HERBERT SMITH FREEHILLS

ENGLAND AND WALES

PREVIEW OF 2018

LEGAL GUIDE

January 2018

CONTENTS

INTRODUCTION

2018 will see major changes to the UK legal landscape, with Brexit negotiations continuing to dominate the headlines. The legal implications of Brexit will of course be hugely significant; preparing for their impact will be a substantial challenge across every industry sector. Our Preview of 2018 outlines these implications, as well as identifying other trends and issues we expect to be on the legal agenda this year.

Another issue which we anticipate will cause a lot of activity this year is the EU General Data Protection Regulation (**GDPR**). In 2018, we will finally see the arrival of this new piece of data protection legislation, reforming current data protection law and coming into force across Europe on 25 May 2018. Whilst most organisations are already well down the track in terms of their readiness for GDPR compliance, we will nonetheless all be watching with baited breath to see how the regulators approach enforcement and whether we will see any of the much hyped large fines imposed for data protection breaches. In the meantime, we think it is fair to say that the GDPR has been reasonably successful in achieving its aim of putting privacy at the heart of everything. We have seen a real cultural shift within organisations so that data privacy has now been raised to a Board level item and is being seen as a whole of business issue.

We hope that you find this Preview of assistance as you prepare to support your businesses in the year ahead. We will of course keep you updated on these and other developments as they happen. In the meantime, do please get in touch with your regular Herbert Smith Freehills contact or the contacts listed in this publication if you would like further information about any of the anticipated legal developments.

Herbert Smith Freehills LLP
January 2018

BREXIT

BREXIT NEGOTIATIONS MOVE TO THE SECOND PHASE

Unless unanimously agreed otherwise, the date set for UK withdrawal from the EU is, at the latest, the end of March 2019. At that time, the UK will automatically leave the EU, even if the terms of leaving or of the future relationship between the UK and the EU have not been agreed.

The first phase of the negotiations focused on purely withdrawal issues: matters necessary to ensure an orderly withdrawal of the UK from the EU, focusing on citizens' rights, financial settlement and the Irish border. The Irish border was the most contested issue discussed in the first phase of negotiations, with both parties agreeing to "full alignment" of Northern Ireland with EU internal market and customs union and also guaranteeing "no new regulatory barriers… between Northern Ireland and the rest of the United Kingdom". Even though these are only fall-backs that apply in the absence of agreed solutions, they will inevitably influence the negotiation to come. However, it is not clear that both sides share the same understanding of what these terms mean.

In December 2017, the European Council confirmed that progress achieved during that first phase was sufficient to allow the negotiations to proceed to the next phase, under which transitional arrangements and the framework for a future relationship between the EU and the UK will be agreed. The European Council has postponed the adoption of guidelines relating to the future relationship until its March meeting and has called on the UK to clarify its position. This phase of the negotiations is due to conclude in October 2018 to give time for the necessary ratifications from the UK and EU Parliaments.

Negotiations relating to the transitional arrangements will consider the issue of duration and whether any departures from the status quo can be agreed. The EU's chief negotiator, Michel Barnier, has proposed that the transition period should be 21 months rather than the 24 months suggested by the UK in order to align with the EU's seven-year budget cycle ending on 31 December 2020. Broadly the EU's proposal is that during the transition the UK would continue to participate in the Customs Union and the Single Market (with all four freedoms) with all the same rights and obligations as if a full member except that the UK would no longer participate in any decision making processes (including the European Parliament).

The negotiations will also raise other issues such as whether the preservation of the status quo can cover international agreements of the EU and governance.

Negotiations relating to the future relationship between the UK and the EU will have to be based on a common understanding amongst the EU-27 as to the scope of the future relationship (goods, services, investment, public procurement but also non-trade issues such as police, security and foreign policy cooperation), as well as the type and depth of the relationship (association or trade and cooperation including regulatory cooperation). It will also have to be considered what type of provisions on ensuring a level playing field (eg in competition, state aids, tax, environmental and health measures) will be required and what institutional and enforcement structure to put in place.

Agreeing a common position on these second phase issues and maintaining a common position amongst the EU-27 during the negotiations is likely to be more difficult than for the issues involved in the first phase of the negotiations. It seems that the need to preserve the "integrity of the Single Market" will be a major guiding principle for the EU in the forthcoming negotiations, which conflicts with the UK position.

In parallel with the negotiations, the European Union (Withdrawal) Bill has been passing through Parliament and is expected to achieve Royal Assent in early 2018 - although this is far from certain. Known as the Withdrawal Bill, this is the key piece of domestic UK legislation which will implement Brexit. The Bill will repeal the European Communities Act 1972, which gives effect and priority to EU law in the UK, thereby formally reasserting the sovereignty and independence of domestic law. However, most of the substance of the Bill is designed to maximise continuity in UK law by preserving and converting into domestic law the whole body of EU law applying to the UK at the time it leaves the EU. To achieve this, the Bill proposes to create extensive powers for the Government to make secondary legislation which amends Acts of Parliament as well as existing secondary legislation. This legislative amendment exercise is due to start during 2018 in preparation for Brexit. Crucially, the UK cannot unilaterally preserve the EU/remaining EU Member State side of these legal frameworks without the consent of the Member States/EU – so these issues depend on any future trade deal.

The Withdrawal Bill does not attempt to deal with areas of the law where major reform will be needed to enable the UK to operate independently from the EU. The Government will also need to adopt a number of new bills in areas where entirely new domestic regulatory regimes will need to be created. We can expect to see this legislation being adopted alongside the Withdrawal Bill during 2018.

The UK Government has also announced that another Bill will be released which will, once passed, enshrine the Withdrawal Agreement between the UK and the EU into UK law (for example in relation to financial settlements, citizens' rights and any transitional period).

Until the UK actually leaves the EU, it remains a Member State and the EU law-making process will continue as normal: current EU law will continue to apply in the UK, and EU laws which are due to be passed or transposed into national law during that period will continue to become part of UK law. The application of future EU laws in the UK is subject to the timing and terms of Brexit and to the prevailing political appetite in the UK.

BREXIT

2018 WILL INCREASINGLY SEE A SHIFT FROM ANALYSIS TO IMPLEMENTATION

Many businesses will face urgent implementation decisions in 2018 as a function of the lead times necessary to build "cliff edge" risk resilience.

Businesses that have not completed their "Brexit audits" to assess their key risks will now wish to complete regulatory, supply chain and contract reviews. Focus should be on market access rights under threat on day one and on risks of extra cost or delay. While there will be some general and sector wide issues to address, it is the idiosyncrasies of individual firm's activities and platforms which is key to both assessing and addressing Brexit issues.

Those that have already identified "cliff edge" risks to current operations will begin to action their plans, phased in line with assessments of proportionality, prioritisation, interdependencies and lead times.

Action to mitigate risks or seize opportunities may include strategic M&A, devising alternative legal structures, uprating customs capabilities, changing geographical footprint, revising compliance frameworks, engaging with regulators, restructuring supply chains and any dispute resolution strategies required for evolving business models. Many Brexit plans will involve high-volume, document and information intensive work (eg document review and repapering exercises).

For further information, please visit our Brexit hub, subscribe to our Brexit blog or contact Gavin Williams or Paul Butcher.

COMPETITION, REGULATION AND TRADE

UK GOVERNMENT PROPOSALS FOR ENHANCED NATIONAL SECURITY REVIEW OVER FOREIGN INVESTMENT IN CRITICAL INFRASTRUCTURE

On 17 October 2017 the Department for Business, Energy & Industrial Strategy (**BEIS**) published its long awaited Green Paper National Security and Infrastructure Investment Review (first foreshadowed at the time of approval of the Hinkley Point C new nuclear project). BEIS proposes to extend the UK Government's powers to review transactions on national security grounds in two tranches.

The short term proposals (on which the consultation closed on 14 November 2017) involve the extension of the Government's existing powers under the Enterprise Act 2002 to intervene in the merger control process on public interest grounds in the military/dual use sector and parts of the advanced technology sector. BEIS proposes to reduce the jurisdictional thresholds triggering the application of the regime in these sectors to ensure that smaller transactions are covered. Under the longer term proposals, BEIS proposes a more significant overhaul: the extension of the current Enterprise Act 2002 public interest intervention regime to a wider category of transactions (for national security purposes), regardless of sector; and/or the introduction of a new mandatory notification regime for national security review of transactions involving specified "essential functions" in key sectors (including civil nuclear, energy and telecommunications). The consultation on the longer terms proposals closed on 9 January 2018. The Government's response is awaited.

For further information, please see our e-bulletin here.

EU PROPOSALS FOR SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE EU

On 13 September 2017 the European Commission unveiled a set of proposals for the screening of foreign direct investment (**FDI**) into the EU on the grounds of security/public order. The core proposals are set out in a draft Regulation, which does not require Member States to adopt or maintain FDI screening mechanisms, but instead provides a framework for those that do to ensure that such mechanisms meet a number of basic requirements (for example as to timetable and judicial review).

The draft Regulation does not propose to give the Commission the power to review and prohibit transactions, but does aim to establish a cooperation and information exchange mechanism between Member States and the Commission in relation to FDI, including a power for the Commission to issue an opinion in relation to the security/public order implications of FDI relating to projects of EU interest. The draft Regulation is now subject to the EU legislative process, and it remains to be seen whether it will be adopted – and if so in what form and when – in light of opposition from a number of Member States.

For further information, please see our e-bulletin here.

EUROPEAN COMMISSION ACTION AGAINST PROCEDURAL BREACHES OF THE EUMR

In May 2017 the European Commission imposed a €110 million fine on Facebook for the provision of misleading information during the Commission's review of its acquisition of WhatsApp under the EU Merger Regulation (**EUMR**), and issued a Statement of Objections to Altice in relation to suspected "gun-jumping" prior to receiving EUMR clearance for its acquisition of Portugal Telecom, including by intervening in commercial decisions and exchanging sensitive information.

In 2018 the Commission is likely to continue its crack-down on breaches of the EUMR's procedural rules, with decisions expected in the Altice investigation and its further probes of Merck/Sigma-Aldrich and General Electric into the provision of misleading or incorrect information during EUMR reviews, and of Canon in relation to its implementation of a "warehousing" transaction structure allowing it to acquire Toshiba Medical Systems prior to obtaining EUMR clearance.

For further information, please see our e-bulletin here.

POTENTIAL REFORM OF EUMR PROCESS AND THRESHOLDS

In January 2017 the European Commission's consultation on reforming certain jurisdictional and procedural aspects of the EU merger control regime closed. The consultation included consideration of potential further measures to streamline the regime following the previous "simplification" package, and possible changes to the system for referring transactions between EU Member States and the Commission. Most significantly, the Commission was considering a possible expansion of the scope of the EUMR to cover transactions where the target does not currently generate sufficient turnover to meet the EUMR thresholds, but is highly valued and may become an important competitive force in the future (for example in the digital and pharmaceutical sectors).

If the EUMR is amended in this way this could represent a significant – and uncertain – extension of its scope. The Commission has now published the third party consultation responses (which were largely negative in relation to this proposal). However, it is not clear whether the Commission intends to propose any legislative changes or to either abandon or put this initiative on hold (for example to assess the operation of the introduction of transaction value jurisdictional thresholds under national merger control regimes of Austria and Germany in 2017). It is to be hoped that further clarity will be provided in the course of 2018.

COMPETITION, REGULATION AND TRADE

UK COMPETITION LAW CLASS ACTIONS

In 2017 the Competition Appeal Tribunal (**CAT**) issued its first decisions on whether to certify the first two applications to bring opt-out class actions under the new UK competition law collective redress regime. The first application (in relation to mobility scooters) was adjourned to allow the proposed class representative to reformulate the case, but subsequently withdrawn. The second application (in relation to MasterCard's interchange fees) was rejected. Despite these rejections, the CAT's judgments provided important confirmations on the criteria applied by the CAT when deciding whether to certify actions, and therefore useful guidance to potential applicants on how to formulate such actions.

The applicant in MasterCard has now sought leave to appeal/ judicially review the CAT's refusal to certify its claim. The outcome of this challenge – together with that of further certification applications in other cases rumoured to be planned for 2018 – will have a further impact on the appetite of class representatives (and litigation funders) to bring claims under the new regime.

For further information, please see our e-bulletin here.

For further information please contact Veronica Roberts or Stephen Wisking.

CONSTRUCTION

GOVERNMENT CONSULTATIONS ON CONSTRUCTION TOPICS

On 24 October 2017 the Department for Business, Energy & Industrial Strategy (**BEIS**) published two consultation papers with responses due by 19 January 2018. The papers addressed retention payments in the construction industry and the 2011 changes to part 2 of the Housing Grants, Construction and Regeneration Act 1996.

At the same time BEIS published a research paper on retentions in the construction industry which comprised a survey of current practice in the industry.

The consultations seek responses to questions on current practice and options for reform in each area.

For further information please contact Mark Lloyd-Williams or Nicholas Downing.

CORPORATE

LISTING RULE CHANGES

Changes to the Listing Rules came into force at the start of January. The rule changes were set out in Financial Conduct Authority (**FCA**) Policy Statement 17/22, published in October 2017. The key changes relate to:

1. the eligibility criteria for premium listed companies in LR 6, including introducing a new concessionary route to premium listing for certain property companies;
2. relaxing the profits test in the class test rules under LR 10 so that (a) where the result of the profits test is 25% or more but all other class test results are under 5%, a premium listed company may disregard the profits test without having to consult the FCA, and/or (b) where the profits test result is 25% or more and is anomalous, a premium listed company may make adjustments to the profit figures for certain genuine one-off cost items without having to consult the FCA; and
3. reverse takeovers under LR 5 to remove the "rebuttable presumption of suspension" which has applied when a reverse takeover is announced or is leaked on the assumption that there would be insufficient information about the proposed transaction for the market to properly assess it.

PROHIBITION ON RESTRICTIVE CONTRACTUAL CLAUSES IN INVESTMENT BANK ENGAGEMENT LETTERS

A new FCA prohibition, which took effect from 3 January 2018, bans investment banks from including clauses in their client engagement letters which give them a right to provide future primary market (debt capital markets, equity capital markets and M&A) services to their client. The FCA's intention is for the ban to leave the client free to decide which firms to do business with, avoiding situations where a client could not approach other firms or would be forced to accept a firm if that firm were to match a third party's terms. "Right of first refusal" clauses are therefore banned. The ban does not apply to future service restrictions in bridging loans – a type of loan that is provided in the expectation that the client will replace it with longer-term financing.

Provisions in an agreement that only give a firm the right or opportunity to: (i) pitch for future business; (ii) be considered in good faith alongside other providers for future business; or (iii) match quotations from other providers, but which do not prevent the client from selecting the other providers, are not prohibited as in these cases the client is not obliged to use the firm.

The prohibition has been implemented via amendments to the Conduct of Business Sourcebook (COBS) Rules 11A.2.

TAKEOVER CODE CHANGES

The UK Takeover Code has been amended with effect from 8 January 2018. The changes were set out in the Takeover Panel Response Statements published in December 2017. The key points to note are that:

- bidders have to address specific additional matters in their intention statements;
- intention statements have to be included in the Rule 2.7 announcement, as well as the offer document;
- a bidder is not be able to publish its offer document within 14 days of its Rule 2.7 announcement unless the target consents;
- Rule 2.8 (no intention to bid) statements must set out the situations in which the statement may be set aside by the bidder; and
- certain rules of the Code, including Rule 2.8 (no intention to bid) and Rule 31.5 (no extension statements), have been amended to prevent bidders circumventing the Code by purchasing "significant" target assets rather than making an offer.

There are also certain transitional provisions for bids which are ongoing at the implementation date. For more information, please see our detailed briefing here.

CHANGES TO THE IPO TIMETABLE PROCESS

From July 2018, new FCA rules will reform the timing of the publication of a prospectus in a typical UK IPO process and the interactions between the issuer and analysts. The changes were set out in FCA Policy Statement 17/23, published in October 2017.

New COBS Rule 11A will offer two alternative timelines, relating to the timing of analysts' involvement in providing unconnected research during the IPO process for an IPO on a regulated market:

- in circumstances where unconnected financial analysts are given access to an issuer's management alongside, and on equal terms to, connected analysts, connected research may be released one day after the registration document or approved prospectus has been published; and
- in circumstances where unconnected financial analysts are not given the same access to the issuer as connected financial analysts, there should be at least seven days' separation between publication of the registration document or approved prospectus and the publication of any connected research.

New guidance to COBS Rule 12 will seek to address concerns that the conduct between: (i) analysts producing connected research; and (ii) an issuer's management and corporate finance advisers, prior to the final agreement of the underwriter or placing mandate and syndicate positions, might affect the accuracy of the connected research that is being published.

IMPLEMENTATION OF THE NEW EU PROSPECTUS REGULATION

The EU Prospectus Regulation (2017/1129) was published in the Official Journal on 30 June 2017 and came into effect on 20 July 2017. The Regulation seeks to simplify the current prospectus regime; in particular, there are broader exceptions from the requirement to issue a prospectus and a reduction in generic and boilerplate disclosure. It will also introduce new requirements on the form and content of risk factors and summaries in prospectuses.

Most of the provisions will be directly effective in Member States two years following publication (although UK implementation is dependent on the terms of Brexit). However, two of the provisions amending the exemptions from the obligation to produce a prospectus applied from July 2017 and a further two provisions will come into force in July 2018. The changes coming into force in July 2018 exempt offers below €1 million from the scope of the new regime and give Member States the discretion to exempt offers where the total offer consideration in the EU, calculated over a 12 month period, is less than €8 million.

Feedback on the European Securities and Markets Authority (**ESMA**)'s three consultation papers relating to technical advice and implementing measures required under the Prospectus Regulation for: (i) the format and content of prospectuses; (ii) the scrutiny and approval of prospectuses; and (iii) the format and content of the "EU growth prospectus" is expected in Q1 2018. The consultation on ESMA's draft Regulatory Technical Standards, as mandated by the new Prospectus Regulation, concerning key financial information in the prospectus summary, advertisement, supplements and publication of the prospectus closes in March 2018.

UK CORPORATE GOVERNANCE REFORM

Following its Corporate Governance Green Paper published in November 2016, the Government issued a Response Paper in August 2017 which set out its key actions for reform. The actions cover the key topics of executive pay, stakeholder engagement and governance in private companies. They are to be implemented by a mixture of secondary legislation, industry initiatives and reforms to the UK Governance Code. The Government said that it expects all of the reforms to be in place by June 2018. The draft secondary legislation which will introduce new disclosure requirements for listed companies in relation to remuneration and stakeholders has not yet been published. For more information, please see our detailed briefing on the Response Paper here.

As part of the package of reforms, the Financial Reporting Council (**FRC**) published its consultation on a new UK Corporate Governance Code in December 2017. The Governance Code will be completely reworked and contains a range of new requirements for both corporate behaviour and reporting.

The consultation follows the FRC's announcement in February 2017 that it would undertake a "fundamental review" of the Governance Code, taking into account work done by the FRC on corporate culture and succession planning and the Government Green Paper. The consultation ends on 28 February 2018, and the FRC is aiming to publish the final version of the new Governance Code by early summer 2018. It is proposed that the new Governance Code will apply to all premium listed companies for financial years beginning on or after 1 January 2019. For further information, please see our detailed briefing on the FRC's proposed new Governance Code here.

GOVERNMENT INTERVENTION IN M&A

The Government published a Green Paper in October 2017 seeking views on proposals to extend the Government's powers to intervene in M&A and other transactions. The two sets of proposals being consulted on are:

- short term changes that would give the Government the power to intervene in smaller transactions than currently permitted when these involve companies that design or manufacture military and dual use products and/or parts of the advanced technology sector; and
- long term reforms to allow better scrutiny of transactions that may raise national security concerns. Options on which views are being sought include introducing a mandatory notification regime and extending the current regime's national security interventions to a wider category of transactions. The sectors which would fall within this regime include civil nuclear, telecommunications, defence, energy and transport.

The consultation on the short term reforms closed on 14 November 2017 and the consultation on the longer term reforms closed on 9 January 2018. Legislation to implement the reforms is expected to be published during 2018. See the Competition, Regulation and Trade section above.

For further information please contact Carol Shutkever or Gareth Sykes.

DISPUTE RESOLUTION

WORKING GROUP PROPOSES PILOT OF NEW RULES FOR DISCLOSURE

In November 2017 a disclosure working group, chaired by Lady Justice Gloster, published its proposals for reforms to the rules governing disclosure of documents in English litigation. The proposals are subject to consultation until 28 February 2018, following which they are to be considered by the Civil Procedure Rule Committee and are then likely to be piloted in the Business and Property Courts.

The working group's report identifies a number of key defects in the current disclosure regime, including that the range of alternative disclosure orders in the "menu" introduced by the Jackson reforms are not being adequately utilised, and standard disclosure has remained the default for most cases. Under the new proposals, in broad summary, the current disclosure menu would be replaced by a new list of "models". Although the list of models is not dramatically different from the current menu, the proposed rules contain clear signs steering the parties, and the court, toward a more restrained approach to disclosure – including that none of the models is referred to as "standard". The court would only make an order that one of the disclosure models should apply where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure (which are to be agreed between the parties before the first case management conference).

The proposed rules contain an express duty to disclose documents a party is aware of which are adverse to its case (unless they are privileged), regardless of any order for disclosure. There is also an express duty to refrain from providing irrelevant documents. The draft rules also provide that where a party wishes to claim a right or duty to withhold a document, or part of a document, or a class of documents (eg on grounds of privilege), it must describe the document (or part or class) and explain "with reasonable precision" the grounds upon which the right or duty is being exercised. What this requires in practice is not clear.

APPEAL REGARDING PRIVILEGE ISSUES

The Court of Appeal is due to hear an appeal in July 2018 against the High Court decision in *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB), which applied a strict approach to both legal advice privilege and litigation privilege.

In relation to legal advice privilege, the Court endorsed the controversial decision in the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), in which the judge concluded that he was bound by the 2003 Court of Appeal decision in *Three Rivers No 5* to limit the "client" to those who are authorised to seek and receive legal advice on behalf of a client corporation, and that (importantly) authority to provide information to the lawyers is not sufficient for these purposes.

In relation to litigation privilege, the decision suggests that it will be more difficult to establish that litigation is in reasonable contemplation in the context of criminal proceedings than civil proceedings. The Court found that the test of whether litigation is in reasonable contemplation is not met just because a criminal investigation is contemplated; only a prosecution, not an investigation, amounts to "litigation" for these purposes, and prosecution only becomes a real prospect once it is discovered there is some truth in the allegations, or at least some material to support them. The situation is different for civil proceedings, as in that context there may be reasonable grounds to contemplate litigation even where there is no proper foundation for a claim. The decision also contains unhelpful comments regarding the second limb of the test for litigation privilege, ie whether a document has been prepared for the dominant purpose of litigation, which would appear to apply equally to civil proceedings. In particular, the Court rejected the submission that litigation privilege extends to documents created to obtain legal advice as to how best to avoid contemplated litigation, even if that entailed seeking to settle the dispute before proceedings were issued.

FIXED RECOVERABLE COSTS

Lord Justice Jackson's report on fixed recoverable costs was published in July 2017. The key recommendation is to introduce a new intermediate track for claims between £25,000 and £100,000, which are of no more than modest complexity and could be tried in three days or less. The new track would have streamlined procedures and be subject to a grid of fixed recoverable costs. In broad terms the costs recoverable under the scheme would range from around £19,000 for a straightforward £30,000 claim to around £68,000 for a £100,000 claim at the upper end of the scale of complexity.

The report also recommends extending the current fixed recoverable costs regime to all fast track cases (not just personal injury, as currently) and introducing a voluntary pilot of a capped costs scheme in High Court claims valued at up to £250,000. The next step will be for the Government to consider the report and, no doubt, subject any proposals for reform to public consultation.

For further information please contact Anna Pertoldi or Maura McIntosh.

EMPLOYMENT

GENDER PAY GAP REPORTING

Private and voluntary sector employers with 250 employees must publish a snapshot of their pay gap data, taken on 5 April 2017, by 4 April 2018; the deadline for public sector employers is 30 March 2018. The pay gap figures must be published on the employer's website for three years and also uploaded onto a central Government website. Employers have been encouraged to voluntarily include in their report a narrative to explain their figures and an action plan to address the gap. There are no specific penalties for non-compliance, but the Equality and Human Rights Commission has enforcement powers (and on 19 December 2017 it issued a consultation on its draft enforcement strategy seeking views by 2 February 2018) and there is a risk of reputational damage for not publishing or, in future years, for being unable to demonstrate sufficient progress. Pay gap reporting has also increased awareness of equal pay as a workplace issue and potential legal claim.

TAXATION OF TERMINATION PAYMENTS

From 6 April 2018 a number of tax reforms will take effect, including in relation to termination payments. All employees will pay income tax and Class 1 NICs on the amount of basic pay that they would have received if they had worked their notice in full (treated as taxable earnings), even if they are not paid a contractual payment in lieu of notice. The first £30,000 of a termination payment will remain exempt from income tax, but any amount above it will be subject to employer NICs as well as income tax from April 2019. Additionally foreign service relief will be abolished for UK resident employees (except in relation to seafarers) with effect from April 2018.

GENERAL DATA PROTECTION REGULATION

The General Data Protection Regulation (**GDPR**) will apply to all companies that conduct business in European Economic Area countries and aims to harmonise data protection rules, procedure and enforcement across the EU. The GDPR will bring data subjects (including employees) enhanced information rights and both data processors and controllers will face greater sanctions, with maximum fines of up to €20 million or 4% of annual worldwide turnover (whichever is greater) for certain breaches. The GDPR will apply directly in the UK from 25 May 2018 and will be supplemented by the Data Protection Bill currently going through Parliament. On Brexit, the GDPR will be incorporated into domestic law under the European Union (Withdrawal) Bill. Our GDPR hub provides further details. See the Technology, Media and Telecommunications and Data Protection section below.

TRADE SECRETS DIRECTIVE

The Trade Secrets Directive aims to create a single market in the EU for intellectual property rights, aligning their protection across European jurisdictions. All Member States are required to implement the Directive by 9 June 2018. The Directive creates a common definition of trade secret and defines what constitutes lawful and unlawful acquisition, use and disclosure of trade secrets. The Directive largely codifies existing practice in the UK, although there is a shift in emphasis from the common law approach of assessing the confidential quality of the information, to an assessment of what steps were taken to keep it secret. The Government has not yet clarified whether it intends to implement the Directive, in view of Brexit.

EMPLOYMENT STATUS REFORMS

The Government intends to publish a consultation paper on options for reforming and improving the employment status tests for both employment rights and tax purposes. Originally planned for the end of 2017, this appears to have been delayed but is expected in early 2018. This will include a consideration of the recommendations in the Taylor Review on Modern Working Practices. The Government also intends to consult on reforms to statutory sick pay, taking into account suggestions made in the Taylor Review and also the Stevenson/Farmer review into mental health. The Supreme Court is due to hear the appeal in the *Pimlico Plumbers* worker status case in February 2018, with the Court of Appeal to hear Uber's appeal later in 2018.

CORPORATE GOVERNANCE REFORM

The Government's long-awaited changes to the UK's corporate governance regime, which are intended to give employees more voice in the boardroom and impose additional reporting requirements with regard to executive pay, are anticipated to take effect by no later than June 2018. See the Corporate section above.

PARENTAL BEREAVEMENT LEAVE

A Private Members' Bill with Government backing has been introduced to Parliament which proposes giving parents who lose a child under the age of 18 two weeks' bereavement leave, with a right to statutory pay for those with at least 26 weeks' service. The intention is for the Bill to be passed in 2018 and the right to be available to parents from 2020 (to allow HMRC and commercial payroll providers enough lead-in time to implement necessary administrative changes).

SENIOR MANAGERS AND CERTIFICATION REGIME (SMCR)

In July 2017, the Financial Conduct Authority and Prudential Regulation Authority published proposals to replace the Approved Persons Regime (**APR**) with the SMCR currently in force for banks. Almost all financial services firms will be required to comply with the SMCR. Final rules are expected in summer 2018; firms will need to update employment contracts, job descriptions, reference templates, and relevant employment policies and procedures to reflect the new rules. Further details are included in the Financial Services Regulatory section below.

EMPLOYMENT

PLANNING FOR BREXIT

The potential impact of Brexit on access to talent is a key concern for all employers reliant on EU staff. As part of phase one of the Brexit negotiations, the UK Government confirmed that it proposes introducing a new "settled status" for EU citizens who have been resident in the UK before the date of the UK's withdrawal. The extent to which new EU migrants after that date will be permitted to seek work in the UK is, as yet, unclear. A new immigration regime will be set out in a draft Immigration Bill in due course. The Government has commissioned the Migration Advisory Committee to report by September 2018 on the impacts on the UK labour market of Brexit and how the UK's immigration system should be aligned with a modern industrial strategy.

In terms of employment rights, the Government has given assurances that workers' rights will be retained following the UK's withdrawal from the EU, at least in the short term. However, amendments to EU-derived legislation (such as the Working Time Regulations, the abolition of which allegedly has had some support in Cabinet) could be made in the longer-term, depending on the future political climate. See the Brexit section above.

For further information please contact Andrew Taggart or Anna Henderson.

ENERGY AND ENVIRONMENT

EXPECTED OFGEM DECISION IN RELATION TO THE REGULATORY TREATMENT OF ELECTRICITY STORAGE

In the first quarter of 2018, Ofgem is expected to publish the results of its consultation on the future regulatory and licensing treatment of electricity storage which closed in November 2017. The decision is expected to provide regulatory certainty to both existing and developing storage facilities. It is anticipated that the proposed changes address in an appropriate manner the issues storage facilities face surrounding final consumption levies (as currently some storage could face double charging of final consumption levies at the time of both importing from and exporting electricity to the grid). The decision is likely to also have a bearing on changes to the electricity and gas regulations on the relevant licences applications forms.

OIL AND GAS: TRANSFERABLE TAX HISTORY

Pursuant to the publication of a discussion paper in March 2017 and the establishment of an expert panel to examine the issue, the Government has announced that it will introduce transferable tax history for UK oil producers. The legislation, which will be published in spring 2018 for a technical consultation before inclusion in the Finance Bill 2019, will allow companies selling North Sea oil and gas fields to transfer some of their tax payment history to the buyers of those fields. The buyers will then be able to set the costs of decommissioning the fields at the end of their lives against the transferred tax history, with the aim of having sufficient tax capacity at the time of decommissioning to be able to monetise the full value of their decommissioning relief. The inability to achieve this in the past, set against the backdrop of falling oil prices, has impacted adversely on acquisition and disposals activity in the UK Continental Shelf (**UKCS**), and by implication, on development and production. In order to bring forward the benefit to the UKCS, the Government is proposing that the legislation will have retrospective effect for deals completing on or after 1 November 2018. The Government has published a document entitled "An Outline of Transferable Tax History", which provides further details of how transferable tax history is intended to work. A link to that document is provided here.

PETROLEUM REVENUE TAX (PRT) TREATMENT OF RETAINED DECOMMISSIONING

The Government will publish a technical consultation in spring 2018 on the PRT treatment of retained decommissioning with the aim of introducing legislation in the Finance Bill 2019. It has been confirmed that any change to the PRT regime will not affect deals that have been previously completed.

RING FENCE CORPORATION TAX: TARIFF RECEIPTS

The Government will legislate in the Finance Bill 2018 to clarify that all activities by UK petroleum licence holders that give rise to tariff income in relation to UK oil and gas assets are oil extraction activities, meaning that the profits are subject to ring fence corporation tax and Supplementary Charge. The change will have effect in relation to accounting periods beginning on and after 1 January 2018.

MIFID II AND REMIT

The implementation of MiFID II on 3 January 2018 in effect varied the scope of activities covered under the EU Market Abuse Regulation (**MAR**) and the EU Regulation on Energy Market Integrity and Transparency (**REMIT**) by extending the definition of "financial instruments" to include energy derivatives and related products traded on multilateral trading facilities (**MTFs**) and other organised trading facilities (**OTFs**). See the Financial Services Regulatory section below.

OFFSHORE INSTALLATIONS (OFFSHORE SAFETY DIRECTIVE) (SAFETY CASE ETC.) REGULATIONS 2015

All existing production installations (meaning production installations for which there was a current Safety Case immediately before 18 July 2013) in the UKCS must have an updated Safety Case approved by 19 July 2018 in order to comply with these Regulations. Please refer to Schedule 14 of the Regulations, which can be found here.

THE 25 YEAR ENVIRONMENT PLAN

The Government's 25 Year Environment Plan, long delayed, was issued on 11 January 2018. The Plan is intended to be a comprehensive strategy for England with a clear vision for the stewardship of the natural environment against which the Government can deliver its (David Cameron) pledge to leave the environment in a better state than it found it. It is a sister strategy to the Clean Growth Plan and Industrial Strategy, both published in late 2017.

One strong current running through the new plan is the adoption of natural capital accounting as a key tool to enable economic values to be ascribed in policy-making to the benefits provided by our environment. The plan has a broad scope and covers air and water quality, minimisation of waste, flooding, access to green spaces and the protection of seas, soils, and species. It promises consultations early in 2018 on a new statutory environmental watchdog independent of Government, whose role will be to assess progress on delivering the strategy, including consultation on a set of national environmental principles. Government will also consult early in 2018 on metrics against which the implementation of the plan are to be assessed, and will report annually on progress. Amongst the more specific measures included in the plan are: a proposal to establish a new green business council, exploring the potential for a natural environmental impact fund, and the publication of a new Resources and Waste strategy in 2018 aspiring to make the UK a world leader in resource efficiency.

BREXIT DEVELOPMENTS

The European (Withdrawal) Bill is currently at the Committee stage and will pass through further stages in the House of Commons and House of Lords during 2018. Concerns have been raised over the broad Henry VIII powers set out in the Bill which would allow ministers to amend "deficiencies" in the law after Brexit. The UK Environmental Law Association has analysed the effect of the Henry

ENERGY AND ENVIRONMENT

VIII provisions in the Bill and anticipates that whilst some of the core environmental primary laws in England will require amendment using these powers, the majority will not. To alleviate concerns over Henry VIII powers, the Secretary of State for the Department for Environment, Food and Rural Affairs (**DEFRA**), Michael Gove, has suggested that a consultation group be established – presumably in 2018.

Michael Gove has also pledged to launch a consultation by early 2018 exploring the possibilities of a new "commission like" independent body to replace the enforcement role of the European Commission, and a new policy statement setting out guiding environmental principles such as "polluter pays" and the "precautionary principle" that exist within the EU Treaty but are not to be written into domestic legislation. MPs have also proposed amendments to the European (Withdrawal) Bill requiring the Government to ensure that all environmental regulatory functions currently performed by EU institutions (such as the European Chemicals Agency (**ECHA**)) will be carried out by equivalent bodies post-Brexit; plans for such bodies will need to be prepared in 2018.

New framework environmental legislation is also under consideration. Presumably this will set the requirement to produce the national policy statement and determine what, if any, legal status it will have.

SUBMISSION FOR REGISTRATIONS UNDER REACH

31 March 2018 is the Phase 3 deadline for the registration of substances under the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation 2006 (**REACH**). Manufacturers and importers of chemical substances in volumes of 1 - 100 tonnes per annum who pre-registered their substances prior to 1 December 2008 must collate information on and assess the potential hazards of the relevant substances and send the analysis to ECHA by the 2018 deadline. Companies will not be able to manufacture or place on the market in the EU any substances which have not been registered by the 2018 deadline. However, ECHA has also made clear that post-Brexit these registrations and other existing registrations by UK-based entities will no longer be valid. They will then have to find an alternative means of compliance for sales in the remaining EU market. Further details can be found here.

HEARING DATES FOR THE LATEST CLIENTEARTH JUDICIAL REVIEW

Following two previous successful legal actions, ClientEarth are bringing a third case against the Government for failure to set out measures to rectify levels of nitrogen dioxide in urban areas that are above the EU limit. The hearing will take place in the High Court before 23 February 2018. ClientEarth is seeking a court order forcing the Government to revise the third version of its Air Quality Plan, which they argue backtracks on previous commitments to establish clean air zones in five cities, is too vague and fails to require reductions in 45 areas that are over the limit.

THE CLEAN AIR BILL 2017-19

The Clean Air Bill 2017-19 was presented to Parliament on 22 November 2017 and a second reading in the House of Commons is expected on 19 January 2018. It is a Private Member's Bill proposed by Geraint Davies MP and would require the Secretary of State to impose air quality targets, provide for air pollution mitigation, improve vehicle emissions testing and restrict the approval of vehicles with certain engine types. The Bill will need to go through further reading stages in the House of Commons and House of Lords before Royal Assent is given.

IMPLEMENTATION OF NATIONAL EMISSION CEILINGS DIRECTIVE 2016

The revised National Emissions Ceilings Directive 2016 (**NECD**) entered into force on 31 December 2016 and Member States are obliged to transpose it into national law by 30 June 2018. The revised NECD ensures that the emissions ceilings set for 2010 will continue to apply until 2020, and sets new emissions reduction commitments for the total emissions of NOx, SO2, NMVOC, NH3 and PM2.5 for 2020 and 2030. Under the revised NECD, each Member State will be obliged to publish a National Air Pollution Control Programme setting out the measures it intends to put in place to meet the NECD targets. Some commentators suggest that it is uncertain whether the UK will transpose this directive considering its proximity to the withdrawal from the EU in March 2019.

For further information please contact Julie Vaughan or Silke Goldberg.

FINANCE: BANKING AND RESTRUCTURING AND INSOLVENCY

THE POTENTIAL DISCONTINUATION OF LIBOR

The Financial Conduct Authority (**FCA**) has said that it will not encourage or compel banks to continue to provide quotes for LIBOR after the end of 2021. The view is that further reform of LIBOR cannot compensate for the lack of data from an underlying market, and that an alternative risk-free rate should be developed.

The Bank of England and the FCA have announced that, from January 2018, the Working Group on Sterling Risk-Free Rates will be tasked with catalysing the transition to the Sterling Over Night Index Average (**SONIA**) across sterling bond, loan and derivative markets, so that SONIA is established as the primary sterling interest rate benchmark by the end of 2021. The Loan Market Association (**LMA**) had raised various issues in relation to the adoption of SONIA as the replacement for LIBOR in the syndicated lending market principally because, as a backward-looking, overnight rate rather than a forward-looking, term rate, it has the potential to cause the loan markets difficulty both operationally and commercially. The Working Group has acknowledged that it needs to examine the need for term SONIA reference rates and a public consultation is planned for 2018. The LMA will be heavily involved in the Working Group, and input from market participants is actively encouraged.

It is difficult to draft meaningful, detailed provisions now which will cater for the replacement of LIBOR by a new reference rate, since it is currently unclear exactly what that reference rate will be, how that replacement rate will operate, and even when it will come into operation as the market standard (and in particular whether it and LIBOR will co-exist). It is therefore important that documents which refer to LIBOR include robust fall-back provisions to allow the relevant interest rate to be determined even if LIBOR is not available. Parties may also wish to consider the consent threshold for replacement of the reference rate in the future.

DRAFT BUSINESS CONTRACT TERMS (ASSIGNMENT OF RECEIVABLES) REGULATIONS 2017 WITHDRAWN, BUT WHAT NEXT?

In September 2017, final form regulations to ban provisions prohibiting the assignment of receivables in certain business-to-business contracts were laid before Parliament and were expected to come into force before the end of 2017. This followed a consultation in December 2014 and the inclusion of a statutory power to make the regulations in the Small Business, Enterprise and Employment Act 2015. However, in November 2017, following widespread concern, the draft Business Contract Terms (Assignment of Receivables) Regulations 2017 were withdrawn. A persuasive paper written by the Financial Law Committee of the City of London Law Society (**CLLS**) (chaired by Dorothy Livingston of Herbert Smith Freehills) found support from ISDA and the LMA, as well as several other CLLS Committees, and the Financial Markets Law Committee expressed concern from a conflicts of law perspective.

The aim of the Regulations was to increase access to invoice financing for small and medium sized businesses but, in the form laid before Parliament before being withdrawn, they could have had an uncertain and much wider effect. For example, the Regulations, which inevitably go against the long-standing English law tradition of freedom of contract in commercial transactions:

- appeared to nullify prohibitions on assignment of receivables in financing agreements which are structured around an income stream of receivables, despite the response to the consultation and the terms of the enabling Act making it clear that financial services agreements should be excluded from the legislation;
- introduced anti-avoidance provisions and disapplications which used uncertain rules of private international law in a way likely to increase legal uncertainty and give rise to additional litigation;
- did not make clear whether they would apply to security assignments and charges;
- did not make clear whether negative pledge clauses, which prohibit the creation of security over assets, would be regarded as prohibitions on assignment;
- would have run counter to the construction industry's measures to ensure that stage payments are passed down to sub-contractors in a timely fashion; and
- did not give any protection to the payer of the receivable, who may not have been able to obtain a good discharge against payment and would have lost rights of set-off against the original counterparty, particularly in an insolvency situation.

The Government still intends to press ahead with the Regulations, but is carrying out a full review in the light of the points raised. It is thought that a revised form of the legislation will be laid before Parliament in the course of 2018.

IFRS 16

The new IFRS 16: Leases, was issued on 13 January 2016 and is due to be effective from 1 January 2019. It will require recognition of all identified leases on a lessee's balance sheet with only limited exceptions. Currently, operating leases are not recognised on a lessee's statement of financial position; instead, operating lease commitments are disclosed in the notes.

The new IFRS 16 may have an impact on, and could result in breach of, agreed financial covenants in facility agreements which are tested against the borrower's financial statements. However, any adverse effects may be mitigated or may even be prevented if a facility agreement contains "frozen GAAP" provisions (ie provisions which require the borrower either to ensure that all its financial covenants are calculated by reference to the same generally accepted accounting principles (**GAAP**) as those used when the facility agreement was entered into or to provide the lender with a comparison back to the original GAAP) or terms allowing renegotiation of covenants when accounting standards change.

FINANCE: BANKING AND RESTRUCTURING AND INSOLVENCY

The LMA has already amended its facility documentation to address these requirements. However, lenders and borrowers still need to be aware of the changes and will need to address any issues which arise as a result, particularly in older documentation and refinancings where the original facility agreement may not contain the current LMA wording.

EU RECAST INSOLVENCY REGULATION 2015 ((EU) 2015/848)

A recast version of EC Regulation 1346/2000 on insolvency proceedings, which seeks to harmonise the regulation and enforcement of insolvency proceedings among Member States by providing for the affairs of insolvent companies and individuals to be administered in the jurisdiction in which they have their centre of main interests (**COMI**), came into force on 26 June 2015 and generally applies to relevant insolvency proceedings from 26 June 2017. Two notable aspects which have yet to come into force are EU requirements for:

- national insolvency registers to be established in all Member States – in force 26 June 2018; and
- specifications to be agreed to enable interconnection of EU national insolvency registers – in force 26 June 2019.

Key changes already introduced by the Recast Insolvency Regulation 2015 include:

- new rules relating to the presumptions of where a debtor's COMI is located to discourage abusive forum shopping; and
- the introduction of a flexible framework for cooperation and coordination between officeholders and courts in insolvencies of groups of companies.

For further information please contact Will Nevin or Kevin Pullen.

FINANCE: DEBT CAPITAL MARKETS, SECURITISATION AND DERIVATIVES

PROSPECTUS REGULATION TO REPLACE CURRENT PROSPECTUS DIRECTIVE

The new Prospectus Regulation came into force on 20 July 2017 and the majority of provisions will apply from 21 July 2019. The key changes for the debt capital markets (**DCM**) include new requirements on the form and content of risk factors and summaries in prospectuses; the expansion of the wholesale disclosure regime; exemption from the requirement to produce a summary (available under the Prospectus Directive to bonds with a minimum denomination of €100,000) to bonds traded on a regulated market to which only qualified investors can have access; and the introduction of the concept of a "universal registration document". Further guidelines on risk factor disclosure are expected from the European Securities and Markets Authority (**ESMA**) later in the year. See the Corporate section above.

THE POTENTIAL DISCONTINUATION OF LIBOR

The Financial Conduct Authority (**FCA**) has said that it will not encourage or compel banks to continue to provide quotes for LIBOR after the end of 2021. The view is that further reform of LIBOR cannot compensate for the lack of data from an underlying market, and that an alternative risk-free rate should be developed. One option suggested is the Sterling Overnight Interbank Average Rate (**SONIA**), which is in the process of being reformed. However, there have been concerns raised about whether SONIA is an appropriate replacement as it is a backward-looking, overnight rate rather than a forward-looking, term rate. See the Finance: Banking and Restructuring and Insolvency section above.

There are two aspects to consider in relation to DCM: (i) ensuring contractual continuity for outstanding legacy bonds which currently reference LIBOR; and (ii) the adoption of an appropriate benchmark for future floating rate bonds. Market participants, together with the International Capital Markets Association, are considering the various options available for bond documentation, particularly given that there is no clear LIBOR alternative. These include making formal amendments to bond documentation via consent solicitation, and including a penultimate fallback mechanism in bond terms and conditions to allow the issuer or determination agent to appoint an independent financial adviser to determine the appropriate rate.

FCA PROHIBITION ON RESTRICTIVE CONTRACTUAL CLAUSES

On 27 June 2017, the FCA published its policy statement (PS17/13) on prohibiting restrictive contractual clauses. With effect from 3 January 2018, new FCA Handbook Rules prohibit firms from entering into agreements containing restrictive clauses relating to the provision of future services. The restrictive clauses identified by the FCA are clauses that provide a "right to act" or a "right of first refusal" in connection with the provision of equity capital markets, DCM or M&A services. Rights to pitch or match quotes will not be prohibited and "tail-gunner" clauses (permitting a firm to recover fees for work already undertaken where a client decides to use another firm) will be unaffected. See the Corporate section above.

PRIIPS REGULATION

The PRIIPs Regulation applies from 1 January 2018 and introduces a pre-contractual disclosure regime for packaged retail and insurance based products (**PRIIPs**). Given the wide scope of the legislation, selling restrictions and legends are being included in wholesale DCM bond prospectuses and documentation in order to ensure that sales are not permitted to retail investors. See the Financial Services Regulatory section below.

THE APPLICATION OF MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE II (MIFID II) AND MARKETS IN FINANCIAL INSTRUMENTS REGULATION (MIFIR) TO DERIVATIVES AND DCM

- Derivatives: The requirements under MiFID II and MiFIR to trade eligible over-the-counter (**OTC**) derivatives on a regulated trading exchange and the updated position limits and position reporting requirements for commodity derivatives are of particular note for derivative markets and come into effect on a phased basis from 3 January 2018. These requirements, once they come into effect, are likely to mirror the equivalent requirements to clear eligible derivative transactions under the European Market Infrastructure Regulation (**EMIR**), and demonstrate the continuing regulatory focus on improving transparency and decreasing perceived credit risk issues in derivative markets.
- DCM: The product governance regime and certain conflicts of interest provisions under MiFID II (which applies from 3 January 2018) are particularly relevant to DCM. See the Financial Services Regulatory section below.

EUROPEAN MARKET INFRASTRUCTURE REGULATION – PHASE IN OF MARGIN REQUIREMENTS FOR NON-CLEARED DERIVATIVES

After a rocky start, the requirement for posting of margin against non-cleared derivatives came into force during 2017. The requirement that eligible counterparties post variation margin (**VM**) (margin to cover the daily changes in the value of the contract) on a daily basis now apply to all in-scope eligible entities. The requirement to post initial margin (**IM**) (an upfront posting of margin against possible losses on the contract) is being phased in on a staggered basis, depending on derivative portfolio size. The obligation to post initial margin will apply to entities with a group notional derivative portfolio above €1.5 trillion from 1 September 2018, with further phasing over 2019 and 2020. The treatment of physically settled FX forwards under this obligation remains unclear following a review by the European Supervisory Authorities. It is likely a period of regulatory forbearance will apply until the position is reviewed, as the technical start date for the requirement is 3 January 2018.

FINANCE: DEBT CAPITAL MARKETS, SECURITISATION AND DERIVATIVES

NEW SECURITISATION REGULATION

The Securitisation Regulation (**SR**) and the accompanying regulation amending Regulation 575/2013 (the **CRR**), were passed in late 2017. The new instruments set out a harmonised framework for regulation of securitisation within the EU, replacing the provisions in the existing sectoral legislation (the CRR, Regulation (EU) 2009/138/EC (**Solvency II**), Directive 2011/61/EU on Alternative Investment Fund Managers (**the AIFMD**) and the provisions of Regulation (EU) 1060/2009, as amended by Regulation (EU) 462/2013 (**CRA III**) which relate to disclosure of information in relation to securitisation transactions (the provisions in CRA III which relate to use of ratings in relation to securitisation transactions will remain in force).

The SR introduces a direct risk retention obligation on originators, sponsors and original lenders, as well as enhanced obligations on originators in relation to the exposures which they securitise. The SR also introduces provides for the establishment of securitisation repositories for reporting purposes, certain specific adjustments (a ban on re-securitisations; a prohibition on securitisations being sold to retail investors) and a new suite of sanctions for non-compliance with the rules.

Finally, the SR introduces the new Simple, Transparent and Standardised (**STS**) designation for securitisation transactions, which is intended to allow transactions which qualify to benefit from lower risk weightings for capital purposes. The Regulation amending the CRR will implement these in respect of banks and investment firms, as well as providing for a broader overhaul of the risk-weightings applicable to securitisation transactions. The STS designation is not available to securitisations backed by exposures which were originated outside the EU, so following Brexit (and assuming no bespoke amendment to this is negotiated as part of the exit deal) UK securitisations will not be able to achieve STS status.

The SR will become law in early 2018, 20 days after publication in the Official Journal of the EU, and the new harmonised rules will apply to securitisations the securities of which are issued on or after 1 January 2019. In respect of securitisations concluded prior to that date, the existing rules will continue to apply. It is intended that securitisations issued prior to 1 January 2019 should be able to benefit from the STS designation if they are able to meet the relevant requirements, although it will not be possible to take advantage of this until certain technical standards have been finalised.

There is a significant amount of secondary EU legislation expected to be developed by the ESMA and other supervisory authorities within a year starting on the application date of the SR, as well as amendments to Solvency II to extend the STS regime in the SR and CRR to insurance and reinsurance undertakings. The European Banking Authority has begun consultations on a number of these with deadlines for submissions in March 2018. Until the adoption of the relevant delegated instruments by the Commission, regulated entities are expected to continue to comply with the existing technical standards.

For further information please contact Michael Poulton or Amy Geddes.

FINANCIAL SERVICES REGULATORY

SENIOR MANAGERS AND CERTIFICATION REGIME (SMCR)

In July 2017, the Financial Conduct Authority (**FCA**) and Prudential Regulation Authority (**PRA**) published proposals to replace the Approved Persons Regime (**APR**) with the SMCR currently in force for banks. Almost all financial services firms will be required to comply with the SMCR, including insurance intermediaries; a separate consultation proposed introducing all elements of the SMCR to the current Senior Insurance Managers Regime applicable to insurers. The consultation periods ended on 3 November 2017. See the Insurance section below.

Key points in the proposals include:

- The SMCR will replace the APR.
- Most firms will need to meet certain core standards, although some will benefit from a lighter touch regime.
- For a few larger firms, the compliance burden will be significantly greater.

In December 2017 the FCA and PRA issued further consultations on the extension of the SMCR. These consultations included proposals on:

- operational aspects of the regime, including how firms will transition into it, changes needed to forms and processes for submitting information to the FCA; and
- applying existing guidance on enforcing the duty of responsibility in banks to other financial services firms.

The FCA has yet to consult on the application of the SMCR to Appointed Representatives.

The December consultations close on 21 February 2018. Final rules on the SMCR extension are expected in the summer of 2018. As with the banks' implementation of the SMCR, implementation projects will benefit from commencing at this stage in the consultation process rather than waiting for the policy statements. The FCA has assumed that the rules will apply to insurers in late 2018 and solo-regulated firms in mid-to-late 2019; the actual commencement dates will be announced and set by HM Treasury in due course.

Our more detailed briefings can be found here and here.

MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE II (MIFID II)

The MiFID Directive (**MiFID II**) and Regulation (**MiFIR**) (together recasting the existing MiFID) applies from 3 January 2018. MiFID II will significantly impact both the structure and operation of EU financial markets and provide increased protection for investors. Changes in relation to markets include increased regulation of trading venues, the introduction of organised trading facilities, broadened scope of systematic internalisers, requirements in respect of algorithmic and high-frequency trading, change in the scope of commodity derivatives and expansion of pre- and post-trade transparency rules. Investor protection changes include those relating to inducements, investment research, product design and intervention, conflicts of interest, client classification and increased disclosures to clients. In the UK, the FCA and the PRA have amended their rules and guidance as part of MiFID II implementation. There are areas where the FCA has gone beyond applying the minimum MiFID II standards, including applying certain MiFID II standards to non-MiFID firms.

Any firm which is a legal entity or structure (including a charity or trust) and which is a client of a MiFID investment firm must make arrangements to obtain a legal entity identifier (**LEI**) if it wishes the investment firm to continue to act on its instructions or make a decision to trade on its behalf from 3 January 2018 onwards. A list of LEI issuers can be found on the Global LEI Foundation (**GLEIF**) website.

EU BANKING REFORM PACKAGE

The European Commission published a package of legislation in November 2016 which aims to complete the outstanding elements of the banking reforms implemented in the EU in the wake of the financial crisis. The European Parliament and the Council of the EU will continue to negotiate the details of the draft proposals during the course of 2018. The proposed legislation will amend:

- Capital Requirements Regulation (**CRR**) and the Capital Requirements Directive (**CRD**);
- Recovery and Resolution Directive (**RRD**); and
- Single Resolution Mechanism Regulation (**SRMR**).

The proposed amendments reflect international standards, in particular Basel III requirements set by the Basel Committee on Banking Supervision and the Financial Stability Board's total loss absorbing capacity standard (**TLAC**), including the following:

- a binding 3% leverage ratio which aims to prevent institutions from increasing lending excessively when they do not have sufficient capital;
- a binding detailed net stable funding ratio (**NSFR**) which aims to increase banks' resilience to funding constraints by requiring credit institutions and systemic investment firms to finance their long-term activities with stable sources of funding;
- a requirement for institutions which trade in securities and derivatives to have more risk-sensitive own funds; and
- the revision of the minimum requirement for own funds and eligible liabilities (**MREL**) and the implementation of TLAC.

The new package also contains EU-specific amendments, such as proposals to improve bank's financing of the EU economy and the

FINANCIAL SERVICES REGULATORY

introduction of more proportionate rules, such as those for smaller and non-complex banks (eg a more proportionate supervisory reporting framework and a derogation from the remuneration rules relating to deferral and pay-out in instruments) and bail-in related rules (eg revision of Article 55 of the RRD under which banks have to include in contracts governed by third country a clause that the creditor recognises the bail-in power of the EU resolution authorities. The draft proposals also introduce a requirement for financial services groups to establish an intermediate EU parent undertaking where two or more institutions established in the EU have the same ultimate parent undertaking in a third country. The requirement will only apply to third country groups identified as non-EU Global Systemically Important Institutions or that have entities on EU territory with total assets of at least €30 billion.

In November 2016, as part of the reform package, the European Commission adopted International Financial Reporting Standard 9 "Financial Instruments" (**IFRS 9**), which replaces IAS 39 (Financial Instruments: Recognition and Measurement) for accounting periods beginning on or after 1 January 2018 and requires the measurement of impairment loss allowances to be based on an expected credit loss (**ECL**) accounting model rather than on an incurred loss accounting model. As a result of concerns that the application of IFRS 9 may lead to a sudden significant increase in ECL provisions and a corresponding sudden decrease in firms' common equity tier 1 (**CET1**) capital, a transitional period was proposed. In late 2017 the European Parliament and the Council adopted the Regulation amending the CRR as regards the transitional period for mitigating the impact on own funds of the introduction of IFRS 9 and the large exposures treatment of certain public sector exposures denominated in non-domestic currencies of Member States. The Regulation is due to be published in the Official Journal shortly; the transitional arrangements started on 1 January 2018 and apply for up to five years.

THE FIFTH MONEY LAUNDERING DIRECTIVE (5MLD)

In response to recent terrorist attacks, the EU has developed a proposal for a new Anti-Money Laundering Directive to amend the Fourth Money Laundering Directive (which applied from 26 July 2017) and further strengthen the EU's anti-money laundering framework. The proposed amendments are aimed at countering terrorist financing and preventing tax avoidance and money laundering through even stricter transparency rules. The new proposal, the 5MLD, sets out changes to the proposed disclosure regime for information on beneficial ownership. The changes specify that certain limited information on beneficial ownership will be provided to the public on demand, rather than, as set out in 4MLD, only to those that can demonstrate a legitimate interest in the information. The proposed 5MLD also makes changes to the due diligence requirements imposed on regulated firms. It grants additional powers to Financial Intelligence Units to seek information from such firms. Negotiations among the European Commission, Council and Parliament are ongoing but appeared to stall in 2017; the UK Government has indicated that it expects negotiations to conclude by early 2018. It is anticipated that Member States will be required to transpose 5MLD no later than 12 months after its publication in the Official Journal.

REVISED PAYMENT SERVICES DIRECTIVE (PSD 2)

PSD 2 updates the current EU framework on payment services, extending its scope to payment service providers that were previously unregulated (account information services and payment initiation services), as well as increasing transparency and security of payment services. PSD2 came into force on 12 January 2016 and the deadline for Member States to transpose the directive into national law was 13 January 2018. The European Banking Authority has been developing guidelines and regulatory technical standards (**RTS**) under PSD 2; some of these will not be effective until after January 2018, for example the RTS on strong customer authentication and common and secure communication which is expected to apply from the third quarter of 2019. In the UK, PSD 2 has been implemented through the Payment Services Regulations 2017. The FCA has set out guidance on the requirements as well as the FCA's regulatory and supervisory approach to PSD 2 in its revised Approach Document.

EU MARKET ABUSE REGULATION (MAR)

MAR has replaced the old Market Abuse Directive. It is directly applicable in Member States (and so, for example, replaces the old Disclosure Rules 2 and 3 for UK listed companies). Key changes in MAR include broadening the definition of "market abuse" to capture a wider range of behaviour (including the manipulation of benchmarks) and to cover a wider range of markets rather than just listed markets, an EU-wide harmonised format for insider lists, enhanced disclosure of own account transactions by persons discharging managerial responsibilities, and stricter civil and criminal enforcement powers for competent authorities, including criminal sanctions. MAR came into force on 3 July 2016. Development of the detail of the regime continues and enhanced enforcement action against the new standards can be expected in 2018. MAR applies to organised trading facilities (**OTFs**) from January 2018.

PRIIPS REGULATION

The EU Regulation on key information documents (**KIDs**) for packaged retail and insurance-based investment products (**PRIIPs**) applies from 1 January 2018. The PRIIPs Regulation introduces a new, pre-contractual disclosure document for retail consumers when they are considering buying PRIIPs. It also provides for enforcement action to be taken when there is a breach of the requirements. The PRIIPs Regulation was originally due to apply from 31 December 2016 but was postponed to 1 January 2018 because of disagreement over the format of the KID.

EU FINTECH ACTION PLAN

In September 2017, the European Commission Vice-President for Financial Stability, Financial Services and Capital Markets Union (**CMU**) Valdis Dombrovskis announced that the Commission would publish a FinTech Action Plan in "early" 2018 (which we estimate as within the first quarter of 2018). The September announcement followed on from the Commission's public consultation on FinTech which ran from 23 March to 15 June 2017, and to which over 200 responses were received. It is reasonable to conclude that the Commission's FinTech Action Plan will have to be fairly wide-ranging to encompass the range of topics (eg robo-advice, initial coin offerings, crowd-funding, etc.) which coalesce under the term "FinTech". Mr Dombrovskis also indicated in his speech that the Commission foresees a strong role for the European Supervisory Authorities (**ESAs**) on FinTech.

For further information please contact Karen Anderson or Clive Cunningham.

INSURANCE

EXTENSION OF SENIOR MANAGERS AND CERTIFICATION REGIME TO INSURERS AND INSURANCE INTERMEDIARIES

The Senior Insurance Managers Regime (**SIMR**) took effect in early 2016. The SIMR introduced a new accountability framework for individuals working in UK insurers, consistent with standards set by the Solvency II Directive. In July 2017, the Financial Conduct Authority (**FCA**) and Prudential Regulation Authority (**PRA**) published proposals to extend application of the Senior Managers and Certification Regime (**SMCR**) that was originally introduced for banks to all almost all financial services firms, including insurers and insurance intermediaries (see the Financial Services Regulatory section above for more information on the extension of the regime to intermediaries).

Further consultation papers published in December 2017 included proposals on:

- operational aspects of the regime, including how firms will transition into it, changes needed to forms and processes for submitting information; and
- applying existing guidance on enforcing the duty of responsibility in banks to other financial services firms.

The December consultations close on 21 February 2018 and final rules on the SMCR extension are expected in the summer of 2018. The FCA has assumed that the rules will apply to insurers in late 2018 and to insurance intermediaries in mid-to-late 2019. Actual commencement dates will be set by HM Treasury in due course.

THE INSURANCE DISTRIBUTION DIRECTIVE

The Insurance Distribution Directive (**IDD**) replaces and updates the Insurance Mediation Directive (**IMD**). The IDD rules are just the minimum level of regulation that each EU Member State must implement, but the changes from the existing European regime are significant. Key changes affecting distributors include:

- some distributors will be regulated for the first time – this will mean a significant increase in the number of regulated firms from less than half (48%) to almost all (98%) distributors of insurance products in the EU;
- new rules on governance, systems and controls, and knowledge requirements;
- a requirement to issue a document known as the insurance product information document (**IPID**) when non-life insurance products are sold. The rules surrounding IPIDs are prescriptive, and we expect to see many distributors embarking on a sizeable project to ensure compliance. Providers of insurance-based investment products will also be required to provide customers with key information documents in line with other types of retail investment products;
- additional disclosures which must be made during the sales process. To add to the complexity, some disclosures (including relating to conflicts of interests and cross-selling) will apply to all insurance products, while others will apply only to those that are investment based (such as risks associated with investment and certain information on costs and related charges).

On 20 December 2017, the EU Commission published draft legislation to delay the IDD start date from 23 February 2018 to 1 October 2018. In doing so, it agreed to requests for a delay made by the European Parliament and a number of Member States despite taking the view that industry had already been given considerable time to adapt to the new rules. Individual states are still required to transpose the IDD into domestic regimes by 23 February 2018 and the European Parliament and the Council will need to agree the new date in an accelerated legislative procedure.

PLANNING FOR BREXIT

Brexit presents the UK insurance sector with the prospect of restricted access to talent and European markets. It also brings some opportunity for regulatory reform once the UK is no longer bound by the constraints of Solvency II and other EU insurance legislation.

"Passporting" currently allows UK (re)insurers and (re)insurance intermediaries to conduct cross-border business in the EU relying on a single home state licence (and EU insurers and intermediaries can conduct business in the UK on the same basis). If, as currently seems likely, the UK withdraws from the EU on terms commonly referred to as a "hard" Brexit, UK-based firms might be forced to shift some of their business to the EU. Meanwhile, international insurers whose European operations are headquartered in the UK are looking carefully at the location of their European hubs. A particular risk, post-Brexit, for UK insurers with policyholders in EU Member States, is that they will no longer be licensed to pay out on claims in those jurisdictions, and EU policyholders will be left without valid insurance.

Despite the uncertainty, firms must prepare for life outside the EU and keep a close watch on the shifting political landscape. Many firms are making plans on the assumption that a "hard" Brexit is the most likely outcome from current negotiations. Some are considering moving some or all of their business outside the UK, possibly (like Lloyd's) setting up a new European subsidiary as a hub for their European affairs. Given that a two year transitional period after the UK extricates itself from the EU is still not a certainty, and as insurance firms can take a year or more to restructure, few are prepared to wait and see what the Government's negotiations might deliver.

PRA REFORM OF SOLVENCY II IMPLEMENTATION

In September 2016, the House of Commons Treasury Committee (**TC**) launched an inquiry to look at the case for changing, or even replacing, Solvency II in a post-Brexit world. The inquiry was subsequently closed on 3 May 2017, when Parliament was dissolved for the general election. Nonetheless, evidence provided to the inquiry highlighted firms' dissatisfaction with how aspects of the Solvency II regime have been implemented in the UK. The PRA argued, on the other hand, that it has taken a flexible approach to implementation of the regime but that its hands are tied by the level of prescription in the Directive.

Despite the early termination of the Solvency II inquiry, the TC's report (which was published on 27 October 2017) recommends (among other things) that the PRA and industry continue to work together on further amendments of the Solvency II regime and on introducing increased proportionality into the regime. Consistent with this proposal, the PRA published consultation papers on the matching adjustment and internal models in late 2017 (both consultations close in the first quarter of 2018). A third (on reporting) is expected in January 2018.

The PRA has confirmed that it is looking at making further improvements to Solvency II, including in the following areas:

- recalculation of the Transitional Measure on Technical Provisions; and
- external audit of Solvency and Financial Condition Report.

EU REFORM OF SOLVENCY II REGIME

As envisaged by Recital 150 of the Solvency II Delegated Regulation, the EU Commission is currently undertaking a review of the methods, assumptions and standard parameters used when calculating the Solvency Capital Requirement (**SCR**) with the standard formula. The review is due to be completed by the end of 2018 and covers a number of aspects of the SCR calculation.

Responding to a request from the Commission, the European Insurance and Occupational Pensions Authority (**EIOPA**) published a consultation paper on its first set of technical advice to the Commission on specific items in the Solvency II Delegated Regulation on 4 July 2017. EIOPA published final advice to the Commission on those items in October 2017. A second consultation paper was issued on 6 November 2017. EIOPA plans to send final technical advice on the areas covered by this later consultation paper to the Commission by the end of February 2018.

Our more detailed briefings on the above topics can be found on our insurance blog here.

For further information please contact Paul Lewis or Geoffrey Maddock.

INTELLECTUAL PROPERTY

THE UNIFIED PATENT COURT (UPC) - OPEN FOR BUSINESS IN 2018?

Last year the expectation was that the UPC Agreement (**UPCA**) would achieve the required ratification levels and that the UK could well ratify in advance of Brexit in order to become a full participant, despite the question marks that arose about the ability of a non-EU jurisdiction to be part of the new unitary and European patent enforcement system. Despite the IP Minister's announcement in November 2016 that the UK would ratify, no ratification was forthcoming, although the UK has drawn closer to ratification as a result of the International Organisations (Immunities and Privileges) (Scotland) Amendment (No 2) Order 2017 being approved by the Scottish Parliament on 25 October 2017. This order will confer certain privileges and immunities on the UPC and its judges and other staff. The equivalent statutory instrument, the Unified Patents Court (Immunities and Privileges Order) 2017 was laid before the House of Commons on 26 June 2017 and following approval by both chambers of the Westminster parliament (including the House of Lords in December 2017), it is waiting approval by the Privy Council, along with the Scottish order. Representative bodies of IP practitioners joined together shortly before Christmas 2017 to send a note to the Government on the key areas that need addressing prior to Brexit, including ratification of the UPC Agreement (see below).

Elsewhere in the EU three more states ratified the UPCA in 2017: Italy, Estonia and Lithuania. This brings the total number of ratifying states to 14, more than the 13 required, but still missing two of the mandatory ratification states other than France: Germany and the UK (while it is still in the EU).

However, with France ratifying the Protocol on Privileges and Immunities at the end of December 2017 and Belgium adopting legislation in December to implement the UPC, the EU looks poised to commence the new court system as soon as possible once the UK leaves the EU. This will be possible only once Germany has ratified. Italy will take the place of the UK as the third mandatory ratifier after France and Germany, and has already ratified as mentioned above.

German ratification is dependent on the outcome of the challenge being mounted in the German Federal Constitutional Court (**FCC**) regarding the constitutionality of the law passed by German Parliament on the UPC's implementation. The German court has asked for observations on the case and had previously set a deadline for any comment by end of October 2017 – though it has been reported that this has now been extended to the end of the year. The FCC will then determine whether or not to dismiss the complaint, a process which is expected to take until at least April 2018. If the complaint is dismissed, Germany will be able to ratify the UPCA soon after. There has, however, been talk of the possibility of the case being referred to the Court of Justice of the EU (**CJEU**), which would cause substantial delay to the case being decided and ultimately to Germany's ratification.

The Preparatory Committee of the UPC published a "Summing up and looking forward" press release on 21 December 2017 detailing the "provisional application" phase and how this will work. It is essentially a pilot phase which will be allowed to come about if sufficient signatory states agree to the Protocol on the Agreement on a UPC on Provisional Application. The Protocol means that the State Parties agree to apply the institutional, organisational and financial parts of the UPCA provisionally before the UPCA enters into force. Once the Protocol enters into force, the organisation (as such) will therefore be created and acquire legal personality. The Administrative Committee, the Budget Committee and the Advisory Committee will be established at the start of provisional application and will then take over the responsibility of the preparations from the Preparatory Committee.

During the provisional application phase the organisation will be able to conclude necessary agreements with third parties and formalise all the preparatory work done by the Preparatory Committee. One area that cannot be conducted before the provisional application phase is the completion of the recruitment of the judges. This is obviously a significant difficulty for the committee. Only once the judges are appointed the two Presidents can be elected, the Presidium can be set up and the Registrar and the Deputy Registrar can be appointed.

However, for the Protocol on Provisional Application to come into effect, 13 signatory states - which have signed the UPCA (and which must include France, UK and Germany) and have ratified the UPCA or informed the depositary that they have received parliamentary approval to ratify the UPCA - must have signed and ratified, accepted or approved the Protocol (in accordance with Article 2(2) of the Protocol) or declared themselves bound by Article 1 of the Protocol. These cover, inter alia, the establishment of the UPC, the Registry, the Mediation and Arbitration Centre, the training and appointment of judges, and the provisions allowing for the UPC Statute and Rules, legal aid, remuneration of judges, the setting up of local or regional divisions, and the establishment of the pool of judges.

Now that the UK has signed the Protocol, along with the other two mandatory signatories, the Protocol is close to coming into effect, although a few more signatories and ratifications are needed. The UK will still need to pass legislation (via statutory instrument) to ratify the Protocol as will some other signatories.

The UPC Preparatory Committee says it has assessed that (even once sufficient ratification of the Protocol has taken place) the provisional application phase needs to be a period of between six to eight months in order to have time to put everything in place and prepare for the Court to be operational.

For more on the UPC see our dedicated UPC hub at www.hsf.com/upc.

BREXIT AND INTELLECTUAL PROPERTY – ACTION REQUIRED NOW

The exact mechanics of how Brexit will materialise and what it would mean for IP rights in the UK is still unclear. However, time is now running short and the main representative bodies for IP practitioners have become concerned that IP rights (which are some of the assets most likely to be adversely impacted by Brexit - indeed in some cases at risk of being lost without specific provision being made by the UK Government prior to Brexit) have not been receiving the attention they require.

On 22 December 2017 therefore, a note was sent to the UK Government by the Law Society which had been contributed to and signed by representatives of the IP Committee of the Law Society of England and Wales, and of the IP Bar Association, the Chartered Institute of Patent Attorneys, the Chartered Institute of Trade Mark Attorneys and the IP Federation.

The note makes the case for the UK as a key IP forum and identifies "a short list of the biggest areas where Government action is necessary to **ensure continuity and certainty** of IP law and to prevent disruption both to undertakings which use IP services and IP service providers".

The following are some of the key recommendations made by the note:

- **Continuation of EU-derived IP rights**: The Government should seek to negotiate a package of rights to secure the continuation of all existing substantive and procedural pan-European rights and defences to them. If this is not achievable, the Government should legislate for the automatic continuation in the UK of EU rights. *"The Government will, in either case, need to negotiate with the EU to ensure ongoing cooperation and data sharing between the agencies responsible. It is important that this negotiation is not held up pending other discussions concerning Brexit and that there is rapid effective communication between the relevant agencies including the UKIPO, EUIPO and others to this end."*
- **Unitary Patent/UPC Agreement**: The note asserts that the Government should provide legal certainty regarding the UPC, and now do the following: (a) confirm that it is the UK's intention to stay in the UPC, and that the UK is prepared to abide by the terms of the UPC Agreement, following Brexit; (b) work towards the coming into effect of the UPC as soon as reasonably practicable in collaboration with other UPC Member States; and (c) work with other UPC Member States and EU institutions to ensure there are no legal or practical obstacles to UK participation in the UPC and the Unitary Patent, following Brexit, on equal terms with other Member States. *"The objectives should be (i) continuation of the Court in London; (ii) continued involvement of UK national judges; and (iii) continued rights of participation of legal professionals qualified and based in the UK in all parts of the Court's procedures on the same terms."*
- **Exhaustion of rights**: The note suggests that *"Industry needs to know what exhaustion rules will apply, post-Brexit, to goods first placed on the market: in the UK, in the EU, the EEA or internationally"*. It asserts that in the interests of legal certainty for UK industry and consumers, the Government should consult widely, decide upon and publicise its position on exhaustion of rights. It is suggested that *"the Government should make it clear that, in the interim, the current regime will continue, and that the position would be reciprocated throughout the EEA."*

The note concludes by saying that there are other IP issues but these are the most significant and most in need of urgent action but that others are being dealt with under the main Brexit negotiations (see following quote, emphasis added): *"There are many other important points of detail in the field of IP that will need to be negotiated and resolved as part of Brexit and we understand that the UKIPO is working on many of them. The volume of work involved to deal with these matters indicates to us the importance of a transitional period in which to negotiate them with the rest of the EU.* ***Bearing in mind the time it has taken to establish some of the international treaties and laws in the field of IP, we think the necessary transitional period is likely to be several years****. We have highlighted the areas above of greatest impact for the approach to be taken by the Ministry of Justice."*

As this note suggests, 2018 will be a key year for the protection of IP rights across Europe. It is not just UK entities that may lose rights, other EU businesses holding rights defined as applying across "the EU" will find that they no longer have coverage in the UK.

For further analysis of the impact of Brexit on IP rights and how to moderate this, see the IP section of the Brexit Legal Guide on the Brexit hub of our website

For further information please contact Joel Smith or Rachel Montagnon.

PENSIONS

LEGAL ENTITY IDENTIFIERS

The introduction of MiFID II, the EU's Markets in Financial Instruments Directive, will require all pension schemes that wish to carry out trades on UK financial markets on/after 3 January 2018 to have a Legal Entity Identifier assigned to them by the London Stock Exchange. See the Financial Services Regulatory section above.

TAKEOVER CODE – OFFEROR'S INTENTIONS WITH REGARD TO TARGET'S PENSION ARRANGEMENTS

Changes to the Takeover Code effective from 8 January 2018 will require offeror companies to state, when announcing a firm intention of making an offer for a quoted target, their intentions with regard to: employer contributions into the target's pension arrangements (including any change to existing arrangements for funding scheme deficits); the accrual of benefits for existing members; and the admission of new members into the scheme.

AUTO-ENROLMENT – END OF FIRST TRANSITIONAL PERIOD

The first transitional period for calculating employers' minimum contributions to DC auto-enrolment vehicles ends on 5 April 2018. During the second transitional period, which runs until 5 April 2019, employers will be required to contribute a minimum of 2% of pay and ensure that overall contributions are at least 5%.

DC CONTRACTING-OUT

Occupational pension schemes providing DC benefits that were formerly contracted-out on a "protected rights" basis have until 5 April 2018 to use the statutory modification power contained in the Pensions Act 1995 in order to remove their protected rights rules.

SAFEGUARDED-FLEXIBLE BENEFITS – RISK WARNINGS TO DC MEMBERS

April 2018 also sees the introduction of the requirement for schemes to give mandatory, tailored risk warnings where members with "safeguarded-flexible benefits" (the most common form of which are Guaranteed Annuity Rates on DC benefits) seek to access their benefits via the new pensions freedoms. At the same time the revised calculation methodology for assessing whether the benefits have a capital value in excess of £30,000 (and, therefore, whether the requirement is engaged for financial advice to be taken by the member concerned) will also come into effect.

LIFETIME ALLOWANCE – INDEXATION

As from April 2018 the Lifetime Allowance, currently set at £1 million, will rise in line with increases in the Consumer Prices Index. The first such increase will see it rise to £1,030,000 as from 6 April 2018.

COLD-CALLING BAN

The long-awaited ban on pensions-related cold calling is now to be included in the Financial Guidance and Claims Bill, which is currently progressing through Parliament and likely to receive Royal Assent during April 2018. Certain provisions of the current Winter Finance Bill, most notably heightened powers for HMRC to refuse to register pension schemes (and to de-register existing ones), are also anticipated to come into effect around the same time.

GENERAL DATA PROTECTION REGULATION (GDPR)

The GDPR applies to pension schemes just as it does to any other controller or processor of personal data, and will come into force on 25 May 2018. All pension schemes should now be well underway with their "GDPR readiness" plans in order to ensure full compliance well in advance of the new Regulation applying. See the Technology, Media and Telecommunications and Data Protection section below.

CENTRAL CLEARING FOR DERIVATIVE TRADES

The transitional exemption for pension funds which engage in over-the-counter derivative trades, that allows them not to undertake "central clearing" for such transactions, expires on 16 August 2018. (A further three-year extension to this period is also currently under consideration by the European Commission.)

OTHER THINGS WE MIGHT SEE IN 2018 – LEGISLATIVE CHANGE

The Government is consulting (or has consulted) on a wide variety of other measures which may or may not make it onto the statute book during the course of 2018. We set these out below:

- Pension Protection Fund: Regulations are expected to take effect on 15 January 2018 to allow the PPF to adjust downwards the compensation paid to a scheme member, who was in receipt of a bridging pension from an eligible scheme when responsibility for it was assumed by the PPF, in order to reflect the manner and time at which that bridging pension would cease to have been paid by the scheme itself.
- Relaxation of the "employer debt" regime: During 2017 the Department for Work and Pensions consulted on alterations to the employer debt regime and, in particular, the introduction of so-called "deferred debt arrangements" in order to permit departing employers not to pay that debt in full at the point of leaving the scheme. The Government's formal response to the consultation is anticipated to be issued, and hence the likely shape of the new regime known, during January 2018.
- White Paper – future of DB schemes: On a related note, February 2018 should then see the publication of the Government's White Paper on the future of DB schemes, following on from the February 2017 Green Paper and associated consultation exercise.

- "Without consent" bulk transfers from formerly contracted-out DB schemes: Long overdue corrective changes to the bulk transfer rules, which currently (and erroneously) only permit the bulk transfer of contracted-out DB rights on a "without consent" basis to a scheme that was a formerly contracted-out scheme (and which thereby prevent such transfers to new schemes and/or those which were never contracted-out), were the subject of a consultation exercise launched by the DWP during late December 2017 and are anticipated to take effect as from 6 April 2018.
- "Without consent" bulk transfers of DC benefits: Provisions designed to facilitate DC-to-DC bulk transfers on a "without consent" basis, removing the requirement for actuarial certification along with the "scheme relationship condition", have by contrast already been the subject of consultation and are also anticipated to come into force on 6 April 2018.
- Financial Assistance Scheme – long service cap: The Government intends that the proposed FAS long service cap (which, more accurately, is a relaxation of the compensation cap for long-serving individuals, and mirrors that now already applying to the Pension Protection Fund) will come into force with effect from April 2018.
- Corporate governance reform: The Government's long-awaited changes to the UK's corporate governance regime, which would potentially give pension funds more voice in the affairs of the scheme's sponsor, are anticipated to take effect by no later than June 2018. See the entry in the Corporate section above.
- Master trusts: The new regulatory regime for master trusts, designed to give members of such schemes the same protections currently afforded to members of other types of work-based pension arrangements, is expected to come into force in October 2018. All existing and new master trusts (the definition of which still includes industry-wide occupational schemes for non-associated employers) will be subject to the new two-limb regime, which will focus on authorisation (to operate) and supervision (when operating). The Pensions Regulator will be given greater powers at the same time to enforce the new legislation and take action against those schemes which do not comply.

OTHER THINGS WE MIGHT SEE IN 2018 – DECISIONS OF THE COURTS

The UK pensions industry is also currently awaiting the outcome of various notable court cases which have been making their way through the system for some time. Whilst most are ostensibly based on the provisions of the particular scheme in question, the principles they lay down will be of industry-wide importance; and two fundamental topics – namely pension increases and equal treatment – feature prominently. The hearings in each of the following are expected to take place (or, where the hearing has already taken place, judgment is anticipated to be handed down) during the course of 2018:

- Equalisation/Guaranteed Minimum Pensions (**GMPs**) – *Lloyds Banking Group*: The trustees of the scheme, collectively with the Lloyds Banking Group and the Lloyds Trade Union, are seeking a ruling on whether there is an obligation to adjust non-GMP benefits (ie the excess over the member's Guaranteed Minimum Pension) to ensure that they are equal as between men and women and, if so, the permissible methods by which to do so. The hearing in the High Court is currently listed to take place during June 2018.
- Equalisation/main scheme benefits – *Safeway v Newton*: In hearing the appeal by Safeway against the High Court decision that its purported equalisation of benefits during the early 1990s was ineffective, the Court of Appeal referred to the Court of Justice of the European Union the question of whether the obligation to "level up" during the so-called Barber Window extended to requiring schemes, under which members earned merely defeasible rights (ie which could then be taken away retrospectively) to a lower Normal Retirement Age, to transform those rights into indefeasible ones for both males and female scheme members. No timeframe is yet known for the CJEU hearing.
- Equal treatment/part-timers – *O'Brien v Ministry of Justice*: The question of whether service completed by part-time employees prior to the coming into force of the Part-Time Workers Directive in 2000 should be taken into account when calculating their pension entitlements has been referred to the CJEU by the Supreme Court. Again, no timeframe is yet known for the CJEU hearing.
- Pension increases/RPI CPI – *Barnardo's v Buckinghamshire*: The appeal by Barnardo's against the Court of Appeal's decision from November 2016 that RPI had not "replaced" CPI for the purposes of its indexation rule, such that it was not possible for the trustees to switch to CPI-based increases to pensions-in-payment going forwards, is due to commence in the Supreme Court during mid-June 2018.
- Pension increases/RPI CPI – *British Telecom*: The hearing of BT's claim in the High Court, seeking clarification as to whether it could unilaterally switch from RPI to CPI for the purposes of inflation-proofing members' benefits under the BT Pension Scheme (and, if so, whether it must first consult with the trustees), took place during December 2017 and judgment is awaited.
- Pension increases/trustee discretion – *British Airways*: The decision of the High Court, that the trustees' unilateral decision to grant discretionary increases to members in excess of what was required by the scheme rules was not unlawful, is being appealed by the airline on the basis that the discretionary element was "benevolent" and therefore contrary to the purposes of the scheme. The hearing is currently due to take place by the end of April 2018.
- Pensions Regulator/Financial Support Directions – *Box Clever Group Pension Scheme*: Back in 2011 the Pensions Regulator issued Financial Support Directions against five ITV group companies in relation to the Box Clever Group Pension Scheme, the sponsoring employer of which had been a joint venture between Granada and Thorn EMI.

PENSIONS

The target companies' reference to the Upper Tribunal on the substantive question of whether it was reasonable for the Pensions Regulator to issue the FSDs has been hampered by appeals and cross-appeals for approximately six years, but is now due to be heard between late January and mid-February 2018.

- Pension fund management services/VAT – *Wheels CIF Trustees v HMRC*: The appellants' claim against HMRC, in which they seek recovery of VAT paid on the supply of fund management services (and which had been stayed pending the decision of the High Court in the *United Biscuits* case), is now likely to be substantively heard by the First-tier Tax Tribunal at some point during 2018.
- PPF compensation limits – *Grenville Holden Hampshire v Pension Protection Fund*: During July 2016 the Court of Appeal referred questions relating to Mr Hampshire's assertions, that the PPF compensation cap (which in his case would result in an approximate two-thirds' reduction to his benefits) is unlawful and puts the UK in breach of the EU Insolvency Directive, to the CJEU. Both the Advocate-General's Opinion, and the full Court's decision, are still awaited.

For further information please contact Alison Brown or Samantha Brown.

REAL ESTATE AND PLANNING

NEW RESTRICTIONS ON LETTING PROPERTIES WITH F AND G RATED ENERGY PERFORMANCE CERTIFICATES (EPCS) PURSUANT TO THE MINIMUM ENERGY EFFICIENCY STANDARDS (MEES) REGULATIONS

From 1 April 2018 landlords may not let, or continue to let, a property with an EPC rating of F or G (the two lowest ratings) until they have either carried out energy efficiency improvement works to raise the property to an E rating or higher, or have registered the property under one of the permitted exemptions on a centralised exemptions register. The register is currently operating on a pilot basis, but is due to become fully operational from 1 April 2018.

Landlords need to be auditing their portfolios now so that by the deadline for registration they have established what improvement works (if any) they wish to undertake or whether any of the exemptions might apply to their properties that do not hold the minimum EPC rating. A failure to address these requirements could result in financial loss for landlords, both in terms of a loss of income if they cannot let or continue to let a sub-standard property, and by way of the sanctions for non-compliance with the regulations, which could be as high as £150,000.

INTRODUCTION OF MANDATORY REQUIREMENTS TO THE RICS SERVICE CHARGE CODE

A new edition of the Royal Institute of Chartered Surveyors Service Charge Code is due to come into effect on 1 April 2018, and for the first time, it is proposed that the Code will contain eight new mandatory requirements with which owners and managers of properties which are governed by the Code will have to comply. Whilst it may well be the case that the majority of responsible landlords already instruct their managing agents to comply with these requirements, the codification of these principles will have a regulatory impact on a managing agent who fails to uphold these standards, and could have a reputational impact on the landlord and its running of the property. Landlords and managing agents would be well advised carefully to examine their service charge accounting procedures and ensure they will be fully compliant from 1 April 2018, and to keep the mandatory principles and guidance in mind when negotiating service charge provisions in new leases.

REGISTER OF BENEFICIAL OWNERSHIP OF UK PROPERTY HELD BY OVERSEAS ENTITIES

Last year the Government issued a consultation paper on the implementation of a register of beneficial ownership of UK property which is held by overseas companies and other entities. The register will cover freehold property, and leases which have a term of 21 years or more and are required to be registered. It is proposed that if an entity does not comply with the requirements of the register, it will be restricted from dealing with its property, and a restriction may be placed on the title to the property at HM Land Registry which prohibits the disposal of the property until the beneficial owner has complied with its registration requirements. There are various criminal sanctions proposed by the Government for failure to comply. In December 2017 the Government confirmed that it would publish draft legislation on the creation of a register of the beneficial ownership of overseas companies and other entities that own property in the UK or participate in Government contracts. Although no specific date has yet been given for the implementation of the proposed register, this is a topic that will require careful monitoring by overseas entities who are interested in investing in UK property.

PLANNING POLICY AND THE HOUSING CRISIS

The National Planning Policy Framework (**NPPF**) is under review, with proposed changes to be published in spring 2018. Landowners and property developers need to be aware of the NPPF because it must be taken into account by local planning authorities when they make decisions on whether to grant planning permission and when setting local development plan policies, for example allocating land for development. The changes to the NPPF are expected to take into account responses to the Government's recent consultation ("Planning for the right homes in the right places"), which set out proposals to make the planning system more transparent and efficient and to increase housing provision. Other planning changes expected on a national level in 2018 include the publication of a Green Paper on reforms to Social Housing, and numerous measures that were outlined in the Chancellor's Autumn Budget 2017 relating to increasing housing and improving infrastructure.

In London, the Mayor Sadiq Khan's new draft version of the London Plan (the spatial development strategy for London) was published on 29 November 2017. It will be subject to an examination in public in autumn 2018, before being formally adopted and replacing the current London Plan in autumn 2019. The new London Plan will guide local authorities when setting their local development plans and will be taken into account by the Mayor and local planning authorities when considering applications for planning permission in the Capital.

After local elections on 3 May 2018 we expect to see a change in local politics in London (and elsewhere in England), which is likely to affect policy-making and planning decisions.

COMMUNITY INFRASTRUCTURE LEVY (CIL)

The Government is due to review the regulations governing CIL charges, which are paid by developers and landowners on new property development. A CIL consultation was announced in the Autumn Budget 2017 but has not been published at the time of writing. Amendments to the CIL regulations are expected to follow the consultation. Separately, brief draft CIL amendment regulations were laid before Parliament in December 2017, amending one regulation to clarify indexation calculations for amended planning permissions, and these regulations are expected to come into force imminently.

REAL ESTATE AND PLANNING

In London, the Mayor's updated draft CIL charging schedule for London (**MCIL2**) is being consulted on until 4 February 2018 and will be subject to an examination in public in 2018 (possibly alongside the examination of the Mayor's draft London Plan). MCIL2 is expected to come into force in April 2019 in London in order to fund Crossrail 2. It will increase the charges a developer or landowner is liable to pay compared to the Mayoral CIL currently in force, which was adopted in April 2012.

INFRASTRUCTURE

The National Infrastructure Commission will publish its National Infrastructure Assessment in 2018, including recommendations for how the identified infrastructure needs and priorities for the UK up to 2050 should be addressed. The Government will be required to respond formally to the recommendations.

The new Crossrail train line is due to open officially as the Elizabeth Line in December 2018, initially running on three routes: from Paddington in London to Abbey Wood, from Paddington to Heathrow and from London Liverpool Street to Shenfield. A full service running from Reading and Heathrow in the west through to Shenfield and Abbey Wood in the east will not begin until December 2019. Plans for Crossrail 2 are expected to progress during 2018.

RELIEF FROM FORFEITURE OF A LICENCE

The Court of Appeal will hear an appeal against the High Court decision in *General Motors UK Limited v The Manchester Ship Canal Company Limited* [2016] EWHC 290 (Ch). This is the first reported case in which relief from forfeiture of a licence (rather than a lease) has been granted. To date, relief from forfeiture has only been granted in cases where there is a proprietary or possessory interest in land. In this case, a 1962 licence to discharge surface water into a canal was granted, in perpetuity, in return for an annual fee. In 2013, the fee went unpaid despite reminders, and the licensor terminated the licence in accordance with its terms. The licensee accepted that the licence had been validly terminated and applied for relief from forfeiture. The High Court decided that in this case, the licensee's rights of drainage into the canal under the licence arrangement were not merely contractual rights, and came "about as close to a possessory right as it is possible to imagine". This meant that the Court had jurisdiction to consider the claim for relief from forfeiture, and did award relief, identifying that the licensee's non-payment of the fee had been careless but not deliberate; that the licensor hadn't actually prevented the licensee from draining into the canal in the meantime; the licensee's delay of one year in applying for relief had not caused any unfairness, and refusing relief would have given the licensor a windfall benefit in that the licensor could demand a far higher licence fee under a new license arrangement.

The case is ground-breaking as pushes the boundaries on the equitable law of relief from forfeiture, and raises interesting questions about whether other types of licences might attract the same status.

For further information please contact Donald Rowlands (Real Estate) or Matthew White (Planning).

TAX

INDEXATION ALLOWANCE

Indexation allowance on corporate capital gains will be frozen for disposals on and after 1 January 2018. Indexation allowance for disposals after this date will be based on the Retail Price Index for December 2017, meaning there will be no relief for inflation accruing after this date when calculating chargeable gains made by companies.

VENTURE CAPITAL SCHEMES

A number of changes to the tax framework for venture capital schemes (including the Enterprise Investment Scheme (**EIS**), Seed Enterprise Investment Scheme and Venture Capital Trusts (**VCTs**)) were announced in Autumn Budget 2017 and will be implemented during 2018.

The Government will legislate to ensure that such schemes target growth investments, rather than arrangements intended to shelter the investor's capital. Relief under the schemes will be focused on companies where there is a real risk to the capital being invested, and will exclude companies and arrangements intended to provide "capital preservation". This change will have effect for investments made on or after Royal Assent to Finance Bill 2018 (likely to be in advance of the start of the new tax year in April 2018).

Additionally, changes will be introduced with effect from April 2018 which are designed to improve access to growth investment for knowledge intensive companies, ie companies with a high research and development spend, which create intellectual property and/or employ a certain proportion of skilled employees. Key changes will be a doubling of the annual limit for individuals investing in knowledge intensive companies under the EIS from £1 million to £2 million, and an increase in the annual EIS and VCT limit on tax advantaged investments in knowledge intensive companies from £5 million to £10 million.

SOFT DRINKS INDUSTRY LEVY

The new soft drinks industry levy will be effective from 1 April 2018. It will apply to the producers and importers of soft drinks containing added sugar at two rates: 18p per litre if the drink has 5g of sugar or more per 100ml, and 24p per litre if the drink has 8g of sugar or more per 100ml.

The stated aim of the levy is to contribute to the Government's plans to reduce childhood obesity by encouraging producers of soft drinks to reformulate their products to reduce sugar content.

TAXATION OF EMPLOYMENT TERMINATION PAYMENTS

A number of changes to "clarify and tighten" the taxation of employment termination payments will come into effect from April 2018. These changes include treating all payments in lieu of notice as earnings (and therefore subject to income tax and Class 1 NICs); subjecting all termination payments above the £30,000 income tax exemption threshold to Class 1 employer NICs, and the abolition of foreign service relief for individuals who are UK resident in the tax year in which their employment is terminated.

PARTNERSHIP TAXATION

A number of changes (in the main, clarificatory) to the taxation of partnerships will take effect in April 2018. The changes include clarification of the rules and introduction of new reporting requirements for partnerships with partners that are themselves partnerships; clarification that, where a partnership has a partner acting in the capacity of a bare trustee (normally on behalf of other partners), the beneficiaries are to be treated as the partners for tax purposes, and confirmation that the allocation of partnership profit shown on the partnership return applies for tax purposes for all of the partners.

TAX FREE DIVIDEND ALLOWANCE

With effect from 6 April 2018, the tax-free dividend allowance of £5,000 will be reduced to £2,000. Dividend income in excess of this allowance is, and will continue to be, taxed at 7.5% (basic rate taxpayers), 32.5% (higher rate taxpayers) and 38.1% (additional rate taxpayers).

REQUIREMENT TO CORRECT PAST OFFSHORE NON-COMPLIANCE

The Government has introduced an obligation for taxpayers to notify HMRC of any offshore tax non-compliance which took place before 6 April 2017 (known as the "requirement to correct"). The regime requires taxpayers with undeclared offshore tax liabilities, relating to income tax, capital gains tax or inheritance tax, to disclose them to HMRC by 30 September 2018, or suffer additional penalties. This deadline coincides with the start date for the Common Reporting Standard, when the tax authorities in more than one hundred countries will begin exchanging data on financial accounts.

OIL AND GAS: TRANSFERABLE TAX HISTORY

Transferable tax history for oil and gas producers will be introduced for deals completing on or after 1 November 2018. This will allow companies selling North Sea oil and gas fields to transfer some of their tax payment history to the buyers of those fields, in turn allowing buyers to be able to set the costs of decommissioning the fields at the end of their lives against the transferred tax history, with the aim of having sufficient tax capacity at the time of decommissioning to be able to monetise the full value of their decommissioning relief. The inability to achieve this in the past, set against the backdrop of falling oil prices, has impacted adversely on acquisition and disposal activity in the UK Continental Shelf, and by implication, on development and production. See the Energy and Environment section above.

TAX

SPRING STATEMENT AND AUTUMN BUDGET 2018

From 2018, a new Budget timetable will be implemented. There will be a single major fiscal event each year, and this will be the Autumn Budget, likely to be held around November. This is the Government's opportunity to set out its future tax, spending and borrowing plans. From spring 2018, an annual Spring Statement will give the Government a chance to respond to an updated economic and fiscal forecast from the Office of Budget Responsibility, but it is not the intention that the Chancellor will make significant tax or spending announcements at the Spring Statement. The date for the 2018 Spring Statement has been announced as 13 March 2018.

CONSULTATIONS EXPECTED

A number of announcements were made at Autumn Budget 2017 in respect of which the Government will publish consultation documents during 2018. These include how to make the taxation of trusts simpler, fairer and more transparent; the design of the VAT registration and deregistration thresholds; possible reform of the intangible fixed asset regime; extending the time limits for HMRC to investigate offshore structures; and off-payroll working in the private sector.

For further information please contact Isaac Zailer or Howard Murray.

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS (TMT) AND DATA PROTECTION

THE EU GENERAL DATA PROTECTION REGULATION TO APPLY

The EU General Data Protection Regulation (**GDPR**) sets out a comprehensive reform of the existing EU data protection regime. The reform is designed to give citizens more control and protection over their personal data. The GDPR entered into force on 25 May 2016 with a two year implementation period before it comes into effect on 25 May 2018.

In the meantime, there has been a variety of guidance at the European level through the Article 29 Working Party (**WP29**) (which reflects the consolidated view of national supervisory data protection authorities in each Member State) and at the national level through the UK Information Commissioner's Office (**ICO**). Most recently, in December 2017 the WP29 issued a consultation on consent and transparency. This follows guidance published in October 2017 on a range of areas including: (i) personal data breach notification requirements; (ii) automated individual decision-making and profiling; and (iii) the application and setting of administrative fines.

The ICO has issued a range of guidelines to assist organisations with compliance as well, including a constantly evolving "Overview of GDPR" which is intended to form the ICO's guide to the GDPR. More recently, the ICO has also issued guidance on: (i) contracts and liabilities between controllers and data processors; and (ii) consent, plus a discussion document on profiling. Subsequent guidance is expected from both authorities in the run-up to the May deadline and beyond. In particular, in early 2018, the WP29 is expected to adopt guidelines on certification and guidance on legitimate interests is expected from the ICO.

In parallel, the UK Government has confirmed its intention for GDPR standards to continue to apply to the UK after Brexit; these will be implemented through a combination of the European Union (Withdrawal) Bill and the new draft Data Protection Bill (**the Bill**). The Bill first passed the Committee Stage in the House of Lords on 22 November 2017. It will next be considered in January 2018. Once finalised it will repeal the current Data Protection Act 1998. The Bill implements various national derogations permitted by the GDPR and also extends the GDPR standards to certain areas of data processing outside EU competence. The Bill provides for the continuation of the Information Commissioner's role and replicates certain Data Protection Act exemptions and provisions.

For further detail of the GDPR and steps to enable organisations to comply with it please refer to our related briefings here and here.

To access the draft Bill please click here and, to access the explanatory notes please click here.

NEW EU CONTENT PORTABILITY REGIME TO APPLY

The new Regulation on cross-border content portability was first published in the EU Official Journal on 30 June 2017 with a subsequent amendment to the Regulation published on 28 July 2017 changing the date of its application. Under the Regulation EU citizens will be able to make full use of their paid online content services (across film, sport, television, music, e-books and gaming) wherever they are in the EU. This follows an informal agreement reached in respect of the Regulation on 7 February 2017 between the European Parliament, the Member States and the European Commission, subsequent formal approval by the European Parliament on 18 May 2017 and the Council of the EU adopting the new Regulation on 8 June 2017.

Service providers will have until 1 April 2018 to comply with the rules. In particular, by 2 June 2018, the provider of a paid online content service will have to verify the Member State of residence of those subscribers who concluded contracts for the provision of online content service before that date. These rules form part of a wider initiative introduced by the European Commission in 2015 aimed at breaking down the barriers to the so-called Digital Single Market where individuals and businesses can seamlessly access and exercise online activities irrespective of their nationality or place of residence.

For further details please refer to our recent article here.

The Regulation of the European Parliament and of the Council on cross-border portability of online content services in the internal market can be accessed here.

EPRIVACY REGULATION TO APPLY

In April 2016, as part of its Digital Single Market Strategy, the European Commission launched a consultation on the Privacy and Electronic Communications Directive (**ePrivacy Directive**) which deals with the processing of personal data and protection of privacy in the electronic communications sector, covering issues such as email marketing.

On 10 January 2017, the Commission then published its new legislative proposal, which took the form of a draft regulation (**ePrivacy Regulation**). The proposal intends to: (i) replace the existing ePrivacy Directive; (ii) bring the e-privacy framework up to date with technological and market reality (including by extending the scope to include both over-the-top providers as well as traditional telephony providers); and (iii) align with the incoming GDPR.

The ePrivacy Regulation is currently envisaged to apply on 25 May 2018, to align with the GDPR. This is a challenging timeframe given the need for approval from the European Parliament and the Council of the EU, the number and range of stakeholder interests at play and the many comments from delegations since the text was first published. The Council published its first redraft of the proposal with

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS (TMT) AND DATA PROTECTION

amendments on 8 September 2017 and there was a vote on the revised text in a plenary session in October 2017. As subsequent discussions are expected early in 2018, it remains to be seen whether the ePrivacy Regulation will come into force at the same time as the GDPR.

The ePrivacy Regulation can be found here.

For the firm's full ePrivacy article please click here.

CYBER SECURITY DIRECTIVE TO BE IMPLEMENTED INTO NATIONAL LAW

The EU Network and Information Security Directive (known as the Cyber Security Directive) was published in the Official Journal in July 2016. The Directive requires certain "operators of essential services" to adopt risk management practices and report major security incidents on their core services to the appropriate national authority.

Member States have until 9 May 2018 to adopt appropriate national legislation to implement the Directive, and such legislation will apply from 10 May 2018. By 9 November 2018, for each sector and subsector referred to in the Directive, Member States are also required to identify the "operators of essential services" with an establishment in their territory.

The UK Department for Digital, Culture, Media & Sport (**DCMS**) issued a public consultation on implementing the Cyber Security Directive in the UK on 8 August 2017. The Consultation sets out the UK Government's planned approach for implementing the Cyber Security Directive, along with a series of questions on a range of detailed policy issues relating to the implementation. It seeks to obtain views from industry, regulators and other interested parties on the proposed plans. The consultation closed on 30 September 2017 and a formal response is expected imminently.

For further information, please see our bulletins, available here and here.

The DCMS Consultation document can be found here.

The Cyber Security Directive can be found here.

REFORM OF EU TELECOMMUNICATIONS FRAMEWORK TO BE APPROVED

In May 2015, as part of its Digital Single Market Strategy, the European Commission published proposals to reform the EU telecommunications regulatory framework. Following a series of consultations in 2015, the Commission published further proposals to reform the EU legislation in September 2016, with the aim of improving internet connectivity across the EU. The proposals include: a directive setting out a European Electronic Communications Code (**the Code**), to replace the existing four key telecommunication directives; a regulation to increase the powers designated to the Body of European Regulators for Electronic Communications; and an action plan for the development of 5G in Europe.

The Code sets out EU-wide common rules and objectives on how the telecoms industry should be regulated and it applies to providers of networks and/or services. In particular, it brings the rules up to date with technological developments since the current regulatory framework was first established (including more prevalent internet use and less traditional telephony) and safeguards consumer choice.

The European Council most recently considered the Code in October 2017 and mandated the Estonian Presidency to commence trilogue negotiations on the proposal, the first of which took place in October 2017. The negotiations are likely to continue during the course of 2018. Whilst timing is unclear is it seems unlikely that the regulatory aspects of the reform will be finalised and approved earlier than the end of 2018.

The European Electronic Communications Code can be found here.

4G AND 5G GHZ SPECTRUM AUCTION

The forthcoming 2.3 GHz and 3.4 GHz spectrum auction (**the Auction**) was originally expected to take place in early 2016, but was delayed due to market uncertainty. In July 2017, Ofcom issued its long awaited statement on the competition issues and auction regulations for the award of the 2.3 and 3.4 GHz spectrum bands.

In light of concerns that the Auction could give rise to a very asymmetric distribution of spectrum holdings between UK mobile network operators (**MNOs**), Ofcom decided to impose two separate caps on the amount of spectrum a single MNO may hold.

Taken together, these two caps: (i) restrict BT/EE from bidding in the 2.3 GHz spectrum auction; and (ii) restrict the amount of spectrum that can be awarded to BT/EE in the 3.4 GHz band and Vodafone across both of the spectrum auctions. Both Three and BT/EE challenged the caps set out in the statement through judicial review, however, the challenges were rejected by the High Court on 20 December 2017 and Three is currently seeking permission to appeal. Given the delays to date and the pending appeal, the exact timing of the Auction remains uncertain but Ofcom is keen for it to take place as early as possible in 2018 and Ofcom's proposed Annual Plan for 2018/2019 also confirms that the Auction remains one of its priorities during that period.

For the firm's full article on the Auction, please click here.

Ofcom's statement on the Auction can be found here.

For further information please contact Nick Pantlin or Claire Wiseman.

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