online at, or above, a minimum price. The CMA found evidence that, on being tipped off about non-compliance with this pricing policy, Fender would sometimes pressurise retailers to increase their online prices.

Both the CMA and the European Commission have been active in investigating RPM cases in recent years. This is the fifth RPM infringement decision taken by the CMA and the largest fine to be imposed to date (despite Fender having benefited from a 60% fine reduction as a result of its leniency application and a further 20% reduction under the CMA's settlement procedure). The CMA has previously published on its website guidance, case studies and an open letter to suppliers and retailers about RPM practices and competition law compliance.

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First Public Interest Intervention Notice of 2020

The Secretary of State (the SoS) for Digital, Culture, Media and Sport has issued a Public Interest Intervention Notice (PIIN) on plurality of the media grounds in relation to the acquisition by Daily Mail and General Trust of JPI Media Publications Limited, the owner of the "i" newspaper. This followed an initial consultation process and representations submitted by the parties on protections for editorial independence going forward.

The CMA is now tasked with reporting back to the SoS on both jurisdictional and competition matters, whilst Ofcom is to report on media public interest considerations, i.e. the need for, to the extent reasonable and practicable, a sufficient plurality of views in newspaper in each market for newspapers in the UK.

These reports are due by 13 March, after which time the SoS will reach her decision as to whether to refer the merger for a more in-depth Phase II investigation, accept undertakings in lieu of a Phase II reference or clear the merger. In the meantime, the SoS has adopted the CMA's previous Initial Enforcement Order (which would have automatically expired within days of the PIIN) to ensure that the parties do not take any action which could adversely prejudice any steps which she might ultimately decide to take.

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CMA's enforcement action during a market study investigation

In connection with the CMA's ongoing market study into online platforms and digital advertising, it has issued a penalty notice, fining AppNexus £20,000 for failing, without reasonable excuse, to comply with the CMA's Information Notice (the maximum administrative fine is £30,000).

The CMA considered this failure to have been serious. It had had an adverse impact on its ability to conduct its market study, in relation to which it is bound by a statutory timetable, and on its ability to consult on its proposed market investigation reference decision. As the CMA pointed out:

"The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based decisions and, more generally, for the quality and effectiveness of its work."

The CMA had provided the company with a draft Information Notice and, thus, AppNexus had had the opportunity to discuss the requirements with the CMA and to make representations, including with regard to timing. The formal Information Notice duly issued on 22 August 2019 required the production of documents and information by 6 September 2019, which was then extended by the CMA by 5 days. A partial response was not received until over three weeks after the extended deadline and a more substantial response followed a further seven weeks later. It was only after AppNexus's parent company, AT&T, became involved (and within only four working days) that a full response was forthcoming on 26 November 2019. The CMA noted "the marked change in compliance" as a result of AT&T's involvement.

Any Information Notice issued by the CMA or another competition regulator should be carefully reviewed on receipt. It is important to establish at the outset whether the information request has been issued on the basis of formal powers, as in this case, mandating a full response by a specific date. In such situations, any potential compliance concerns should be discussed at the earliest opportunity with the relevant regulator and deadlines should not be ignored. Any response provided, whether on a mandatory or a voluntary basis, should always be accurate and not misleading.

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INSURANCE AND FINANCIAL SERVICES

by Matthew Griffith CONTACT

"Dear CEO" letter sets out the FCA's expectations on non-financial 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 non-financial 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 non-financial 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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Launch of second market for pensions and investment advice review

The FCA's business plan last April outlined its intention to review the market for pensions and investment advice for a second time (the so-called "Assessing Suitability Review 2"). The FCA has now published a statement that it will start to conduct this review and intends to release the report during late 2020. The review will focus on the advice that consumers receive around retirement income.

This review is just one element of a wider FCA strategy for the financial advice sector. Other elements include the ongoing work on defined benefit pension transfer advice, FCA activities targeting pension and investment scams, and the focus on firms holding adequate financial resources and professional indemnity insurance.

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Next steps for LIBOR transition in 2020: the time to act is now

The Bank of England (BoE), FCA and the Working Group on Sterling Risk-Free Reference Rates (RFRWG) have published a set of documents to outline the priorities and milestones during 2020 for the LIBOR transition.

With 2020 such a critical year for LIBOR transition, the BoE has raised concerns that some firms need to accelerate efforts to ensure they are prepared for LIBOR cessation by end-2021. The RFRWG has therefore published an updated roadmap for the year ahead to highlight important events. It also clearly sets out actions market participants should take to reduce LIBOR exposure including:

- ceasing issuance of cash products linked to sterling LIBOR by end-Q3 2020
- taking steps that demonstrate that compounded SONIA is easily accessible and usable
- take steps to enable a further shift of volumes from LIBOR to SONIA in derivative markets
- establishing a framework for the transition of legacy LIBOR products, and
- considering how best to address issues "tough legacy" contracts.

Furthermore, the BoE and FCA have also sent a joint letter to major banks and insurers setting out expected progress during 2020 and highlights the close monitoring of the steps being taken.

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PROFESSIONAL PRACTICES

by Rob Morris and Graham Reid CONTACT

Revised SRA reporting obligations

The recent introduction of the SRA's new Standards and Regulations has resulted in updated reporting obligations, intended to bring clarity and consistency to decision-making, but which place stringent requirements on solicitors to report potential beaches of the Code in a wider range of circumstances and at an earlier stage than they might previously have done. The new reporting obligations are set out at paragraph 7.7 and 7.8 of the new Code of Conduct.

The change in emphasis to reporting at an earlier stage necessarily brings with it a risk of over-reporting, and consequent concerns about COLPs and the SRA being overrun with minor early reports as individuals and firms seek to stay within the Code for fear of "getting it wrong". This carries with it an inevitable increased level of stress for the subject of the report, who might find themselves summarily subject to an SRA investigation which subsequently proves to be unnecessary.

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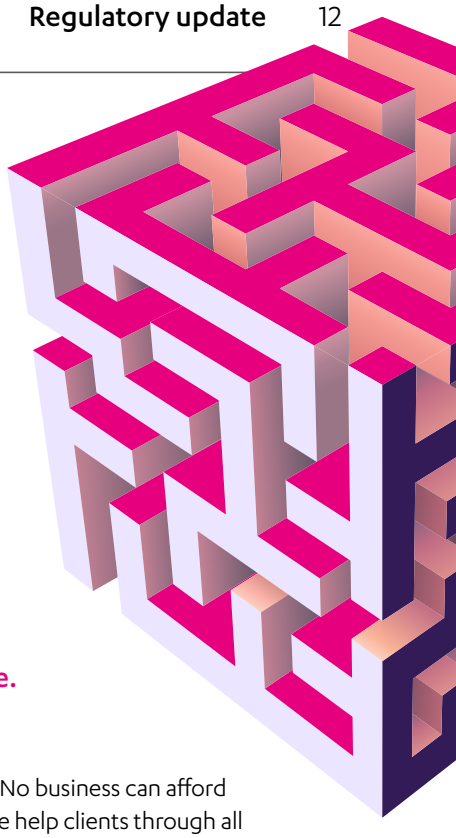

NAVIGATING THE MAZE

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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