TRAVERS SMITH

Insights for In-house Counsel

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Insights for In-house Counsel

Our round-up of recent developments in law and practice for in-house counsel. Highlights include:

Brexit

Our Business-friendly Guide to the Brexit deal

Brexit and financial services

What happens next for financial services following the conclusion of the Brexit deal?

COVID-19

The latest on the Government's COVID-19 related financial support measures for business

Contract law update

Worked examples in contracts, missed contractual deadlines and post-Brexit issues

Issues for employers

The new post-Brexit immigration system, National Insurance post-Brexit and a reminder about the change to the Off-payroll rules

Competition and merger control

A summary of where we are post-Brexit in relation to merger control and competition law

National Security and Investment Bill

Commentary on the Government's proposed strengthening of its powers to scrutinise transactions on grounds of national security

Data and cyber-security fines

The latest on the *Schrems* case, cyber-security fines and the Government's new data strategy

DAC 6

Update on the new tax reporting requirements

Real estate

The latest on landlord and tenant negotiations and tax changes affecting the real estate sector

Pensions

Imminent Royal Assent for the Pensions Bill, addressing climate risk and dealing with the impact of COVID

Corporate reporting

Climate-related financial disclosures and corporate governance and reporting during the COVID crisis

Sustainable business

How can we support your business in meeting sustainable business objectives

Anti-bribery measures

News of our recent ABC newsletter

Contents

Brexit – p.3–4

Financial services – p.5

Financial support for businesses – p.6

Contracts – p.7–8

Dispute resolution – p.9

Competition law – p.10

Data protection & cyber-security – p.11–12

Intellectual property/technology – p.13

Recent issues for UK employers – p.14–15

Corporate governance & reporting – p.16–17

Tax – p.18

Real estate – p.19

Finance – p.20

Pensions – p.21

Sustainable business – p.22

Anti-bribery measures – p.23

Brexit

THE UK/EU BREXIT DEAL

The conclusion of the Trade and Cooperation Agreement (**"TCA"**) between the UK and EU on Christmas Eve was welcome news for us and our clients. The last-minute nature of the deal, however, means there was no time for businesses here in the UK or for their EU trading partners to prepare for its impact. Whilst there are some grace periods for implementation in the Agreement, notably on data protection and compliance with the new rules of origin requirements, the TCA makes few other concessions to need for time to adapt to the new framework.

We are already seeing some disruption, particularly in sectors reliant on goods trade with the EU (for more on this, please refer to **this briefing**).

And whilst the avoidance of tariffs and quotas under the TCA is a lifeline for many businesses, there will be non-tariff barriers for UK/EU trade which will in effect be little different to those which would have applied in a no-deal scenario.

A BUSINESS-FRIENDLY GUIDE TO THE TCA

We have now updated all of our guidance on Brexit-related topics to reflect our assessment of the impact of the TCA. Our full suite of guidance, now accessible via our **Business-friendly Guide to the TCA** on our **Brexit Hub**, covers the following topics:

- Implementation/grace periods
- Level playing field and disputes
- Financial services
- Investment and M&A
- Goods and non-financial services
- Data and tech sector issues
- Employment and immigration
- Tax and social security
- Intellectual property
- State aid and public procurement
- Consumer protection
- Environment and climate change
- Energy and transport

Importantly, our guide also identifies issues which are not covered by the TCA and where uncertainty remains.

Looking at the "big picture", our initial assessment of the deal is that it will allow the UK to diverge from EU regulation (in line with the Government's stated aim), although this approach will be easier to pursue as regards the technical detail and practical implementation of legislation, rather than the broad underlying principles. As such, it could enable the UK to seek competitive regulatory advantage by pursuing a series of "marginal gains" across key sectors – but a more radical deregulatory approach would risk upsetting the balance of the TCA (to which the EU could respond in a number of ways, including withdrawing benefits under the agreement). With one or two exceptions, the Government has yet to set out where it proposes to diverge from the EU and there is a lack of detail about its overall post-Brexit strategy. See our earlier briefing **here**, which also provides an overview of the TCA.

We are also continuing to reflect on how Brexit may reshape certain aspects of the UK economy and what new opportunities it may present for business. In 2020, for example, we looked at whether Brexit may make it more attractive to structure investments in certain EU member states through the UK in order to take advantage of **Bilateral Investment Treaties**. We also looked at the impact of Brexit and COVID-19 on **UK ports, distribution and manufacturing**, including the UK Government's proposal for a network of freeports.

TRADE AGREEMENTS WITH OTHER TERRITORIES

The UK has now also concluded "continuity" **free trade agreements** with a number of important trading partners elsewhere in the world, including Israel, Japan, Norway, Switzerland, Liechstenstein, Turkey, Singapore, South Korea, South Africa and others, some of which, notably the deal with Turkey, were unlocked by the signing of the agreement with the EU.

This is a significant achievement on the part of UK trade negotiators, given the relatively short timeframe and the large number of parallel negotiations. However, these agreements largely preserve the benefits of EU-negotiated trade agreements, which the UK would otherwise have lost as a result of Brexit. Negotiations continue with other major trading partners including the US, Australia and New Zealand, and the UK is also considering joining the CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership).

Brexit

Whilst some of these arrangements, if successfully concluded, could confer benefits on the UK (as compared with EU membership), it is likely to be some years before a positive impact on the UK economy would be felt. Meanwhile, as noted above, trade barriers with the EU are set to increase, which is likely to have a negative economic impact across a range of sectors (at least in the short term whilst businesses in the UK adapt to new post-Brexit trading conditions).

IMPACT ON FINANCIAL SERVICES

As expected, the TCA did little to address the provision of financial services from the UK to the EU or from the EU to the UK. UK firms can no longer use the EU single market passport to supply services into the EU. EU firms may not use that passport to supply services into the UK. Many EU firms dealing with UK institutional counterparties and investors are now reliant on the UK's overseas persons exclusion regime (which is under review).

Work continues on the "equivalence" assessment processes. The European Commission's MiFID/MIFIR equivalence assessment process, for example, could result in the introduction of something analogous to the passport if the European Commission assesses the UK's regulatory regime as "equivalent". In the joint declaration accompanying the TCA, the UK and the EU said that they will agree, by March 2021, a Memorandum of Understanding between them establishing a framework for regulatory cooperation on financial services. They also agreed that they will discuss "how to move forward" on both sides with equivalence determinations "without prejudice to the unilateral and autonomous decision-making process of either side". Recent pronouncements from the EU suggest that it will not be rushed as regards its autonomous process and so mutual equivalency assessments may be some way off.

Click **here** to see our New Year briefing on financial services regulation in 2021 which refers to this and other aspects of the post-Brexit landscape.

IMPACT ON USERS OF DERIVATIVES

For UK and EU users of derivatives, the end of the Brexit transition period has meant that UK (and some EU and EEA) users of derivatives find themselves in a new regulatory environment. The UK, and its domestic regulators, are now responsible for administering UK EMIR (the UK onshored version of the European Market Infrastructure Regulation ("**EMIR**")). While this is primarily of relevance to UK users of derivatives, EU and EEA users of derivatives with cross-border arrangements (such as European funds that trade with UK banks) will also need to understand the changes.

For example, there are some differences in the way in which derivatives need to be reported, certain deadlines for notifications to regulators, and some areas of regulatory divergence (which have, in certain circumstances, been mitigated by time-limited exemptions).

We have produced a useful **checklist** designed to act as a reference point for UK, and affected EU and EEA, users of derivatives to assist them in ensuring that their arrangements are in order.

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Financial services

As mentioned, the end of the EU/UK Brexit transition period in December 2020 meant that UK firms are no longer able to use the EU single market passport to supply services into the UK. By the same token, EU firms cannot use that passport to supply services into the UK and must now rely on the UK's overseas person exclusion regime.

Time will tell as to what extent the current, broad convergence between the regulatory regimes in the EU and the UK will result in mutual equivalency assessments and the introduction of something analogous to the lost passport.

However, some degree of divergence is inevitable and indications of what the UK's post-Brexit financial services landscape may look like have already started to emerge. Beyond those measures that are expressly driven by Brexit, therefore, firms will have to grapple with a growing number of domestically-inspired UK measures while still having to have regard to relevant EU measures which, despite not being directly applicable, are likely to continue to have indirect impact on the UK regime. If you are interested in the current status of UK law and regulation in this sector – and how it may develop – please see our detailed **New Year briefing** on financial services regulation 2021.

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UK Government COVID-19-related financial support measures for business

COVID-19 JOB RETENTION MEASURES

The Coronavirus Job Retention Scheme (**"CJRS"**), first introduced in March 2020, has been extended several times and will now continue until 30 April 2021.

Under the CJRS, employers can place workers on furlough (paid leave) where their work has been affected by the pandemic or where they need to reduce their hours for childcare reasons while schools are closed. Furlough can be fulltime (i.e. the employee does no work) or part-time (i.e. the employee works reduced hours). While on furlough, the employee must receive at least 80% of their normal wages for any hours not worked up to a cap of £2,500 per month (prorated for any time worked during furlough). The Government subsidy has changed over time but it currently covers the required 80% of wages for unworked hours up to the cap. The CJRS was due to be reviewed in January 2021 with a view to reducing the subsidy but the Government has confirmed that the scheme will continue in its current form until April 2021.

The Government has hinted that, when the CJRS closes, a more flexible, less generous job support scheme could be put in its place and/or there might be a further job retention incentive, such as a one-time bonus depending on the number of staff retained. However, the detail of such measures will depend on the state of the pandemic and Government restrictions in April 2021.

Read more about the CJRS **here**.

COVID-19 GOVERNMENT-BACKED FINANCE PACKAGES

The Government has extended the operation of its COVID-related loan schemes (the BBLS, the CBILS and the CLBILS) on a number of occasions, and they are currently expected to operate until 31 March 2021. A new guarantee scheme is expected to be launched soon.

As a reminder, details of these loan schemes are set out below:

- Bounce Back Loan Scheme (**BBLS**) – loans of up to £50,000 for businesses of any turnover;
- Coronavirus Business Interruption Loan Scheme (**CBILS**) – loans of up to £5 million for businesses with an annual turnover of up to £45 million; or
- Coronavirus Large Business Interruption Loan Scheme (**CLBILS**) – loans of up to £200 million for larger businesses.

Existing BBLS borrowers now benefit from a "Pay as You Grow" flexible repayment system, with the potential for extending the length of a BBLS loan from six years to ten, requesting interest-only periods of up to six months and/or payment holidays. CBILS accredited lenders can extend the length of loans from a maximum of six years to ten years to help businesses to repay the loan.

For the latest on all of the Government-backed finance packages, see our full guidance note **here**.

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Contracts

BREXIT: CONTRACTUAL POINTS TO WATCH OUT FOR

We have produced a series of briefings on the implications of Brexit for contracts. For a general overview, see **this article**. Other issues to consider include:

- **Incoterms:** EU businesses purchasing or selling goods to the UK should review the Incoterms they use to ensure that they will remain appropriate after the UK has left the EU Single Market and Customs Union. Click **here** for more detail.
- **Force majeure and material adverse change clauses:** even with a deal, some level of disruption to UK-EU goods and services contracts is widely expected and may well give rise to contractual disputes. In many cases, force majeure and material adverse change clauses are likely to be significant. Click **here** for more detail.
- **Goods shortages:** the introduction of new border red tape from 1 January 2021 is widely expected to cause material disruption to EU-UK goods trade. **This article** discusses how contracts can help mitigate this risk.
- **References to "EU", "EEA" etc:** many existing contracts will refer to the EU as if it includes the UK. **This article** discusses how UK courts are likely to interpret these contracts (assuming they have not been amended to reflect the post-Brexit situation).

MISSED DEADLINES FOR THE EXERCISE OF CONTRACTUAL RIGHTS

Many contracts require contractual rights to be exercised within a particular timeframe. What if you miss the deadline, but there was some justification for your delay? Should you be allowed extra time? The UK Court of Appeal recently looked at these issues in the case of *Joseph v Deloitte*. Although Mr Joseph didn't manage to persuade the Court that he should have had longer to exercise his rights, the arguments he used are likely to be relevant to other cases involving missed deadlines and very slightly different facts could have led to a wholly different outcome.

Click **here** to read our briefing on this case, which discusses issues including implied terms and promissory estoppel.

Contracts

WORKED EXAMPLES IN CONTRACTS

In *Altera Voyageur v Premier Oil*, the High Court considered how much weight should be placed on worked examples when interpreting contracts. Premier Oil hired an oil production and storage vessel from Altera. A dispute arose over how much was due in hire fees. Altera argued that the amount should be calculated in line with worked examples in the schedules. Premier argued that the narrative wording in the main agreement took precedence and that the worked examples could not have reflected the parties' intentions, as they contained extra steps going beyond the narrative wording.

The court concluded that the worked examples should be followed because previous cases had concluded that "*in the context of lengthy contracts [...] illustrations or examples [may] deserve particular attention as something to which the parties particularly turned their minds*". It also noted that the narrative wording in the main agreement did not go into the same level of detail as the examples and left some matters unclear; this suggested that the worked examples were intended to expand upon the narrative wording in order to achieve greater certainty. The parties had agreed not one but two worked examples, both of which featured extra steps not included in the narrative wording. The judge appears to have thought it unlikely that both examples would contain the same mistake. Lastly, the sum that resulted may have been commercially unreasonable, but it was not manifestly absurd.

Comment: Worked examples are quite common in longer contracts and our view is that they are generally well worth including as an aid to interpretation – but to avoid disputes such as this one, it is important to ensure that the example matches up with the operative wording of the main agreement. It also critical that during negotiations, adequate attention is paid to any worked examples to ensure that they genuinely reflect the parties' intentions.

Click **here** to watch our video on this case and worked examples more generally.

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Dispute resolution

BREXIT: DISPUTE RESOLUTION MECHANISMS IN CONTRACTS

The UK-EU TCA does not address either allocation of jurisdiction between English and EU courts, or the recognition and enforcement of the judgments of those courts. The previous regime governing these areas, the Recast Brussels Regulation, has therefore now fallen away with no comprehensive replacement in place. The UK has applied to join the Lugano Convention (which would provide a near like-for-like replacement for the Recast Brussels Regulation) but has not yet received the permission it requires from the EU to do so.

Pending the outcome of that application, the English courts will therefore apply have to apply a combination of the Hague Convention (which is far less comprehensive than the Lugano Convention) and common law rules to determine whether they have jurisdiction to hear disputes with an EU element, and to determine whether judgments from EU courts should be recognised and enforced. EU courts will also apply a combination of the Hague Convention and their own local rules to determine whether they have jurisdiction to hear a dispute, and whether English court judgments should be recognised and enforced.

To mitigate against the uncertainty brought on by these changes, parties to transactions which involve EU-based parties or assets should consider carefully which governing law and dispute resolution mechanism to include in contracts. For further information on the impact of the TCA on this topic please see our briefing **here**.

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Competition law

BREXIT – UK AND EU MERGER CONTROL AND COMPETITION LAW POST-BREXIT

The end of the Brexit transition period on 31 December 2020 means that:

- as regards merger control, the UK will cease to be part of the "one stop shop" under the EU Merger Regulation – which means that a separate filing may be required in the UK, depending on whether the UK jurisdictional thresholds are met. For more detail, see our briefing **here**;
- as regards competition law, the UK will cease to be subject to Articles 101 and 102 of the Treaty on the Functioning of the European Union, which will no longer apply in the UK. It will retain its own national competition law, which is closely modelled on EU competition law, although it will be able to diverge from the EU approach in future. Our briefing considers the implications of this and also discusses the transitional provisions for European Commission competition investigations which were ongoing as at 31 December 2020: click **here**.

Whilst the UK-EU TCA contains provisions on both competition law and merger control, our initial view is that we do not expect these to have a particularly significant impact in practice.

Brexit: UK and EU merger control from 2021 | Travers Smith

Brexit: UK and EU competition law from 2021 | Travers Smith

NATIONAL SECURITY AND INVESTMENT BILL

The Government has recently published draft legislation designed to strengthen its powers to scrutinise transactions on grounds of national security. This will result in a significant widening of the sectors subject to national security scrutiny beyond defence and certain advanced technology businesses to encompass critical infrastructure and a broader range of advanced technology (e.g. nano-technology and discovery and development of new materials).

It had been expected that notification would be voluntary for all of these sectors, in line with the UK's approach to merger control generally, where there is no legal obligation to notify (and it is open to parties to decide to take the risk of not notifying and proceed with completion of the transaction). However, the UK has decided to make a subset of the sectors potentially covered by the new regime subject to mandatory notification. Failure to notify will render the transaction void and civil and criminal penalties may be imposed. This will mean that transactions which may fall within the mandatory regime will have to be structured so that completion cannot take place until clearance has been obtained. The Government is anticipating 1,000–1,830 notifications to be made each year (this is a very significant increase on its previous estimate of 200).

The Government has also indicated that it reserves the right to apply the provisions of the NSI Bill retrospectively to some transactions (which is admittedly unusual). However, whilst it is important to be aware of this, our view is that this power is likely to be exercised cautiously. Click **here** for our briefing.

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Data protection and cyber-security

AN UPDATE ON *SCHREMS II/FACEBOOK IRELAND*: IMPLICATIONS FOR PERSONAL DATA TRANSFERS OUT OF THE EEA

The implications of the CJEU judgment in *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* were keenly felt in the UK, both in terms of the invalidation by the CJEU of the EU-US Privacy Shield as a safeguarding mechanism for transferring personal data from the EEA to the US, and due to the CJEU's comments on the use of standard contractual clauses and the transfer risk assessment that must now be carried out when relying on such clauses to export personal data, essentially to ensure that the protection granted to personal data in the EEA, travels with the data wherever it goes.

The CJEU's decision is explained in more detail in our **full briefing**. The judgment has now been supplemented by the eagerly-awaited draft guidance of the European Data Protection Board ("**the EDPB**") which sets out in further detail what is required in terms of an assessment of the local data protection and surveillance laws of the destination country by both the data exporter and the importer, together with the supplementary technical, contractual and organisational measures which may be taken where the parties conclude that these are required in order to maintain a standard of protection for the exported data equivalent to the EEA standard. Whilst the guidance is detailed, it is fair to say that the options provided for dealing with such situations are not entirely commercial or practical.

The European Commission has also, following the *Schrems II* judgment, released a set of draft, updated standard contractual clauses, again drafted with both the *Schrems II* judgment and the EDPB guidance in mind, expected to be formally approved in the first quarter of 2021; businesses will then have a year to re-paper their current data transfer agreements to ensure that they incorporate the new standard contractual clauses.

Comment: The upshot is a considerable increase in the compliance burden for those exporting personal data from the EEA (and their importing counterparts), not least, controllers who export personal data to the UK, which will have to take these measures into account if the EU does not grant an adequacy decision in favour of the UK within the first six months of this year. In the meantime, and to allow for additional time for the EU to consider whether or not to grant an adequacy decision, the TCA has addressed the lacuna which has been created since the end of the transition period, by including a grace period until the end of April initially (with possible extension to the end of June), during which EU based controllers are permitted to continue to transfer personal data to the UK without the need to comply with GDPR Chpt V requirements on personal data transfers to third countries.

For further details about the EDPB draft guidance and the draft standard contractual clauses, please see our **briefing summary** of a recent webinar which we held in conjunction with TechUK on International Data Flows.

Data protection and cyber-security

CYBER-SECURITY FINES

In Autumn 2020, the ICO announced its final decisions on the level of penalty to be levied against British Airways and Marriott in respect of personal data breaches which came to light soon after the implementation of GDPR in May 2018. The penalties awarded serve as a timely reminder of the importance of having appropriate IT security measures in place to keep data secure.

The fines were set at £20 million and £18.4 million respectively. While both fines were reduced from the original £183 million and £99 million "intention to fine" notices announced by the ICO last summer, they are nevertheless the largest fines levied by the ICO to date and set an important precedent now that GDPR has provided the ICO with increased powers.

The data breaches in both cases were a result in part, of a failure by both BA and Marriott to put in place what were regarded as basic, common place IT and organisational security measures, which in turn demonstrated a failure to implement appropriate technical and organisational measures to ensure an appropriate level of security. The final penalties were reduced to reflect the prompt response of both organisations in terms of early notification to, and co-operation with, the ICO, and dealing with the IT security problems swiftly.

However, both BA and Marriott are now the subject of class actions brought by individuals pursuant to GDPR and the Data Protection Act 2018, for compensation for both material and non-material damage caused by the data breaches.

NATIONAL DATA STRATEGY

Meanwhile, we wait to see how the ICO's new role as a regulator in a third country will evolve, in particular in light of the Government's announcement of its National Data Strategy which sets out the Government's road map towards harnessing data to encourage a more high tech economy. For further details of this strategy, please refer again to our **briefing summary** from our recent webinar on International Data Flows.

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Intellectual property/ technology

THE CRUSADE AGAINST BIG TECH CONTINUES

Both the EU and the UK have recently announced proposals aimed at curbing the market power of big tech companies, and requiring online platforms and intermediaries to take greater responsibility for the content that they host and the way in which they operate with their business customers and consumers.

For further details of the EU's proposals for the Digital Services Act and the Digital Markets Act, the UK Government's response to the Online Harms White Paper, and the establishment of the Digital Markets Unit, please see our **briefing**.

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Recent issues for UK employers

POST-BREXIT IMMIGRATION SYSTEM

The UK Government has introduced a new post-Brexit points-based immigration system which also applies to EU nationals following the end of the Brexit transition period on 31 December 2020.

The new system, which opened on 1 December 2020, requires employers to hold a Government-approved sponsor licence in order to sponsor the visas of any non-UK nationals arriving in the UK from January 2021 onwards. As of 1 January 2021, newly arriving EU and non-EU nationals alike require work visas to work in the UK – for most, this will take the form of a new employer-sponsored Skilled Worker visa. Employers in the UK are encouraged to apply for a sponsor licence as soon as possible if they do not already have one.

Existing EU employees who arrived in the UK before 31 December 2020 are permitted to stay and work in the UK, provided they apply under the EU Settlement Scheme. They will need to apply by the deadline of 30 June 2021, which will allow them to continue living and working in the UK beyond that date.

For more information on the new immigration system please see our **briefing note** or you can view our webinar **here**.

COVID-19 JOB RETENTION MEASURES

For the latest news on the Government's COVID-19 job retention measures, please see our article **here**.

EMPLOYEE SHARE OFFERS

Any company wishing to offer shares to its employees needs to check that it can do so without having to prepare and publish a prospectus. Fortunately, several jurisdictions have useful exemptions from this time-consuming and expensive process. Until the end of the transition period, the EU prospectus regime applied in the UK. In the unusual event that an appropriate exemption could not be found, once a prospectus had been published in a member state it could be passported throughout the EU. As the UK and EU have not reached an agreement on prospectus rules, the UK is a now a third country for the purposes of the EU prospectus regime and passporting between the UK and EU member states is not permitted. In most cases, however, an employee share offer should fall within an exemption from both the UK and EU prospectus requirements.

Recent issues for UK employers

NATIONAL INSURANCE CONTRIBUTIONS

For UK employers with workers in the EU, the TCA contains some welcome clarification on their social security obligations from 1 January. Importantly, a new Protocol on Social Security Co-ordination has been agreed, replicating many of the existing EU rules, including those for 'posted' workers (to be known as 'detached' workers). Crucially, however, each EU member state had until 1 February 2021 to decide whether it wanted to adopt the new rules for detached workers. We have had confirmation that all EU member states have opted to apply the detached worker rules.

A table setting out where we are aware each EU member state currently stands can be found **here**.

OFF-PAYROLL RULES

The off-payroll rules which apply in the public sector are being extended to the private sector from April 2021. The rules, which affect how large and medium size businesses engage and tax contractors, were due to come into force in the private sector in April 2020 but were delayed until April 2021 due to the pandemic. Legislation has now been made which brings the rules into force from 6 April 2021 and there is every indication that the rules will come into force as planned. You can read more about the rules and how they will affect your business in our briefing notes: **The new off payroll working rules: Do they apply to my business?** and **The new off payroll working rules: What do you have to do?**

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Corporate governance and reporting

UPDATED FRC GUIDANCE ON CORPORATE GOVERNANCE AND REPORTING DURING COVID-19

In December 2020, the Financial Reporting Council updated published a revised and consolidated version of its **guidance for companies on corporate governance and reporting during the COVID-19 pandemic**, which replaces its previous COVID-19 guidance for companies. The Guidance highlights the need for clear leadership, strong governance and effective decision-making based on reliable information and notes that boards should consider the following:

- how the flow of management information can be maintained;
- the impact of COVID-19 on risk management processes and internal controls; and
- whether a dividend is appropriate.

CONTINUED RELAXATION OF RULES ON SHAREHOLDER MEETINGS DURING COVID-19

The provisions of **CIGA** which grant flexibility in relation to the holding of general meetings of UK companies have been extended to cover general meetings held on or before **30 March 2021**. Until this date, CIGA permits companies to hold entirely (or partially) virtual meetings, or to limit the number of attendees to the required quorum, irrespective of the wording in their articles of association. Whether they opt for a closed meeting with an interactive element, a hybrid meeting or a fully virtual meeting, it is evident that companies must make shareholder engagement a key focus.

For further details, please see our client briefings on AGMs and reporting for **Official List companies** and **AIM-listed companies**.

Last week, the GC 100 also published "**Shareholder Meetings – Time for Change?**". The discussion paper looks at the limitations of the current AGM format and advocates a legislative framework that permits companies to choose a format for their meeting which they consider to be best for their shareholders and stakeholders. It also contains a draft code of best practice (including several detailed recommendations) regarding electronic participation at hybrid and virtual shareholder meetings, as well as pro forma explanatory wording for proposals to amend articles of association in relation to hybrid and virtual meetings.

Corporate governance and reporting

CLIMATE-RELATED FINANCIAL DISCLOSURES

In November 2020, the Government published its **roadmap** for moving to mandatory disclosures consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures ("**TCFD**"). The requirements will eventually apply to all sectors on a staged basis, broadly depending on the size of the business.

Premium UK listed companies are in the first wave and the Listing Rules have been amended to require that, for financial years beginning on or after 1 January 2021, premium UK listed commercial companies make TCFD-aligned disclosures or explain non-compliance.

While this requirement does not apply to the annual reports for the financial year 2020, investor expectations are that companies will begin to move towards TCFD disclosures and some are already doing so voluntarily.

Other listed issuers are expected to be brought into scope of these new requirements in 2022.

For further details, please see our client briefings on AGMs and reporting for **companies listed on the Official List** and for **AIM-listed companies**.

NEW FORMAT FOR LISTED COMPANY ANNUAL REPORTS

The FCA has confirmed that the application of the European Single Electronic Format ("**ESEF**") to UK listed companies will now apply to financial periods starting on or after 1 January 2021, for publication from 1 January 2022. ESEF requires issuers to publish and file their reports in XHTML format. For the financial year 2020, issuers may choose to file their reports in ESEF, or may continue to use the current PDF format.

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Tax

UPDATE ON REPORTING UNDER DAC 6

Following the conclusion of the TCA, the UK Government has removed DAC 6 Hallmarks A, B, C and E from the scope of the UK's implementation of EU directive 2018/822 ("**DAC 6**"), with effect from the end of 31 December 2020. Reporting under DAC 6 will still be required by UK intermediaries and taxpayers for a limited time, but only arrangements which trigger the D Hallmarks (arrangements which obscure beneficial ownership or which thwart effective OECD CRS reporting) will be reportable. HM Revenue & Customs has confirmed that this change also applies to arrangements entered into prior to 1 January 2021.

Over the coming year, the Government intends to repeal the legislation implementing DAC 6 in its entirety and implement the OECD's mandatory disclosure rules instead.

This decision will reduce the DAC 6 compliance burden on businesses that focus mainly on the UK, but those with wider EU operations will still need to operate the full rules.

REAL ESTATE TAX CHANGES

We have recently published a briefing containing an overview of the key (non-Covid specific) tax changes for the real estate sector which have been implemented recently or are coming down the track in the next few months, plus a summary of some potentially significant future developments for both direct and indirect real estate investments. We comment on what these developments mean for the sector and on some steps that those affected should think about taking. To read our briefing, click **here**.

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Real estate

LANDLORD AND TENANT NEGOTIATIONS – UPDATE

The repeated lockdowns have forced many businesses to stop trading, which has had a huge impact on their financial status and their ability to pay rent.

The Government has extended, until **31 March 2021**, the emergency measures introduced in the Corporate Insolvency and Governance Act 2020, the Coronavirus Act 2020 and elsewhere, which prevent landlords from seeking to forfeit business leases for arrears of rent, and restrict the grounds on which they can apply for a winding-up petition or utilise Commercial Rent Recovery.

The Government's Code of Practice for commercial property relationships is intended to support landlords and tenants to negotiate affordable rental agreements, building on the discussions that are already taking place by giving parties affected by the crisis the tools to come to a mutually beneficial agreement.

Click **here** to read our guide for UK landlords and **here** for our advice for UK tenants.

REAL ESTATE TAX CHANGES

As mentioned above, we have recently published a briefing on the key (non-Covid specific) tax changes for the sector which have been implemented recently or are expected in the coming months, plus a summary of some potentially significant future developments for both direct and indirect real estate investments. To read our briefing, click **here**.

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Finance

IMPLICATIONS OF BREXIT FOR FINANCE TRANSACTIONS

In November 2020 the Loan Market Association published a helpful summary of the planned changes to its suite of loan facility documentation after the end of the Brexit transition period.

The documentation changes are relatively minor and mostly relate to the changes to EU legislative references.

For a wider consideration of the implications of Brexit for finance transactions and for restructuring and insolvency, see our guidance note **here**.

LIBOR DISCONTINUATION

LIBOR is to be discontinued after the end of 2021. We continue to see more financial products linked to alternative rates, where previously LIBOR was used. For sterling loans, a compounded version of SONIA (the Sterling Overnight Index Average), is being used as a replacement in many cases, based on daily SONIA quotations over a reference period (e.g. three months). Simpler products are referencing other rates –Bank of England base rate for instance.

The Bank of England and Financial Conduct Authority continue to push market participants to take active steps towards transition (see their latest page **here**). By end Q1 2021, financial institutions are expected to (a) cease initiation of new GBP LIBOR linked loans that expire after the end of 2021 and (b) accelerate active conversion of existing loans where viable in order to reduce legacy volume.

However there will inevitably be implications for existing contracts once LIBOR ceases to be quoted, if the documentation does not provide for a successor rate. This does not only apply to financial products; many late payment clauses in commercial contracts refer to LIBOR for instance. Even if parties are able to amend existing contracts to add LIBOR fallback mechanics, it is essential to consider any unintended regulatory, accounting and tax implications when re-pricing exposures.

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Pensions

PENSION SCHEMES BILL

The Pension Schemes Bill should receive Royal Assent imminently. It covers, among other things:

- changes to defined benefit scheme funding legislation to require schemes to have a long-term strategy;
- new notification duties for certain corporate activities; and
- new criminal and civil penalties for acts or omissions which put scheme members' benefits at risk.

In connection with the legislation, the Pensions Regulator will be publishing a new code of practice focusing on long-term funding objectives, for example buy-out, consolidation or self-sufficiency. Trustees will be expected to have a journey plan under which the scheme reduces its dependency on the employer as the scheme becomes more mature. It is proposed that schemes will have to follow a 'fast track' approach to funding with fixed parameters or (equally acceptable) explain a 'bespoke' approach. Meanwhile, the Regulator is expected to continue its proactive focus on the level of deficit recovery contributions compared with dividends and other shareholder distributions.

Those engaged in corporate activity will need to make notifications to the Regulator and pension scheme trustees in more circumstances than at present and perhaps at an earlier stage. These new circumstances are expected to include the sale of a material part of a business and the granting of security that has priority over debt to the pension scheme. The new criminal and civil penalties mean that they will also have to consider even more carefully than now whether any proposals could adversely affect the security of defined benefit scheme members' benefits. They may also need to declare to the Regulator how any detriment will be mitigated.

CLIMATE RISK

Pension schemes will be required to incorporate climate change risks and opportunities into their governance systems and make specific additional public disclosures about climate change targets and policies. These requirements are to be phased in over time, starting from October 2021 with the largest schemes and authorised master trusts. A Government consultation on draft regulations and guidance is open until 10 March 2021.

The growing focus on these matters may have an impact on trustees' investment decisions. Employers might wish to engage with trustees on this topic, especially where ESG and sustainability are also a business priority.

COVID-19

The Pensions Regulator relaxed some reporting requirements during the early months of the COVID-19 pandemic. These are now generally restored.

Some employers deferred or reduced deficit recovery contributions to defined benefit pension schemes. The Regulator was relaxed about this being done, to allow breathing space for assessment of the employer's covenant and discussion of affordability going forward. Any longer-term reduction or suspension now needs to be explained to the Regulator.

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Sustainable business

The sustainability agenda is inevitably resulting in a wave of new regulation, with a particular focus during this coming year, with the UK hosting the COP 26 climate summit in November, on climate-related issues. For example:

- the UK Government's recent **commitment** to mandate climate-related disclosures in line with the recommendations of the **Taskforce on Climate-related Disclosures**, across the entire UK business and finance community over the next 4 years; and
- the **EU's sustainable finance action plan** which will impose important new obligations on many asset managers and financial advisers from March 2021.

Last month, we launched a series of webinars on the theme of "**Sustainability and alternative asset managers: the new normal**". Our first webinar, "*How the EU's Green Deal and Sustainable Finance Action Plan will affect private markets*", took place on **21 January 2021** and featured a keynote speech from Nathan Fabian, Chief Responsible Investment Officer at the UN-backed Principles for Responsible Investment (PRI) and Chairperson of the European Platform on Sustainable Finance, followed by a lively panel discussion chaired by our senior partner, Kathleen Russ.

Future webinars on ESG and wider sustainability issues affecting alternative asset managers are planned for the coming months. If you would like to take part in future sessions, please register **here**.

Our **Sustainable Business hub** contains comprehensive guidance on a range of sustainability issues, including ESG, responsible investment and green finance, bribery ethical taxation and ethical workplace issues, and mitigating litigation risks associated with all of these topics.

Our Sustainability Initiative is led by Senior Partner, **Kathleen Russ**, Head of Environment and Operational Risk **Doug Bryden**, Corporate Partner **George Weavil** and Senior Consultant, **Simon Witney**. Please do get in touch with any of them, or your usual contact at the firm, if you would like to discuss any Sustainable Business issues.

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Anti-bribery measures

Our Autumn 2020 ABC **newsletter** highlighted fraudulent activity during the COVID-19 crisis and other key updates in this area.

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