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UK

PREVIEW OF 2017

LEGAL GUIDE

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INTRODUCTION

2017 will see major changes to the UK legal landscape, with Article 50 of the Treaty on European Union expected to be triggered by the end of March 2017 to begin the Brexit process. The legal implications of Brexit will be hugely significant; preparing for their impact will be a substantial challenge across every industry sector. Our Preview of 2017 outlines these implications, as well as identifying other trends and issues we expect to be on the legal agenda this year.

In the banking and finance arena, change to the contractual recognition of bail-in requirement may take place during 2017 to ensure that it is applied more pragmatically. In insolvency, various reforms are expected to come into force from the spring of 2017.

A number of changes to the UK competition regime are anticipated. Changes to the EU merger control regime are being considered. Private enforcement of competition law and measures aimed at facilitating damages claims remain a key priority.

Forthcoming corporate law changes include potential amendment to the UK corporate governance framework as well as a range of new reporting obligations on companies.

In dispute resolution, an important appeal decision on legal advice privilege is expected, and Lord Justice Jackson is to lead a new review of fixed recoverable costs to report by the end of July 2017.

In employment law, a new obligation on larger employers to report on the gender pay gap is expected to come into force in April, along with the apprenticeship levy. New rules on references in financial institutions come into force in March, and the Trade Union Act 2016 is also likely to be commenced during the year.

In energy and environment, a Government plan to develop a smart, flexible energy system for the UK is expected in the spring. The Government is also planning a consultation on the introduction of foreign investment rules for critical infrastructure. Support for renewable energy continues through the Contract for Difference mechanism.

Regulatory changes in the financial institutions sector include consideration of a banking reform package which aims to complete the banking reforms implemented in the EU in the wake of the financial crisis. Progress will continue to be made towards the implementation of various EU legislation, including MiFID II, the Market Abuse Regulation and the EU PRIIPs (packaged retail and insurance-based investment products) Regulation.

In insurance law, a new right will come into force for policyholders to claim damages for late payment of insurance claims, and we expect to

see further developments in the framework for the individual accountability of senior managers in insurers and insurance intermediaries.

In relation to intellectual property, following the Government's announcement that the UK plans to ratify the Unified Patent Court Agreement despite the prospect of Brexit, the Unified Patent Court now looks set to become a reality in 2017.

Various changes are expected in pensions law, including a further reduction in the annual allowance for those who access their benefits flexibly; strengthened measures to outlaw "pensions liberation" scams; and the possibility of a requirement to equalise Guaranteed Minimum Pensions being introduced, five years after it was first mooted.

There continues to be a focus on energy efficiency in the real estate arena. In planning, the Housing White Paper and the Government's response to the Community Infrastructure Levy are expected early in 2017, the Neighbourhood Planning Bill is expected to be passed by Parliament and we can also expect further progress with implementation of the Housing and Planning Act 2016.

In tax, a number of significant changes will be implemented during 2017. In relation to corporate tax, the rules governing the tax deductibility of corporate interest expense will be reformed, as will those relating to corporation tax loss relief and the substantial shareholdings exemption. New rules will also be implemented to counteract tax avoidance through the use of hybrid instruments and arrangements. With regard to individuals and personal tax, the rules relating to the taxation of non-UK domiciled individuals will be overhauled, with the introduction of a new "deemed UK domicile" status.

In technology, media and telecommunications, organisations will need to spend time during 2017 preparing to comply with the General Data Protection Regulation which comes into force in May 2018. Elsewhere in the sector, provisions in the Investigatory Powers Act are likely to come into force during 2017 and the Digital Economy Bill is expected to receive Royal Assent in the spring.

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 to follow up on anything raised in this report.

Herbert Smith Freehills LLP
January 2017

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BREXIT

GOVERNMENT TO TRIGGER ARTICLE 50 OF THE TREATY ON EUROPEAN UNION TO START THE BREXIT PROCESS

The Prime Minister announced in October 2016 that the Government would trigger Article 50 of the Treaty on European Union, which governs the process of negotiation of the terms of a Member State's withdrawal from the EU, before the end of March 2017, and that the next Queen's Speech will include a Great Repeal Bill to repeal prospectively the European Communities Act 1972.

The Government has made clear that it intends to serve the Article 50 notice without any prior Parliamentary approval, but this decision is subject to judicial review. At first instance the legal challenge was successful; the judgment of the Supreme Court in the appeal is expected later in January. The outcome of the appeal may affect the timing of both the notice and the legislation more broadly. If the Supreme Court rules that Parliamentary approval is required, there is a possibility that the legislation will not be passed by Parliament and that the Government will be unable to act, throwing the process into confusion and possibly even triggering a general election.

Assuming the Article 50 procedure is triggered, the UK will remain a Member State of the EU during the notice period, which is set at two years (unless it were to be agreed with all 27 other Member States that its membership should cease sooner or continue for a longer period). At the end of the notice period, the UK will automatically leave the EU, even if the terms of leaving have not been agreed. The Government's announcement indicates that the UK's exit from the EU will take place around March 2019.

During the two-year notice period, negotiations will focus on the terms of the withdrawal of the UK from the EU. These discussions are also likely to deal to some extent (but almost certainly not comprehensively) with the future relationship between the EU and the UK. The detailed terms of the long-term future EU-UK relationship may not be dealt with until after the UK has left the EU at the end of the notice period, and could take many years – some commentators say up to 10 – to negotiate. The scope and course of the negotiations will be susceptible to the constantly shifting political situations and priorities in the UK and Europe and against a backdrop of political volatility in the world at large. As well as the likely triggering of Brexit negotiations, 2017 will see the inauguration of a new US President, elections in France, Germany, Hungary, Norway and Holland, amongst others, and the ongoing migrant and banking crises. In this context, negotiations of the UK's exit from the EU may not prove to be the top priority of all EU Member States.

In parallel with the negotiations with the EU of the UK's terms of withdrawal, the Great Repeal Bill will provide the framework under which UK lawmakers will (during the same two-year notice period) need to review the elements of UK law which are derived from EU law and take decisions as to whether to retain, reform or repeal them.

The British Government has indicated that its initial plan is to preserve the application of EU law and then introduce changes over time such that the Great Repeal Bill will not initially involve much repealing at all. More generally, the premise of the Bill is far from straightforward. Some EU rules assign roles to European bodies. Assuming a departure from the EU Single Market, these rules would need to be changed to refer to UK bodies. In the case of EU rules which are cross-border or international in nature, it will not be possible for the UK unilaterally to preserve the effects of these frameworks without the cooperation and consent of the other countries in question. Additional transitional provisions will also be required where existing EU property rights (eg EU Trademarks) will cease to cover the UK, so as to ensure that rights in use in the UK retain recognition as national rights.

Also during the two-year notice period, it is likely that the UK will be working to improve its position with third countries and lay the groundwork for negotiating trade agreements with them, not least because on leaving the EU, the UK will cease to benefit from existing EU trade agreements with third countries and will be excluded from those under negotiation. The UK's capacity to negotiate trade agreements has largely been outsourced to the EU, so it will have to make a major effort to build up this function. It remains to be seen whether any third countries will be willing to complete trade deals with the UK until the UK's post-Brexit relationship with the EU is clear.

Until the UK actually leaves the EU, 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.

For further information, please visit our [Brexit hub](#) or contact [Gavin Williams](#) or [Dorothy Livingston](#).

BANKING, RESTRUCTURING AND INSOLVENCY

EU BANK RECOVERY AND RESOLUTION DIRECTIVE 2014/59 (BRRD) – ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN REQUIREMENT

From 1 January 2016, Article 55 of the BRRD obliged EU Member States to make a change in national law which affects a wide range of contracts, including banking contracts. Article 55 is part of complex bank resolution legislation and is intended to give weight, outside the EU, to the powers of the EU resolution authorities to bail-in, ie write down or convert into equity, liabilities of a failing in-scope entity to maintain it as a going concern. Broadly, Article 55 requires that if an EU regulated credit institution or investment firm enters into, or materially amends, any liability governed by the law of a jurisdiction outside the EU, it must, from 1 January 2016, obtain a contractually binding acknowledgement and agreement from the counterparty that the liability can be bailed-in. Due to the wide range of liabilities to which the requirement applies, in-scope firms have found it very difficult to comply with Article 55 in some areas of business, ranging from trade finance documentation to membership of foreign clearing houses.

Furthermore, despite the final draft of the European Banking Authority technical standards being adopted in March 2016, it is for national regulators to enforce and potentially provide flexibility in the application of the requirement. In the UK, some flexibility has been provided by amendments made to the Prudential Regulation Authority Rulebook on 1 August 2016 such that UK in-scope entities may request that the contractual recognition of bail-in requirement is dis-applied for “phase two” liabilities (ie unsecured liabilities other than debt instruments) where including the bail-in clause is “impracticable”. Firms authorised by the Financial Conduct Authority (FCA) may apply for a similar modification direction of the relevant FCA rule where compliance with the rule is impracticable. The FCA direction ends on 30 June 2017 (or earlier if the relevant rule is revoked or amended before then). Notwithstanding these UK modifications, the requirement has continued to be problematic.

More recently, on 23 November 2016, developments at the EU level indicate that change should be on the way with the release by the European Commission of a Communication on “Call for evidence: EU regulatory framework for financial services”, which refers to the need to reduce unnecessary regulatory constraints on banks’ ability to finance the wider economy and, one of the examples given, is to ensure that the contractual recognition of bail-in requirement can be applied pragmatically, and a [draft amending Directive of the European Parliament and Council](#), which acknowledges some of the difficulties which banks are facing when trying to comply and proposes a replacement Article 55. Although the current drafting of the proposed replacement does not appear to achieve that aim, it is to be hoped that Article 55 may become less problematic for in-scope entities during 2017.

INSOLVENCY LAW – SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 (SBEE ACT)

Under the SBEE Act and related secondary legislation, further changes to insolvency law will come into force on 6 April 2017. These changes

include the loosening of requirements to hold physical creditor meetings, the abolition of final creditor meetings and new procedures to enable creditors to opt out of receiving routine correspondence and office-holder reports (other than those relating to dividend payments).

INSOLVENCY RULES 2016

New Insolvency Rules 2016 (IR 2016) will come into force on 6 April 2017, replacing the Insolvency Rules 1986 (IR 1986). The IR 2016 are intended to simplify and modernise the IR 1986, principally by reducing certain procedural requirements and red tape.

RECAST INSOLVENCY REGULATION ((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, came into force on 26 June 2015. The Recast Insolvency Regulation will apply to relevant insolvency proceedings from 26 June 2017. Changes include:

- a new three month “look back” period which will be relevant when determining a debtor’s centre of main interest and which aims to reduce abusive forum shopping;
- new procedural rules to improve co-ordination between insolvency practitioners in group insolvency situations; and
- the creation of a new Europe-wide insolvency register.

REVIEW OF THE CORPORATE INSOLVENCY FRAMEWORK

In May 2016, the Insolvency Service published a consultation paper setting out a number of options designed to improve the existing corporate insolvency regime. The four areas being considered for reform are:

- a new three month moratorium for distressed companies;
- a widening of the definition of essential supplies to allow distressed companies to maintain business critical contracts;
- introduction of a flexible restructuring plan that would bind both secured and unsecured creditors and introduce a “cram-down” mechanism; and
- amending the rules regarding priorities to allow rescue financing to be put in place.

The responses to the proposals were not, in general, positive. The Government published a summary of the responses on 28 September 2016 and is understood to be continuing to review the proposals in light of the responses received. Further developments in 2017 are therefore awaited.

For further information please contact [Laurence Elliott](#) or [Dorothy Livingston](#).

COMPETITION, REGULATION AND TRADE

EU MERGER CONTROL

In October 2016 the European Commission launched a consultation seeking feedback on certain jurisdictional and procedural aspects of the EU merger control regime. The consultation includes consideration of potential further measures to streamline the regime following the 2013 “simplification” package, and possible changes to the system for referring transactions between EU Member States and the Commission. Most significantly, the Commission is considering a possible expansion of the scope of the EU Merger Regulation (**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. The Commission is particularly concerned about such transactions in the digital and pharmaceutical sectors escaping EU merger control scrutiny. If the EUMR is amended in this way this could represent a significant extension of its scope. The consultation does not address the Commission’s previous proposal to extend the EUMR to cover non-controlling minority stakes, which the Commission does not currently appear to be taking forward. The consultation closes on 13 January 2017 and the Commission will then assess next steps.

NEW CONTROLS ON FOREIGN INVESTMENT IN UK CRITICAL INFRASTRUCTURE

In September 2016 the Government announced (in the wake of its approval for the Hinkley Point C new nuclear project) that it intends to introduce a new legal framework for foreign investment in critical infrastructure. This will include a “*cross-cutting national security requirement for continuing Government approval of the ownership and control of critical infrastructure*”, and a review of the current Enterprise Act 2002 merger control public interest regime. Little further detail is currently available, including what infrastructure and what level of control will be covered, but the Government is expected to consult on its proposals shortly. The Competition and Markets Authority has warned (in its September 2016 submission to the Business, Energy and Industrial Strategy Select Committee inquiry into the Government’s industrial strategy) of the risks of widening the current scope for Government public interest interventions, including the potential impact of any reduction in clarity on investment incentives.

EU DAMAGES DIRECTIVE

Member States have until 27 December 2016 to implement the EU Directive on antitrust damages actions. The Directive’s effects will therefore start to be felt during the course of 2017. The aim of the Directive is to ensure that anyone who has suffered harm caused by an infringement of the competition rules can effectively exercise the right to claim full compensation, and that equivalent protection is available throughout the EU. To that end the Directive requires Member States to introduce a series of measures including as to the disclosure of evidence, limitation periods, joint and several liability, the passing on of overcharges, quantification of harm and consensual dispute resolution. It is unlikely that the Directive will impact the – already high – level of competition litigation in the UK, but a greater number of damages

actions and settlements are likely in Member States where the private enforcement of competition law is currently limited.

UK COMPETITION LAW CLASS ACTIONS

In 2016 the first class actions were launched under the new UK competition law collective redress regime, which allows claimants to bring an action on an “opt-out” basis, subject to certification from the Competition Appeal Tribunal (**CAT**). The first certification application was heard in December 2016 and its outcome is awaited (although the CAT expressed doubt during the hearing about the claim’s ability to move forward as currently formulated). The second application – relating to a claim for £14 billion against MasterCard on behalf of all UK consumers – will be heard on 18 January 2017. The CAT’s approach to certification will have a significant impact on claimants’ (and litigation funders’) appetite to bring claims under the new regime.

EUROPEAN COMMISSION FINAL E-COMMERCE SECTOR INQUIRY REPORT

The Commission launched its sector inquiry into e-commerce in May 2015, as part of its wider Digital Single Market strategy, to examine prevailing market trends and potential barriers to competition. It published its preliminary findings in September 2016, including evidence of widespread contractual restrictions affecting online sales (in particular of consumer goods, such as bans on the use of online marketplaces, restrictions on cross-border sales, and pricing restrictions). Some of the practices uncovered may give rise to serious competition law concerns. The final report is expected in early 2017 and the Commission is then likely to launch competition law enforcement actions against individual companies.

CJEU RULING ON THE LEGALITY OF ONLINE SALES BANS

The Court of Justice of the European Union (**CJEU**) is expected to issue a preliminary reference ruling in the *Coty* case in the first half of 2017. This case concerns the compatibility of restrictions imposed by suppliers on their retailers selling via third party online platforms (such as Amazon Marketplace or eBay) with the EU competition law rules. Such platform bans have been sanctioned by the German competition authority in a number of cases, but other authorities and courts have not necessarily taken the same strict approach. It is widely hoped that the ruling will provide much needed clarity. Parties will then need to assess whether their distribution arrangements require amendment.

For further information please contact [Kyriakos Fountoukakos](#) or [Stephen Wisking](#).

CONSTRUCTION

NEW PART R OF THE BUILDING REGULATIONS - HIGH SPEED BROADBAND ACCESS

From 1 January 2017, all new buildings and many renovations are required to incorporate provision for infrastructure to connect to high speed electronic communications networks. This is the effect of the Building (Amendment) Regulations 2016 implementing an EU Directive to the same effect. The Regulations apply to works in respect of which Building Regulations approval is sought after 1 January 2017. From that date, they apply to all new building works (with certain exceptions) and also apply to major renovation works affecting wired or wireless network access infrastructure, unless the cost of compliance would be disproportionate to the benefit gained.

The requirements set out in the Regulations are supplemented by an Approved Document giving guidance on how to comply with a new Part R of the Building Regulations. The effect of the new Regulations and the Approved Document is that building work must be carried out so as to ensure that a building is equipped with high speed-ready physical infrastructure up to a network termination point for electronic communications networks. This is in order to reduce future connection costs, even if actual super-fast connectivity is not immediately available.

This means that there must be suitable physical infrastructure from the service provider's access point to an occupier's network termination point. In the case of multi-dwelling buildings, these must be equipped with a common access point capable of serving all the dwellings in the building.

The requirement is therefore to ensure that the service provider's ductwork and cabling can reach an access point but does not extend or provide any cabling or equipment beyond the network termination point. It is therefore for a developer or occupier to decide whether and how to make use of the access point.

The Government anticipates that there will be few exceptions to the overall requirements when development is being carried out. It should therefore be a matter of course for most new developments and major renovations to incorporate the infrastructure required by the Regulations. However, retrofitting of the infrastructure in question in existing buildings is not required where no relevant renovation is planned. It should also be noted that the requirement is for the physical infrastructure to be adequate to ensure that copper, fibre optic cable or wireless devices capable of delivering broadband speeds greater than 30Mbps can be installed: the Approved Document points out that, in practice, a standard copper telephone cable, when connected to a service provider's fibre network, can deliver broadband speeds up to 70 Mbps.

For further information please contact [Mark Lloyd-Williams](#) or [Nicholas Downing](#).

CORPORATE

CORPORATE GOVERNANCE

The Department for Business, Energy and Industrial Strategy (**BEIS**) published a Green Paper in November 2016 on corporate governance reform which may result in changes to the UK corporate governance framework during the course of 2017. The Green Paper focuses on executive pay, strengthening the employee, customer and wider stakeholder voice at board level and corporate governance in large privately-held businesses. The Green Paper is very much a discussion document looking at a range of options. It does not advocate a particular route in relation to the issues raised. Responses to the consultation are requested by 17 February 2017. In response to the Green Paper, the Financial Reporting Council has announced that it will issue a consultation on potential changes to the UK Corporate Governance Code in 2017.

GOVERNANCE AND DIRECTORS' REMUNERATION

The House of Commons BEIS Committee has launched an inquiry into corporate governance and directors' remuneration. Specific issues the Committee is considering include: (i) whether the roles of directors and non-executive directors are sufficiently clear and how the interests of shareholders and employees are best balanced; (ii) whether the current executive pay framework is effective and how executive pay should take into account a company's long-term performance; and (iii) how greater diversity of board membership should be achieved and if there should be employee representation on boards and/or remuneration committees. The Committee's report is expected in the first half of 2017.

NON-FINANCIAL REPORTING

The Non-Financial Reporting Directive (2014/95/EU) introduces new reporting requirements for annual reports for financial years beginning on or after 1 January 2017 including that: (i) public-interest entities with 500 or more employees must include in their strategic report a statement relating to anti-corruption and bribery matters including a description of policies and the risks related to those matters; and (ii) listed companies must include in their corporate governance statement a description of its board diversity policy applied with regard to aspects such as educational and professional backgrounds, and how it has been applied in the reporting period. Regulations amending the Companies Act 2006 and amendments to the Transparency Rules (DTR 7) to reflect the requirements in the Directive were finalised late in 2016.

PAYMENT PRACTICES REPORTING

The Small Business, Enterprise and Employment Act 2015 (**SBEE Act**) gives the Secretary of State the power to make regulations requiring large companies/LLPs to publish reports on their payment practices. In December 2016, the Government published revised Regulations to implement this requirement which are expected to come into force on 6 April 2017. The revised Regulations propose that large UK-incorporated companies must report on their payment practices

twice a year including information about their standard payment terms and the proportion of invoices paid in 30 days or less, paid between 31 and 60 days and paid beyond 60 days. A director must approve the company's information, which must then be submitted to a centrally hosted government website for publication. The Government intends to publish guidance in early 2017 to assist companies/LLPs to comply with the reporting obligation.

GENDER PAY GAP REPORTING

See the entry in the employment and incentives section below for further details.

INVOICE ASSIGNMENT CLAUSES

Under the SBEE Act, the Secretary of State has the power to make regulations to nullify provisions prohibiting assignment of receivables in certain business-to-business contracts. The Government has consulted on the form and content of the regulations to implement this nullification. The implementation date was due to be April 2016 but no further progress has been made and the timing is now unclear.

REGISTER OF BENEFICIAL OWNERSHIP

Changes to the register of persons with significant control (**PSC**) regime are expected in 2017 following amendments to the Fourth Money Laundering Directive (**4MLD**) which must be implemented in the UK by 26 June 2017. UK incorporated companies and LLPs have, since 6 April 2016, been required to keep a PSC register, with the test for "significant control" including holding 25% of the shares or voting rights in the company. Under 4MLD the threshold for disclosure is 10% for "Passive Non-Financial Entities" (broadly, intermediaries) and ongoing disclosure of beneficial ownership is required (rather than annual public disclosure). In September 2016, the Treasury issued a consultation paper on implementation of the 4MLD and in November 2016, BEIS published a consultation paper specifically on changes to the PSC register regime. See the entry in the financial services regulatory section below for further details on 4MLD.

PROHIBITION ON CORPORATE DIRECTORS

The SBEE Act includes a provision banning corporate directors (that is, the use of a company as the director of another company). The prohibition was originally due to come into force in October 2016 with a grace period of 12 months from commencement of the prohibition for existing corporate directors. However, that timing has slipped and the date may now be April or June 2017. The Government has consulted on the circumstances where the use of corporate directors could continue under exceptions to the general prohibition, including for example, subsidiary companies of parent companies with shares admitted to trading on regulated or prescribed markets.

CORPORATE

REGULATORY INFORMATION

Certain provisions of the Delegated EU Regulation relating to access to regulatory information published by issuers (EU/2016/1437) (**the Regulation**) came into force from 1 January 2017. The Regulation requires the European Securities and Markets Authority (**ESMA**) to set up and operate a web portal to be called the European Electronic Access Point (**EEAP**) providing access to all published regulatory information made accessible via each Member State's storage service. To assist in the functionality of the EEAP, the Regulation requires issuers to have a legal entity identifier (**LEI**) number and that each type of regulatory information be classified into one or more specified categories. The Financial Conduct Authority (**FCA**) is proposing a new DTR 6.2.2AR and 6.2.2BR which will require an issuer to notify the FCA of its LEI and the relevant classification(s) when it files regulated information with the FCA. The consultation closed on 2 January 2017, however, the FCA encourages issuers to provide LEI and classify regulatory information from 1 January 2017. The EEAP itself is scheduled to go live on 1 January 2018.

INVESTMENT BANKING

The FCA published the findings of its investment and corporate banking market study in October 2016 setting out a series of remedies aimed at ensuring there is effective competition in the market. These include changes to the way investment banks produce league tables and changes to Initial Public Offering allocation policies or practices. The FCA is also consulting on prohibiting restrictive contractual clauses in investment bank engagement letters with corporate clients which give the bank a "right of refusal" or "right to act" in relation to corporate finance work, however, "right to pitch" and "right to match" clauses would not be prohibited (as these clauses do not restrict client choice in the same manner). The FCA expects to publish its final rules to prohibit restrictive contractual clauses in early 2017.

PROPOSALS FOR DIRECTIVE TO AMEND THE SHAREHOLDER RIGHTS DIRECTIVE

The European Commission published a proposal for a Directive to amend the Shareholder Rights Directive in April 2014. The key aspects of the proposed amending Directive include: approval of directors' remuneration, approval of related party transactions, obligations on intermediaries to disclose underlying shareholders and enhanced disclosure requirements of institutional investors and asset managers' investment policies and strategies. Agreement was reached on the form of the amending Directive in late 2016 and it is expected to be finalised in 2017. It will be directly effective in Member States two years following publication in the EU Official Journal.

PROPOSED AMENDMENTS TO THE PROSPECTUS REGIME

In December 2015, the European Commission published a draft Regulation proposing amendments to the prospectus regime in the EU, primarily to simplify the regime to facilitate capital raising (**the Regulation**). Upon implementation, the Regulation would replace

entirely the current EU Prospectus Directive regime. The Regulation proposes that prospectuses could be made shorter or contain less generic or boilerplate disclosure (for example, in risk factors). In late 2016, agreement was reached on the form of the Regulation, which could lead to the Regulation being finalised in 2017. It will be directly effective in Member States two years following publication in the EU Official Journal.

For further information, please contact [Carol Shutkever](#) or [Gareth Sykes](#).

DEBT CAPITAL MARKETS, SECURITISATION AND DERIVATIVES

NEW SECURITISATION REGULATION

On 30 September 2015 the European Commission published its proposal for a Securitisation Regulation, seeking to simplify and harmonise existing legislation on due diligence, risk retention and disclosure. The proposal also establishes a set of European criteria for "Simple, Transparent and Standardised" (STS) securitisation, which would benefit from more favourable regulatory capital treatment. The stated aim of the Regulation, when introduced, was to promote the integration of EU financial markets, diversify funding sources and unlock capital, as part of the broader plans for the EU Capital Markets Union.

The European Parliament's Committee on Economic and Monetary Affairs has proposed amendments to the draft Regulation, and the final version of these was made public on 8 December 2016. These amendments alter the European Commission's original proposal in a number of significant ways, and industry participants have expressed concerns that if the proposals are adopted in their current form, they may detract from the European Commission's original aims for the new Regulation, hampering rather than enabling the development of the market. Informal negotiations between the Parliament, the European Council and the Commission will begin in early 2017 to agree the final text of the Regulation, which is expected to be put to a vote of the European Parliament and come into effect during the course of 2017.

PROSPECTUS REGULATION TO REPLACE CURRENT PROSPECTUS DIRECTIVE

In 2015, the European Commission proposed a new prospectus regime to replace the existing EU Prospectus Directive. In 2016, trilogue negotiations took place between the Parliament, European Council and Commission on the form of the draft prospectus regulation (**the Regulation**) and, on 16 December 2016, the Council published the final compromise text of the Regulation as provisionally agreed with the Parliament. There are a number of changes for debt capital markets including new requirements on the form and content of risk factors and summaries in prospectuses, the expansion of the wholesale disclosure regime 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" to assist frequent issuers. The Regulation is expected to apply 24 months following publication in the EU Official Journal. See the entry in the corporate section above for further details.

REGULATORY TECHNICAL STANDARDS (RTS) REGULATION ON ARTICLE 8B OF CREDIT RATING AGENCIES REGULATION III (CRA III)

Article 8b of CRA III imposes reporting obligations on issuers, originators and sponsors of structured finance instrument (SFIs). The RTS Regulation (setting out technical standards in regard to these obligations) applies from 1 January 2017 to SFIs issued after the date of its entry into force where the issuer, originator or sponsor is

established in the EU. However, the European Securities and Markets Authority (ESMA) stated that the proposed website which is to be set up to house the information would not be ready by 1 January 2017. ESMA expects the new securitisation legislation (see above) to provide further clarity on reporting obligations in relation to SFIs.

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

The final Regulatory Technical Standards (RTS) containing the requirements for posting of margin against non-cleared derivatives were published in the EU Official Journal on 15 December 2016 and came into force on 4 January 2017. The requirements will involve financial counterparties (defined in EMIR to include banks, insurance companies, investment firms, pension funds and hedge funds) being obliged to post variation margin (VM) (margin to cover the daily changes in the value of the contract) on a daily basis and initial margin (IM) (an upfront posting of margin against possible losses on the contract). The RTS contain significant detail on the amount, type, frequency, operational and legal requirements which eligible entities must meet to comply with the RTS. The RTS requirements have staggered effect, with the first VM obligations expected to apply to all eligible entities from 1 March 2017 and the first IM obligations on a staggered basis thereafter, depending on entity size.

For further information, please contact [Michael Poulton](#) or [Amy Geddes](#).

DISPUTE RESOLUTION

APPEAL REGARDING WHO IS THE “CLIENT” FOR PURPOSES OF LEGAL ADVICE PRIVILEGE

The final months of 2016 provided the first two reported English decisions applying the narrow interpretation of “client” from the rather notorious 2003 Court of Appeal decision in *Three Rivers No 5*. In both cases the court found that the “client” for privilege purposes was restricted to a limited group of employees within the client organisation, so that communications or documents prepared by anyone else were not privileged. In the second decision, in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), the judge concluded that the effect of *Three Rivers No 5* is to limit the “client” to those who are authorised to seek and receive legal advice on behalf of a client corporation, and that authority to provide information to the lawyers is not sufficient for these purposes. The judge has granted RBS permission to appeal against the decision and has granted a “leapfrog” certificate enabling the appeal to proceed directly to the Supreme Court, subject to permission being given by the Supreme Court. It is anticipated that the appeal will be heard early in 2017.

COMPULSORY E-FILING IN ROLLS BUILDING COURTS

A CE-File system is in operation in the Rolls Building courts (including Chancery, the Commercial Court and the Technology and Construction Court) which allows parties to litigation in those courts, and their legal representatives, to issue and file documents electronically and to access documents on the court file 24 hours a day. The CE-File system is expected to become mandatory for legally represented parties from 25 April 2017, although no formal announcement to that effect has been made as yet.

CIVIL COURTS STRUCTURE REVIEW – IMPLEMENTATION

Lord Justice Briggs’s final report in his review of the future of the civil courts structure was published in July 2016. Key recommendations relevant to commercial parties include establishing an Online Court, initially for money claims up to £25,000, and transferring some of judges’ more routine and non-contentious work to case officers, under judicial training and supervision. In “Transforming our justice system: summary of reforms and consultation”, published by the Ministry of Justice on 15 September 2016, the Government stated its intention to create a new process to resolve many disputes entirely online, building on Lord Justice Briggs’ proposals, and to make more use of case officers for routine tasks. The timing is not, however, clear.

FIXED RECOVERABLE COSTS

In a speech in January 2016, Lord Justice Jackson recommended the introduction of a scale of fixed recoverable costs, based on claim value, for all claims worth up to £250,000. In September 2016 the Government announced its intention to extend fixed costs to “as many civil cases as possible”, and in November 2016 Lord Justice Jackson was commissioned to lead a new review of fixed recoverable costs to report by the end of July 2017. The threshold at which any regime of fixed recoverable costs might be set is a matter to be considered in the

review, but it is understood that Lord Justice Jackson remains particularly interested in cases valued at up to £250,000.

REFORMING THE CIVIL PROCEDURE RULES (CPR)

The Civil Procedure Rule Committee is currently considering how it can work towards streamlining, reducing or reformatting the CPR with a view to making them simpler particularly for the benefit of litigants in person. This proposal is at an early stage and it is not yet clear what changes might be made, or on what timescale.

EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO) REGULATION

A new EU Regulation came into force in July 2014 establishing a procedure to facilitate cross-border debt recovery in civil and commercial matters (Regulation (EU) 655/2014). Under the new procedure, in cross-border cases, a creditor can obtain an EAPO which effectively freezes the debtor’s funds in an EU bank account up to a specified amount. The main provisions apply from January 2017. The Regulation does not apply to the UK and Denmark, which have opted out.

SIGNATURE AND RATIFICATION OF THE EU-SINGAPORE FREE TRADE AGREEMENT (EUSFTA)

This agreement is seen as a stepping stone for the EU towards entering into a trade deal with the whole ASEAN region. The agreement was finalised and initialled by the EU and Singapore in 2015 and covers important issues of trade, intellectual property rights, investment protection and investor state dispute settlement. The Court of Justice of the European Union (CJEU) is currently considering the extent of the EU’s competence to sign the agreement on behalf of the Member States. On 21 December 2016, EU Advocate General Eleanor Sharpston QC concluded that the EUSFTA will need to be finalised by the EU and the Member States acting jointly. Although the opinion does not bind them, the Court tends to follow the approach adopted by the Advocate General. The CJEU is expected to issue its own judgment in 2017. Once this has been determined, the ratification process will commence. There are a number of uncertainties surrounding the EUSFTA in light of Brexit, and the extent to which the UK will be bound by and benefit from the treaty is yet to be determined.

TRANS-ATLANTIC TRADE INVESTMENT PARTNERSHIP

The Trans-Atlantic Trade Investment Partnership (TTIP) is a proposed deal between the EU and the US, two of the world’s largest economies, which is intended to remove trade barriers, create wealth and promote investment. The TTIP has been hugely controversial, particularly in Europe. Current indications suggest that a deal may not be possible, with comments from the French and German governments to that effect. If agreement were to be reached, the UK’s role in the treaty is uncertain given Brexit.

For further information please contact [Paula Hodges QC](#) (arbitration) or [Anna Pertoldi](#).

EMPLOYMENT AND INCENTIVES

COMMENCEMENT OF TRADE UNION ACT 2016

The Act provides for: increased ballot thresholds; a six month limit on a strike mandate, after which another ballot is required (can be increased to nine months if the employer agrees); doubling of the amount of notice of a strike to be given to an employer to 14 days; more stringent requirements for unions to supervise picketing; more specific requirements for the wording of the ballot paper; and changes to arrangements concerning political funding contributions and, in the public sector, facility time and check-off. A response to the consultation on allowing employers to hire agency staff to provide cover for industrial action is still awaited. Further information is available [here](#).

NEW NATIONAL MINIMUM WAGE RATES

The national minimum wage rates will increase in April 2017. The rate for workers aged 21 to 24 will increase to £7.05 an hour and the rate for those aged 25 and over (the national living wage) will increase to £7.50 an hour.

BONUS BUY-OUTS

On 26 September 2016 the Prudential Regulation Authority (**PRA**) published a policy statement on remuneration, focussing on buy-out awards granted to employees who move between banks, building societies and PRA-designated investment firms, including UK branches of non-EEA headquartered firms. The new rules, which apply to buy-outs agreed from 1 January 2017, require that firms are unable to agree buy-outs unless they have received a remuneration statement from their new employee (prepared by the former employer) setting out the details of foregone deferred remuneration, and then must operate malus and clawback on buy-out amounts where the foregone deferred remuneration would have been subject to malus or clawback by the previous employer.

APPRENTICESHIP LEVY

The Government will introduce a levy on large employers to help fund three million new apprenticeships in April 2017. The levy will support all post-16 apprenticeships in England, and will provide funding that each employer can use to meet their individual needs. See the entry in the tax section below for further details.

NEW OBLIGATION ON LARGER EMPLOYERS TO REPORT GENDER PAY GAP

Final form draft Gender Pay Gap Information Regulations have been laid before Parliament and are expected to be commenced in April 2017. Private and voluntary sector employers with 250 or more employees (including individuals with a contract personally to do work) will have to take a snapshot of pay data on 5 April 2017 (and every subsequent anniversary) and publish it within 12 months (ie the first data must be published by 4 April 2018). Publication of pay information may well increase the risk of equal pay claims or reputational damage and larger employers may wish to audit their

position and consider taking action to address disparity ahead of the requirement coming into force. Further detail on the final regulations is available [here](#).

SALARY-SACRIFICE SCHEMES

HMRC will restrict the use of salary sacrifice for the provision of benefits in kind (with certain exceptions) with effect from April 2017, making them chargeable to income tax and employer National Insurance Contributions (**NICs**). A new tax-free childcare regime is also expected in early 2017. See the entry in the pensions section below for further details.

FINANCIAL CONDUCT AUTHORITY (FCA) AND PRA REGULATORY REFERENCE RULES

Regulated banks and insurers will have to comply with new rules on references for all candidates being recruited to senior management functions, senior insurance management functions, FCA-controlled functions or significant harm functions from 7 March 2017 onwards. Further detail is available [here](#).

For further information please contact [Peter Frost](#) or [Andrew Taggart](#).

ENERGY AND ENVIRONMENT

GOVERNMENT TO CONSULT ON INTRODUCTION OF FOREIGN INVESTMENT RULES FOR CRITICAL INFRASTRUCTURE

In the context of giving the go-ahead for the Hinkley Point C new nuclear project, the Government announced its intention to reform its approach to the ownership and control of critical infrastructure to ensure that the implications of foreign ownership are scrutinised for the purposes of national security. There are few details about the proposed reforms, but they will include a “cross-cutting national security requirement for continuing Government approval of the ownership and control of critical infrastructure” and a review of the Enterprise Act 2002 public interest regime. The term “critical infrastructure” has not been defined. A formal consultation on the proposed changes is expected in early 2017. See the entry in the competition, regulation and trade section above for further details.

OFGEM REVIEW OF EMBEDDED BENEFITS

In a letter dated 29 July 2016, Ofgem sought views on its concerns that the current transmission charging arrangements for embedded generation prevent a level playing field between small embedded generation and large embedded and transmission connected generation (the letter is available [here](#)). Ofgem cites the size and increasing rate of the Transmission Network Use of System (TNUoS) demand residual as a particular concern, given that it may distort the market by encouraging investment in smaller embedded generation, leading to an inefficient generation mix. Ofgem received 145 responses to the letter and published an update letter on 2 December 2016 (the letter is available [here](#)). The update letter notes that Ofgem still considers TNUoS demand residual payments to embedded generation to be a major concern and intends to publish its network charging proposals in early 2017. Ofgem has also received proposed modifications to the Connection and Use of System Code which relate to the current TNUoS charging arrangements for embedded generation. It intends to consult on the proposed code modifications in early 2017, with a view to implementing any changes in April 2018.

NON-ROAD MOBILE MACHINERY REGULATION TAKES EFFECT

The Non-Road Mobile Machinery (NRMM) Regulation, which sets pollution limits for off-road engines such as tractors, excavators and lawn mowers, will replace an earlier Directive and includes limits for particulate matter and gaseous emissions, such as nitrogen oxides, depending on engine power and use. Data published earlier by the Commission showed that NRMM engines are responsible for 15% of all nitrous oxide emissions in the EU and 5% of particulate pollution. The Regulation also contains procedures for engine manufacturers to follow in order to obtain approval for their engines, without which their products cannot be placed on the EU market.

NEW ENVIRONMENTAL PERMITTING REGULATIONS IN FORCE

The new Environmental Permitting (England and Wales) Regulations 2016 were made on 11 December 2016 and took effect on 1 January 2017. The Regulations consolidate numerous amendments to the previous Regulations rather than introducing new policy. The Government has indicated that, for England, there will not be a wider policy review of the Regulations until 2019.

SUPPORT FOR RENEWABLE ENERGY

Save for grace period allowances, the scheme for Renewable Obligation Certificates (**ROCs**) will close to new applicants at the end of March 2017 pursuant to the Renewables Obligation Closure Order 2014. From this point, new applicants will only be entitled to support for renewable energy generation through the Contract for Difference (**CfD**) mechanism. The scheme has already closed (subject to grace periods) to new solar PV generating capacity in England, Scotland and Wales and new onshore wind capacity in England, Northern Ireland, Scotland and Wales. Further details on the scheme's closure can be found on the Ofgem website [here](#).

NEW ELECTRICITY SYSTEM OPERATOR INCENTIVES

The current electricity System Operator (**SO**) incentives scheme, which is designed to encourage National Grid to operate the electricity transmission system in an efficient and effective manner, ends on 31 March 2017. Ofgem has [consulted](#) on the SO incentives scheme that will apply from 1 April 2017 to spring/summer 2018 (when the new SO incentives framework will come into effect), to ensure that the incentives reflect the changing nature of the UK's electricity system and the SO's role within it. Ofgem's preferred option is to maintain the current incentive framework but to implement changes where there could be benefits to consumers. Ofgem planned to issue initial proposals for this interim period by the end of 2016 and to shortly thereafter commence stakeholder engagement on the SO incentives that should apply from spring/summer 2018 onwards.

ENVIRONMENTAL IMPACT ASSESSMENT (EIA) DIRECTIVE 2014

Member States are required to implement revisions to the EIA Directive adopted in 2014 by 16 May 2017. Amongst other things, the revised Directive adds to the assessment criteria required for screening and assessing project risks. The Scottish and Welsh Governments launched consultations on proposed amendments to introduce the revisions into devolved legislation. Those consultations closed on 31 October 2016 and 11 November 2016 respectively. The Government announced its consultation on the implementation of the revised EIA Directive in the EIA regime and the Nationally Significant Infrastructure Projects legislation. The consultation will close on 1 February 2017.

ONSHORE TRANSMISSION - COMPETITIVELY APPOINTED TRANSMISSION OWNERS (CATOS)

The Government has decided to extend the use of competitive tendering to onshore electricity transmission assets that are new, separable and high value. Ofgem's latest consultation on tender models and market offering closed in September 2016 and the response is awaited. Ofgem expects to be in a position to run the first onshore transmission tender in late 2017 to early 2018. See details of the consultation process on Ofgem's website [here](#).

MEDIUM COMBUSTION PLANT DIRECTIVE 2015 IMPLEMENTATION DUE

This Directive regulates air emissions from the combustion of fuels in plant with a rated thermal input between one and 50 megawatts. This could include generators and boilers for large buildings, or those providing heat or steam for small industrial installations. The Directive includes limits on emissions of sulphur dioxide, nitrogen oxides and particulates (dust), together with obligations to monitor emissions of carbon monoxide. Certain types of plant benefit from an exemption including: waste incineration and co-incineration; internal combustion engines in non-road mobile machinery; gas turbines on offshore platforms and reactors in the chemicals industry. The provisions differ for new and existing equipment. On 16 November 2016, the Government launched a consultation on implementing the Directive. The consultation will close on 8 February 2017.

EU CIRCULAR ECONOMY PACKAGE

The European Parliament and the Council is considering an extensive revamp of EU waste and recycling legislation introduced in December 2015 as part of the Commission's Circular Economy package. It is expected this process could take between one and three years. The package involves a wide-ranging action plan, together with proposals for changes to key waste legislation including the Waste Framework Directive, Packaging Waste Directive, Landfill Directive and Waste Electrical and Electronic Equipment Directive. Key proposals include economic incentives for producers to put greener products on the market and support recovery and recycling schemes, more stringent targets for recycling, and various additional restrictions and incentives aimed at discouraging landfill. Further detail can be found [here](#).

NATIONAL INFRASTRUCTURE ASSESSMENT

In October 2016 the National Infrastructure Commission (**the Commission**) called for evidence to inform the development of its National Infrastructure Assessment (**NIA**). Submissions are due by 10 February 2017. NIAs are to be published once in every Parliament and will set out the Commission's assessment of, and recommendations for, the UK's long-term infrastructure needs in the energy, transport, digital communications, water and wastewater (drainage and sewerage), flood risk management, and solid waste sectors. The Commission plans to publish a Vision and Priorities document in the summer of 2017 that will identify key long-term infrastructure challenges and priority action areas for the UK. This will

form the basis of a public consultation that will inform the NIA that is to be published in 2018. See details of the call for evidence [here](#).

NETWORK INNOVATION REVIEW

Ofgem is consulting on proposed changes to the Network Innovation Allowance and the Network Innovation Competition. These schemes are part of the gas and electricity network price controls that are intended to incentivise monopoly network companies to focus on innovation. The schemes fund research and trial projects that focus on transitioning to a low carbon economy while offering cost savings and/or wider environmental benefits to customers. The response deadline is 6 February 2017. See details of the consultation [here](#).

ANNOUNCEMENT OF BUDGET FOR UK SECOND CfD ALLOCATION ROUND

On 9 November 2016, the Government published the draft budget and strike prices for the second CfD allocation round taking place in April 2017, together with accompanying guidelines, and consultation papers in respect of coal, geothermal and fuelled technologies and non-mainland onshore wind. The second CfD allocation round is for Pot 2 (less-established technologies ie offshore wind, fuelled technologies, wave, tidal stream and geothermal) and the Government has confirmed that the annual budget available will be £290 million (in 2011/12 prices) for delivery years 2021/22 and 2022/23. There is a total cap of 150MW for CfDs for fuelled technologies in this round. However, there is no maximum MW for other technologies and no minimum MW will be applied for any technologies in the allocation round (there is no longer any minimum MW for wave and tidal stream).

Up to £70 million of the annual budget will be allocated to fuelled technologies and the remaining £220 million will be allocated to offshore wind, geothermal, wave and tidal stream (any amount not used for fuelled technologies can be used for other Pot 2 technologies). The annual budget for the first CfD allocation round for Pot 2 was £155 million for 2016/17 and £260 million for 2017/18 to 2020/21. The strike prices for the second allocation round have been set to target the cheapest 19% of projects in each technology to ensure value for money for consumers. The final budget will be confirmed no later than 10 working days before commencement of the allocation round.

GOVERNMENT CONSULTATION ON PHASING OUT UNABATED COAL GENERATION

The Government has launched a consultation inviting views on its proposal to phase out unabated coal generation by 2025. Responses are due by 8 February 2017. The consultation is aiming to investigate ways to regulate the closure of unabated coal, for example by placing obligations on existing unabated coal producers which currently only apply to new coal power stations such as emission limits and the demonstration of carbon capture and storage technology, to provide greater market certainty for investors. The Government has

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particularly identified new gas generators as having the potential to fill the capacity required to replace the electricity supply from coal generators. The Government notes within the consultation that it is confident that the Capacity Market provides a robust mechanism to bring forward the investment needed to compensate for the closure of unabated coal and that there will be no impact on the security of electricity supply. Further detail can be found [here](#).

DEVELOPING A SMART, FLEXIBLE ENERGY SYSTEM FOR THE UK

The Government and Ofgem issued a call for evidence in November 2016 in relation to the development of a smart, flexible energy system that is underpinned by information technology and the ability to modify generation and consumption patterns to respond to external signals. The consultation will consider, amongst other issues, the removal of barriers to storage and demand-side response, improvement of price signals, drivers of innovation and changes to roles and responsibilities in the energy system. Responses are due by 12 January 2017 and will inform the plan that the Government and Ofgem intend to publish in spring 2017. Further detail can be found [here](#).

BEIS FEE FOR SERVICES UNDER OPCC AND OCR

The Department for Business, Energy and Industrial Strategy (**BEIS**) has provided its response to the consultation relating to proposed changes to Regulation 6 of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (**OPPC**) and Regulation 8 of the Offshore Chemicals Regulations 2002 (**OCR**), in order to enable the BEIS to charge industry a fee for providing certain services under those Regulations. BEIS has said it will now develop its proposal to charge a fee for certain regulatory services under OPPC and OCR, and will subsequently seek Parliamentary approval for proposed regulatory amendments in early 2017, with a view to them entering into force in the spring of 2017. BEIS's guidance on cost recovery for offshore functions would be updated before the new regulations enter into force. BEIS has also said that updated guidance on OPPC and OCR will also be taken forward in 2017. Further details can be found [here](#).

For further information please contact [Anna Howell](#) or [Julie Vaughan](#).

FINANCIAL SERVICES REGULATORY

THE FCA'S MISSION STATEMENT

The Financial Conduct Authority (**FCA**) published a consultation on its draft [mission statement](#) in October 2016. The FCA has published [key themes](#) from the feedback received so far. Subject to the outcome of the consultation, the mission statement can be expected to influence the FCA's choice of policy initiatives in the course of 2017. A large part of the draft mission statement duplicates the FCA [business plan](#). There are, however, some significant new themes:

- taking action against firms in relation to their unregulated activities where these affect the financial system;
- focusing on protecting vulnerable customers;
- encouraging transparency by "changing the way firms present choices to consumers and 'nudging' them towards appropriate decisions";
- ensuring fairness in price discriminate between customers;
- discouraging the giving of greater weight to pay-offs the nearer in time to the present they are;
- effecting redress in cases where it is most needed; and
- reviewing FCA rules where they appear to inhibit competition.

The FCA also seeks views on whether firms should have an enforceable duty of care to their retail customers. The FCA does not consider this is necessary but is willing to consider feedback from respondents.

SENIOR MANAGERS AND CERTIFICATION REGIME

The Prudential Regulation Authority (**PRA**) and the FCA implemented a new individual accountability framework for deposit-takers, PRA investment firms and insurers in March 2016 in the form of the senior managers and certification regime (**SMCR**) and the senior insurance managers regime (**SIMR**). Enhancing the accountability framework remains a high-priority for the regulators. The following developments are expected during the course of 2017:

- Certain requirements within the SMCR will apply from 7 March 2017: firms are required to issue certificates relating to the fitness and propriety of individuals under the certification regime by this date; the FCA conduct rules will apply to staff at relevant firms who are not within the SMCR; and rules relating to regulatory references under the SMCR and SIMR come into force (see our briefing [here](#)).
- The PRA and the FCA are expected to consult on the extension of the SMCR to all other FSMA-authorized firms, including further developing the regime for insurers in the first quarter of 2017. The extended regime is expected to apply from 2018.
- As part of the on-going measures to strengthen the rules on individual accountability, the PRA and FCA have proposed amendments to both SMCR and SIMR. We summarise the proposed changes to the SMCR in our briefing [here](#). Final rules are

expected during the course of 2017. The key proposals under consultation include:

- Introduction of a new senior management function (SMF 23 Chief Operations Manager) and the widening of the definition of "key business area" under SMF 6, which may result in additional Senior Managers in some firms
- New prescribed responsibility for operational resilience and operational continuity
- Extension of certain conduct rules to all non-executive directors
- Additional guidance on the duty of responsibility
- Finally, following the publication of a discussion paper in September 2016, the FCA is expected to consult on whether a Senior Manager is needed for the legal function in early 2017.

The PRA and FCA have also published feedback on the implementation and allocation of Senior Managers, governance maps and statements of responsibility. The feedback should provide useful guidance for firms which have already implemented SMCR.

MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE II (MIFID II)

The MiFID Directive (**MiFID II Directive**) and Regulation (**MiFIR**) (together recasting the existing MiFID) 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.

Following a one-year delay, MiFID II will now apply from January 2018. Level 2 legislation and technical standards are expected to be finalised in the first quarter of 2017. In the UK, HM Treasury is expected to consult on changes to legislation to implement the MiFID II Directive in early 2017. The FCA and the PRA have both consulted on MiFID II implementation during the course of 2016; final changes to the FCA and PRA Rulebooks are expected in the second quarter of 2017.

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 draft proposals will be considered by the European

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Parliament and the Council of the EU during the course of 2017. The proposed legislation will amend the following pieces of legislation:

- Capital Requirements Regulation (**CRR**) and the Capital Requirements Directive (**CRD**);
- Banking Recovery and Resolution Directive (**BRRD**); 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 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 BRRD 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; see the entry in the banking, restructuring and insolvency section above for further details). 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 EUR 30 billion.

THE FOURTH MONEY LAUNDERING DIRECTIVE (4MLD)

The [Fourth Money Laundering Directive \(4MLD\)](#) must be transposed by EEA Member States by 26 June 2017. It extends the scope of the current money laundering regime.

The primary modifications relate to compliance requirements. These include, for example, promoting a greater risk-based approach, restricting use of simplified due diligence as a blanket exemption

from customer due diligence, minor changes to the definition of "beneficial owner" for companies and trusts and extending the categories of individuals brought within the definition of Politically Exposed Persons (**PEPs**).

4MLD extends the scope of the "money laundering" definition to include laundering the proceeds of tax offences. In the UK, however, an "all crimes" reporting regime already operates.

Chapter III of 4MLD will require Member States to require corporates (ie including all EU group members) and certain trusts to obtain and hold adequate, accurate and current information on their beneficial ownership. They must submit this information to a central registry (such as Companies House in the UK). Similar requirements have already been introduced in the UK via the requirement for companies to maintain a register of Persons of Significant Control (**PSC Register**). See the entry in the corporate section above for further details.

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 4MLD (which has yet to be implemented by Member States – see above) 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 is called the "Fifth Money Laundering Directive" (**5MLD**). It 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 EU Commission, Council and Parliament are ongoing. 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, as well as increasing transparency and security of payment services. PSD2 came into force on 12 January 2016 and Member States must transpose the directive into national law by 13 January 2018. In the UK, the FCA is considering feedback to the call for input on its approach to the current payment services regime, published in February 2016. Once the FCA has developed its approach

to the revised payment services regime, it will consult on necessary Handbook changes and updated guidance in 2017.

THE REVISED WIRE TRANSFER REGULATION (WTR)

The [Revised Wire Transfer Regulation](#) is directly applicable in Member States of the EEA. It will apply from 26 June 2017. This regulation imposes further “know your customer” requirements for payment service providers (**PSPs**), including a new requirement on the PSP of the payer to ensure that transfers of funds are accompanied by information on the payee. PSPs of the payer need to make sure that all transfers of funds are accompanied by complete information when the payee’s PSP is situated outside the EU. The Revised WTR also imposes new accuracy verification requirements on PSPs of the payee.

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 2017. MAR will apply 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**) 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 has now been postponed to 1 January 2018 because of disagreement over the format of the KID.

For further information please contact [Karen Anderson](#) or [Clive Cunningham](#).

INSURANCE

THE INSURANCE DISTRIBUTION DIRECTIVE

The [Insurance Distribution Directive \(IDD\)](#) will replace and update the old Insurance Mediation Directive (**IMD**) from 23 February 2018. It extends the IMD conduct of business regime to all insurance distributors, including (re)insurers as well as intermediaries (this has already been given effect in the UK). The IDD enlarges the exemptions under the IMD but, unlike the IMD, applies some requirements (lighter than the full regime) to businesses who take advantage of them. Distributors will be required to act honestly and fairly and in the interests of customers. The IDD contains high level rules about remuneration, conflicts of interest, transparency, advice standards, cross-selling, product oversight and governance. These rules are to be enlarged in a delegated act, a [draft](#) of which has been published for consultation. There are also special rules for investment based insurance products. Member States will have the option of prohibiting distributors receiving remuneration from third parties, eg introductory commission.

NEW RIGHT FOR POLICYHOLDERS TO CLAIM DAMAGES FOR LATE PAYMENT OF INSURANCE CLAIMS

One of the reforms brought about by the Enterprise Act 2016 when it comes into force in May 2017 will be a change in approach to remedies for late payment of insurance claims. Any contract of insurance made after the provisions come into force will include an implied term that if the insured makes a claim, the insurer must pay any sums due in respect of the claim within a reasonable time. Breach of this implied term will give policyholders a potential right to claim damages in the event of late payment. Our briefing on the practical implications for clients can be found [here](#).

TREASURY SELECT COMMITTEE INQUIRY INTO SOLVENCY II

On 13 September 2016, the House of Commons Treasury Select Committee (**TSC**) launched an [inquiry](#) into Solvency II. The TSC wishes to examine the case for retaining, losing or adapting Solvency II in a post-Brexit world, noting that significant concerns have been raised about whether the new regime represents good value for the costs associated with its implementation. The Chairman of the TSC, Andrew Tyrie MP, has commented that Brexit provides an opportunity for the UK to "assume greater control of insurance regulation" and that the committee will look at what improvements could be made to the Solvency II regime once the UK is no longer bound by EU constraints in this area. Areas to be considered by the inquiry include any impact of Solvency II on the competitiveness of the UK insurance industry and the impact of Solvency II on the role of insurance in meeting the needs of UK customers and the wider UK business economy.

No date has been given for the TSC to report on its findings although it can be expected to do so during 2017.

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

The Prudential Regulation Authority's new 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. More recently, it has been confirmed that aspects of the Senior Managers and Certification Regime (**SMCR**) that was introduced for banks will be extended to insurers and to insurance intermediaries. The regulators will consult on this wider application of the regime in 2017: see the entry in the financial services regulatory section above for further details. It is not yet clear precisely what changes this will bring for insurers that are already bound by the SIMR but it is expected to include the introduction of the same duty of responsibility as applies to senior managers in banks. Other proposed changes in this area include the extension of conduct rules to all non-executive directors. Discussions are continuing about the application of the SMCR to the legal function within a bank and the same issues can be expected to arise in the insurance sector. The Financial Conduct Authority proposes that the legal function within a firm should be allocated to a senior manager notwithstanding concerns that this raises for the position of lawyers whose advice to clients is subject to legal professional privilege.

For further information please contact [Paul Lewis](#) or [Geoffrey Maddock](#).

INTELLECTUAL PROPERTY

THE UNIFIED PATENT COURT (UPC) MAY BE OPEN FOR BUSINESS IN 2017 DESPITE A FUTURE BREXIT

The last six months have been eventful following the UK's June 2016 referendum vote to leave the EU. The exact mechanics of how Brexit will materialise and what it would mean for intellectual property rights in the UK is still unclear. For the latest Brexit-related developments and legal analysis (including intellectual property), please visit our [Brexit hub here](#). However what is now clear is that the UPC and unitary patent (UP) system will now go ahead in the short term, rather than being delayed until after Brexit, following the UK IP Minister's announcement at the EU Competitiveness Council meeting on 28 November 2016 that the UK will ratify the Unified Patent Court Agreement (UPCA) whilst still a member of the EU (see [here](#)) - provided of course that Germany also ratifies and the UK does not further delay.

For full implementation of the UPCA, 13 signatory States must ratify the UPCA including the UK, France and Germany. As at 7 December 2016 France and 10 other contracting Member States have done so. The required amendments have also been made to the Brussels Regulation and have been in force since 10 January 2015.

Once ratification is sufficient, the whole system will come into effect on the first day of the fourth month after this. The Preparatory Committee of the UPC has announced that spring 2017 is a likely time for the UPC (and hence the UP) to come into operation, although this may be delayed depending on how quickly the UK and Germany ratify.

Several states have signed the [Protocol on the Provisional Application of the Agreement on the Unified Patent Court](#) including Germany, France and the UK (with a reservation on Article 4 - see the detail linked on this and the other signatory states on the [signatory page](#)). The protocol will allow the provisional application of the institutional, financial and administrative provisions of the UPCA and will enable the necessary legal and practical arrangements to be made in contemplation of the establishment of the UPC, including the appointment of judges.

Once Article 50 is triggered, the UK will formally commence negotiations with the other EU Member States to effect a withdrawal agreement that will set out the arrangements for its withdrawal and details of its future relationship with the EU. The UK will leave the EU when the withdrawal agreement enters into force, or at the latest, two years from the date on which Article 50 is formally triggered. As it stands, this means that the UK will remain a member of the EU with EU law continuing to apply to the UK potentially until early 2019. For an insight into what this would mean for the UPC and intellectual property rights in general, in the UK and across Europe, please see our briefing following the Government's announcement on ratification [here](#).

We have a dedicated UPC and UP right [hub](#) on our website. In an [introductory article](#) we provide an overview of the UPC and the UP system, and details of Counsel's Opinion that we obtained as a

member of the Intellectual Property Lawyers Association (IPLA) on the possibility of the UK continuing to be a part of the UP system after Brexit. [In this article](#) we discuss the Opinion, which does not rule out the UK being a part of the UP/UPC system theoretically. However, given the current political context, it is difficult to see how the UK would be able to do so without reopening the UPCA or accepting the primacy of EU law and the jurisdiction of the CJEU in matters covered by the Agreement.

The new UP framework only needs the UPC to come into operation for this new patent right to become available. The UP will cover all participating EU Member States (currently all except Spain, Croatia and Poland). It is to be noted that Brexit will not directly impact our membership of the European Patent Convention and the European patent system and that European patents (EPs) and national patents will be available as usual.

Once the UPC is in operation, all European patents from participating EU Member States will be subject to its jurisdiction unless opted out by patentees. There will be a sunrise period during which holders of European patents may opt their patents out of the new UPC system prior to it coming into effect. The process will be organised by the Preparatory Committee during the transitional period. It is not yet certain when the sunrise opt-out period will start.

THE DIGITAL SINGLE MARKET

2017 may well be the year that some of the European Commission's Digital Single Market strategies are passed into legislation by the European Parliament. On 14 September 2016 the European Commission communicated its latest proposals for the harmonisation of copyright in the EU. The proposal package is part of a wider Digital Single Market strategy presented in May 2015 aimed at:

- better online access for consumers and businesses across Europe;
- creating the right conditions and a level playing field for advanced digital networks and innovative services; and
- maximising the growth potential of the digital economy.

The three main priorities of the new 2016 package were stated to be:

- better choice and access to content online across borders;
- improving copyright rules on research, education and inclusion of disabled people; and
- a fairer and sustainable marketplace for creators and press.

These objectives are to be achieved through the implementation of the proposed Regulation on Rights Clearance for Online TV Programming, the Digital Copyright Directive, and the 2014 Marrakesh Treaty.

INTELLECTUAL PROPERTY

The Digital Copyright Directive (DCD)

Among other things, Articles 3 to 5 of this Directive introduce new mandatory exceptions for text and data mining, the use of works and other subject matter in digital and cross-border teaching activities, and the preservation of cultural heritage.

- Article 3 – Text and data mining: The UK already has a text and data mining exception since 2014 (section 29A of the Copyright Designs and Patents Act 1988 (**CDPA**) as amended). However, the exception in Article 3 of the DCD would be narrower in relation to the beneficiaries – applying only to research organisations, as opposed to any “person”, as in the CDPA). It would, on the other hand, be broader in relation to the scope – covering commercial use as well as non-commercial use.
- Article 4 – Teaching activities: Most EU Member States will already have some sort of exception to teaching related activities; however, Article 4 is aimed at covering digital use of works specifically which has so far been a grey area.
- Article 5 – Preservation and cultural heritage: This provision would allow cultural heritage institutions to make copies (in any format) of works that are permanently in their collection for the sole purpose of conservation.
- Article 11 – This would introduce a new right for press publishers to authorise the reproduction and making available for digital use of their articles. The new right intends to recognise the important role press publishers play in investing and creating quality journalist content, however many are concerned that this would harm citizens’ access to knowledge and information (eg the so-called Google tax effect).

The most controversial provision is likely to be Article 13 together with Recitals 38 and 39, which address the liability of internet service providers (**ISPs**). In particular, “where ISPs store and provide access to the public to copyright uploaded by their users thereby performing an act of communication to the public, they are obliged to conclude a licensing agreement with right holders... and should take appropriate and proportionate measures such as implementing effective technologies”. The provisions have been widely criticised as their compatibility and interaction with the E-commerce Directive is unclear, in particular the prohibition of general monitoring and the safe harbour provisions. It remains to be seen in what form the text will be implemented, if at all, as big online hosting providers are likely to attempt to have this provision amended.

Finally, Article 15 requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14 to include transparency obligations for the benefit of authors and performers. Under Article 15, Member States must ensure that authors and performers are entitled to request “additional, appropriate remuneration...when the remuneration originally agreed is disproportionately low”. How this provision is to work in practice is unclear. Little or no assistance is provided by Recital 42, which is silent on a possible opt-out.

The Regulation: The Regulation on Rights Clearance for Online TV Programming proposes to facilitate the clearance of right for online transmission and digital retransmissions of TV and radio programmes. The key terms consist in extending the country of origin principle and mandatory collective management rights.

The Marrakesh Treaty: The implementation of the Marrakesh Treaty signed in 2014 aims to facilitate access to published works for person who are blind, visually impaired or otherwise print disabled and has been largely welcomed by all parties.

For further information please contact [Sebastian Moore](#) or [Rachel Montagnon](#).

PENSIONS

EARLY EXIT CHARGES FROM DEFINED CONTRIBUTION (DC) ARRANGEMENTS

As from 31 March 2017 the Financial Conduct Authority (FCA) will be placing a cap on excessive early exit charges for members of contract-based arrangements who seek to access the "pension freedoms" that came into effect in April 2015. In line with the proposals contained in its consultation exercise carried out during summer 2016, a cap of 1% will apply in relation to existing arrangements and 0% in relation to new ones. The Department for Work and Pensions (DWP) has similarly indicated its intention to introduce the same level of cap for occupational pension schemes, although this will not take effect until October 2017.

PENSIONS DASHBOARD

March 2017 is also the anticipated launch date of the prototype version of HM Treasury's online "pensions dashboard", a platform which will allow savers to view the value of all their pensions savings in one place (as well as acting as a portal via which individuals can track down "lost" pension pots with previous employers). The project is being led by the Association of British Insurers and as many as 17 leading industry providers are now understood to have signed up to the initiative.

DEFINED BENEFIT (DB) CONTRACTING-OUT

The abolition of contracting-out on a DB basis has led to a "disconnect" in many schemes' Guaranteed Minimum Pension (GMP) rules, which require GMPs to be inflation-proofed as from the end of a member's contracted-out service (ie 5 April 2016 for a member still earning benefits under a formerly contracted-out scheme) rather than the date on which he or she subsequently leaves pensionable service. Members whose GMPs are inflation-proofed as from this earlier date will be over-compensated and provided with a GMP at State Pension Age which is higher than it should be.

5 April 2017 marks the end of trustees' one-year period for utilising statutory modification powers to amend scheme rules and ensure that the revaluation requirements apply only on cessation of pensionable service and not, if earlier, when contracted-out service ceased.

LIFETIME ISA

April 2017 will see the introduction of the Lifetime ISA for adults under the age of 40, into which individuals will be able to contribute up to £4,000 annually and receive a 25% bonus from the Government. The standard annual ISA savings limit will, as from the same date, be increased from (just over) £15,000 to £20,000.

MONEY PURCHASE ANNUAL ALLOWANCE

At the same time the Government intends to reduce the "money purchase annual allowance", being the amount of tax-efficient pensions savings that individuals who have accessed their benefits

flexibly are henceforth permitted to make, from £10,000 down to £4,000 per annum.

OTHER MEASURES FROM THE 2016 AUTUMN STATEMENT

The Government also intends to remove the income tax and national insurance advantages associated with salary sacrifice arrangements as from April 2017, save in respect of a limited number of cases (one of which being pension contributions). A "pensions advice allowance", whereby members can withdraw up to £500 from their DC funds in order to pay for financial advice when they are considering accessing their benefits (flexibly or otherwise) without paying either a tax penalty (under HMRC's authorised payments regime) or income tax, is also on the cards as from April 2017. And finally a stricter regime to deal with pension scams, including a possible ban on cold-calling, is also proposed (albeit as from an as-yet-unknown date).

PROHIBITION ON CORPORATE DIRECTORS

The timescale for introduction of the prohibition on corporate directors is not known with any certainty at present. Nor is the extent of any exception to the general prohibition, which might include (ie permit the continued use of) corporate directors of pension scheme trustee companies. See the entry in the corporate section above for further details.

VAT RECLAIMS BY SCHEME SPONSORS ON PENSION FUND INVESTMENT MANAGEMENT EXPENSES

We are still no closer to resolution of the pension scheme VAT saga. During September 2016 HMRC announced a yet further extension to the transitional period (during which employers may reclaim VAT on pension fund investment management expenses either under the longstanding "70:30 rule-of-thumb" or in accordance with revised arrangements adopted in light of the decision of the Court of Justice of the European Union (CJEU) in *PPG Holdings*) for a further 12 months, until 31 December 2017. HMRC also confirmed that if employers in the latter category wish to switch back to the previous (ie pre-PPG) means of dealing with VAT reclaims, they will be able to do so.

INCREASED REGULATION OF MASTER TRUSTS

The Pension Schemes Bill 2016-17, which will in time become the Pension Schemes Act 2017, contains provisions designed to bring about a heightened regulatory regime for master trusts – the current definition of which includes, somewhat controversially, industry-wide occupational schemes for non-associated employers. All existing and new master trusts 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. It is not presently known as from what date these new provisions will come into effect.

PENSIONS

OTHER THINGS WE MIGHT SEE IN 2017 – 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 2017. For completeness we set these out below in summary form:

- **Pension Protection Fund (PPF) long service cap:** The Government intends that the proposed PPF long service cap (which, more accurately, is a relaxation of the PPF compensation cap for long-serving individuals) will come into force with effect from April 2017.
- **Accessing the pension freedoms – advice requirement and mandatory risk warnings:** The Government also intends to introduce with effect from April 2017 a new means of calculating the value of members' benefits in order to ascertain whether the £30,000 threshold – above which financial advice must be taken before benefits are accessed flexibly – has been reached. Whilst the new methodology can be expected to result in significantly fewer members (particularly those whose benefits include Guaranteed Annuity Rates (GARs)) attaining that threshold, a further legislative provision will require trustees to give mandatory, tailored "risk warnings" whenever benefits such as GARs are to be given up, irrespective of whether the value of the member's benefits exceeds the £30,000 threshold.
- **Lump sum death benefits settled on new trusts:** HMRC has consulted on new "provision of information" requirements where a lump sum death benefit is paid to (ie settled upon) a separate trust. The proposed changes are designed to make it easier for the ultimate beneficiary of such a payment to ensure that the correct amount of tax has been paid. The new obligations, on the scheme administrator (to give certain information to the trustees of the settlement to which the monies are paid) and on those settlement trustees (to pass this information on to the ultimate beneficiary) should, it is said, give the trust beneficiary everything that is needed to recover any excess tax paid. Such death benefits are taxed at the recipient's marginal rate, hence by "excess tax" we mean the amount by which the 45% standalone tax charge (levied automatically on the payment into the new trust) exceeds the tax liability calculated using the marginal rate of tax of the ultimate beneficiary.
- **"Without consent" bulk transfers from formerly contracted-out schemes:** Less good news is that the DWP have formally announced that corrective changes to the bulk transfer rules, which currently (and erroneously) only permit the bulk transfer of contracted-out 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), will not be made until autumn 2017 at the earliest.
- **Guaranteed Minimum Pension (GMP) equalisation:** In November 2016 the DWP launched a consultation exercise (running until

February 2017) on a new methodology for equalising GMPs, something which the Government continues to insist there is a legal requirement to do in respect of those benefits earned from May 1990 onwards. The new proposals centre on a one-off "value test" followed by conversion of the member's GMP into a main scheme benefit, rather than annual gold-plating of members' GMPs by undertaking comparative "better of" tests every year until benefits are drawn.

The Government has also indicated that its withdrawn 2012 regulations (which sought to require GMP equalisation without any need for an opposite-sex comparator) may be reviewed, and consulted on again, in light of the outcome of the current consultation exercise. It is possible that if any requirement to equalise GMPs is introduced into English law, this could take place during the course of 2017 – the Government has (quite assertively) indicated that our impending exit from the EU will not impact upon its plans to require equalised GMPs from 1990 onwards. But until any such requirement is introduced, the predominant industry view remains that no obligation currently exists.

- **Corporate governance reform:** It is also possible that proposed changes to the UK's corporate governance regime, which would potentially give pension funds more voice in the affairs of the scheme's sponsor (and maybe even a seat at its boardroom table), could take effect as early as 2017. See the entry in the corporate section above for further details.

OTHER THINGS WE MIGHT SEE IN 2017 – 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 three fundamental topics – namely pension increases, an employer's duty of good faith, and benefit equalisation – 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 2017:

- **Pension increases/trustee discretion – *British Airways*:** The High Court's judgment in *British Airways*' action against the trustees of the Airways Pension Scheme (the hearing of which took place very publicly between October and December 2016, and which concerns the propriety of additional discretionary increases to members' benefits granted by the Airways Pension Scheme trustees in addition to Consumer Prices Index (CPI)-based indexation) is anticipated to be given during early 2017.
- **Pension increases/relationship between fixed increases and Limited Price Indexation (LPI) – *Dutton v FDR Ltd*:** The appeal against the High Court decision that, where scheme rules provide for both fixed increases to pensions in payment and an LPI-based

measure (such as increases in line with the Retail Prices Index (RPI) capped at 5%), those fixed increases operate as an underpin to the LPI obligation, is due to be heard by the Court of Appeal during late February 2017.

- **Pension increases/RPI CPI – *Barnardo's v Buckinghamshire***: It is understood that Barnardo's is seeking leave to appeal against the Court of Appeal's decision in 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. The outcome of their application (ie whether an appeal will be allowed) is anticipated by the end of March 2017 and it is possible that the Supreme Court could then hear any such appeal by the end of this calendar year.
- **Employer's duty of good faith/validity of "non-pensionability" agreements – *Bradbury v BBC***: The appeal by orchestra clarinettist Mr Bradbury against the High Court's decision, that the BBC's capping of pensionable pay increases at 1% by a collateral contractual agreement between employer and employee: (i) was legally effective; and (ii) did not breach the employer's duty of good faith, is due to be heard by the Court of Appeal during March 2017.
- **Employer's duty of good faith/closure to accrual – *IBM v Dalgleish***: In a similar vein IBM's appeal, against the decision of the High Court that the manner in which it went about closing its defined benefit pension schemes to future accrual constituted a breach of its implied obligation of good faith, is due to start in the Court of Appeal in May 2017.
- **Equalisation – *Safeway Ltd v Newton***: The appeal by Safeway concerning its purported equalisation of benefits during the early 1990s, which were held by the High Court in February 2016 to have been ineffective, is listed for hearing in the Court of Appeal during July 2017.
- **Same-sex death benefits – *Walker v Innospec***: The Supreme Court hearing in this long-running case, which questions the lawfulness of the UK legislative provision that does not require death benefits payable to same-sex partners to take account of service prior to December 2005, took place during November 2016. We anticipate judgment being handed down during the first quarter of 2017.
- **PPF compensation limits – *Grenville Holden Hampshire v Pension Protection Fund***: During July 2016 the Court of Appeal referred to the CJEU 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. It is possible that the CJEU will consider the matter during the course of 2017 although more definitive timescales cannot be predicted at present.

For further information please contact [Alison Brown](#) or [Daniel Schaffer](#).

REAL ESTATE AND PLANNING

REGISTER OF EXEMPTIONS TO BE SET UP FOR PROPERTIES WITH F AND G RATED ENERGY PERFORMANCE CERTIFICATES (EPCS)

Regulations are now in force, which prohibit, from 1 April 2018, the granting of new leases or renewal leases of commercial properties in England and Wales which are rated F or G on their EPCs. Before such properties can be let, cost effective energy efficiency improvements must be performed so that the property attains an EPC rating of E or above. From 1 April 2023, the Regulations will apply to all leases, including those already in existence. Landlords who consider that an exemption applies under these Regulations are still able to let F and G rated properties, but will need to lodge an exemption on a centralised exemptions register. This register was expected in 2016, but the date from which landlords may register an exemption is now 1 April 2017 for non-domestic private rented properties and 1 October 2017 for domestic private rented properties.

REVALUATION OF BUSINESS RATES

Business rates are calculated by applying a national multiplier to a property's rateable value. The multiplier increases in line with inflation each year and is reset when new rating lists come into force. All rateable values for England and Wales will be revised with effect from 1 April 2017 based on market conditions on 1 April 2015, following a new countrywide revaluation by the Valuation Office Agency (which will reflect market and sector changes in different parts of the country since 2008). The multiplier will be 0.466 in 2017/18, increased to 0.479 for large occupiers (and subject to supplements in some areas). The revised rateable values will result in many businesses facing substantial increases, particularly those in the south-east of England. Although transitional relief will be available to smooth the increases or decreases in rates payable, transition will not apply to increases in liability in 2017/18 unless (where the rateable value exceeds £100,000), the increase is at least 42%. This is in stark contrast to 2010/11, when the threshold was 12.5%. Decreases will be capped at 4.1% in 2017/18, meaning that businesses that have been subject to excessive rates liabilities for some years will have to wait several years before seeing a real benefit of any reduction in rateable value.

RATING ASSESSMENTS OF MULTI-OCCUPIED BUILDINGS OR SITES

Following the Supreme Court's decision in *Woolway (VO) v Mazars* the Valuation Office Agency has changed its practice and will now assess separately all individual floors of an office building or parts of what might be considered single sites such as hospitals. This can lead to the loss of a quantum discount where a number of office floors or parts of a site were previously treated as one and the ratepayer will then pay materially more by way of rates. As a consequence rates mitigation measures, such as interlinking stairways or lifts in office buildings to obtain quantum discounts, are expected to become more prevalent in 2017.

ELECTRONIC COMMUNICATIONS CODE AS PART OF THE DIGITAL ECONOMY BILL

See the entry in the technology, media and telecommunications section below for further details.

ASSIGNMENT OF LEASES AND THE LANDLORD AND TENANT (COVENANTS) ACT 1995

EMI Group Limited v O&H Q1 Limited will be heard by the Court of Appeal by 8 May 2017. The case centres around whether, under the Act, a new lease can be assigned by a tenant to its existing guarantor. The High Court ruled that this was prohibited by the Act, making the assignment void by operation of law, the assignor tenant remained liable for the performance of its covenants and the guarantor continued to guarantee the tenant's obligations. The High Court ruling limits group restructuring opportunities and reinforces the importance of due diligence on a sale or acquisition to check that a new tenancy has not at any stage been the subject of an assignment directly to a guarantor.

CHANGES TO PARTNERSHIP LEGISLATION

HM Treasury have completed a consultation process on proposals to change UK limited partnership legislation. If enacted, a new form of corporate vehicle, a "private fund limited partnership" (PFLP), would be created. Unlike the current position where a limited partner faces the potential loss of limited liability for the debts and obligations of the partnership if it takes part in the management of the limited partnership business, it is proposed that a non-exhaustive "white list" of key activities and decisions could be taken by a limited partner in a PFLP. Other changes may improve investor privacy and simplify registration requirements. The proposed legislation is quite likely to be enacted some time in 2017. Click [here](#) for our e-bulletin.

LAW COMMISSION PROJECTS

It was announced in 2016 that the Government would bring forward proposals to respond to the Law Commission's recommendations and a draft Law of Property Bill to modernise and simplify the law relating to easements, covenants and *profits à prendre*. There may be some movement on these recommendations in 2017 but it is unclear when, if at all, the Government will respond to other Law Commission recommendations such as the simplification of the law relating to rights of light, the introduction of a new statutory scheme of conservation covenants (which would enable landowners to enter long-lasting, enforceable covenants for conservation purposes) and the abolition of the current law of forfeiture and replacement with a modern statutory scheme for the termination of tenancies on the ground of tenant default.

PLANNING

The Government is due to publish the awaited Housing White Paper in January 2017, along with its response to last year's review of the Community Infrastructure Levy (**CIL**). The Neighbourhood Planning Bill is expected to be passed by Parliament having now passed to the House of Lords. We can expect a continued focus on the importance of neighbourhood planning, green belt development and the provision of housing, including affordable housing and starter homes, and on improvements to transport networks and communications.

For further information, please contact [Matthew Bonye](#) (Real Estate) or [Matthew White](#) (Planning).

TAX

HYBRID MISMATCHES

New legislation is introduced from 1 January 2017 to counteract tax avoidance through the use of hybrid mismatches. The new measures are aimed at arrangements that exploit a difference in the tax treatment of an entity or instrument under the laws of two or more jurisdictions to produce a mismatch in the tax treatment of a payment made under the arrangement, having the effect of lowering the aggregate tax burden of the parties involved. The legislation applies to payments made on or after 1 January 2017.

CORPORATION TAX RATE

The rate of corporation tax will reduce from 20% to 19% for the financial year commencing 1 April 2017, and will reduce further to 17% for the financial year commencing 1 April 2020.

NEW REGIME FOR TAX DEDUCTIBILITY OF CORPORATE INTEREST EXPENSE

Following recommendations made by the Organisation for Economic Co-operation and Development as part of its Base Erosion and Profit Shifting project, the UK's rules governing tax deductibility of corporate interest expense will be overhauled from 1 April 2017. The broad aim of the new regime is that an entity's net interest deductions should be directly linked to the taxable income generated by its economic activities. Key to the new regime is the limitation of an entity's net interest deductions to a fixed ratio of 30% of its profit, measured using EBITDA based on tax figures. It is intended that a group ratio rule operates alongside this, allowing entities exceeding the fixed ratio to deduct interest expense up to its group's ratio of net third party interest to group EBITDA if that is higher.

REFORM OF THE CORPORATION TAX LOSS REGIME

As announced at Budget 2017, the corporation tax loss relief regime will be modernised and simplified. The key changes will be: (1) increased flexibility for carried forward losses: corporation tax losses arising from 1 April 2017 may be carried forward and set against profits from other income streams/different activities within the same group and against the profits of other companies within the same group; and (2) a restriction on the amount of profits relievable by carried forward losses: from 1 April 2017, the amount of profits against which carried forward losses can be set will be restricted to 50%, subject to an annual allowance of £5 million per group.

REFORM OF THE SUBSTANTIAL SHAREHOLDING EXEMPTION (SSE)

The SSE, which exempts from the charge to tax gains or losses accruing on the disposal by companies of shares where certain conditions are met, is to be expanded in relation to disposals made on or after 1 April 2017. A number of changes will be made to the qualifying conditions: (1) the condition that the investing company is required to be a trading company or part of a trading group is to be removed; (2) the condition that the investment must have been held

for a continuous period of, at minimum, 12 months in the two years preceding the sale is being extended to a continuous period of 12 months in the six years preceding the sale; (3) the condition that the company in which the shares are sold continues to be a qualifying company immediately after the sale is to be withdrawn, unless the sale is to a connected party; and (4) for a class of investors defined as Qualifying Institutional Investors, the condition that the company in which the shares were sold is a trading company will also be removed (the legislation contains a list of Qualifying Institutional Investors).

REFORM OF THE TAXATION OF NON-UK DOMICILED INDIVIDUALS (NON-DOMS)

A number of changes to the taxation of non-doms will be introduced from 6 April 2017, including the introduction of deemed UK domicile status for non-doms who have been UK resident for 15 out of the previous 20 tax years. Additionally, shares in offshore closely held companies that have an interest in UK residential property will no longer be considered "excluded property" for UK inheritance tax purposes where the shares are owned by a non-UK domiciled individual or an offshore trust. Finally, the scope of Business Investment Relief will be expanded with the aim of making it easier and more attractive to potential investors to bring offshore money into the UK to invest in UK businesses.

APPRENTICESHIP LEVY

From 6 April 2017, employers operating in the UK will be subject to the new Apprenticeship levy, to be charged at a rate of 0.5% of an employer's pay bill. Employers will receive an annual allowance of £15,000 to offset against their levy payment, which means that employers will only pay the levy if their pay bill exceeds £3 million in a given year. See also the entry in the employment and incentives section above for further details.

BUDGET 2017

The spring Budget will take place on 8 March 2017. A further Budget will take place in autumn 2017. From 2018, there will be a new budget timetable. The Chancellor will deliver a spring Statement in response to the Office for Budget Responsibility's spring forecast, but this is not expected to be a major fiscal event. There will be only one Budget each year, and this will take place in the autumn.

For further information please contact [Isaac Zailer](#) or [Howard Murray](#).

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS (TMT) AND DATA PROTECTION

NEW BBC ROYAL CHARTER AND GOVERNANCE REGIME IMPLEMENTED

The BBC Royal Charter, the constitutional basis for the BBC, sets out its public purposes, guarantees its independence and outlines the duties of Ofcom and the BBC board. The new Royal Charter and the accompanying Framework Agreement came into force on 1 January 2017 and set out how the BBC will operate until the end of December 2027. Key changes include: (i) a single board replacing the BBC Trust and internal BBC Executive Board; and (ii) Ofcom taking over from the BBC Trust as an external independent regulator for the first time in its history.

Although the new Charter came into force at the start of the year, Ofcom and the new BBC board will not take on their new governance roles until April 2017. In the meantime on 15 December 2016, Ofcom issued four consultations in relation to its new competition powers and intends to issue statements of requirements and guidance by 3 April 2017.

CONTINUE PREPARING FOR THE EU GENERAL DATA PROTECTION REGULATION

The new EU General Data Protection Regulation (**GDPR**) was published in the Official Journal of the European Union so that it entered into force on 25 May 2016, with a two year implementation period before it applies from 25 May 2018. For many organisations 2017 will therefore need to be spent getting their house in order to be able to comply with this new data protection regime by the May 2018 deadline.

In the meantime, guidance is starting to come through. On 16 December 2016, the Article 29 Working Party adopted its first guidelines on implementing certain priority areas of the GDPR, being data portability, data protection officers and lead supervisory authorities. The guidance follows input from a number of stakeholders (including national data protection authorities) who now have until the end of January 2017 to provide any further comments. The UK Information Commissioner has also published guidance on privacy notices under the GDPR. Organisations ought to take into account any guidance produced when contemplating how they will comply with the new requirements.

INTERNATIONAL DATA TRANSFER UNCERTAINTY

A number of developments over the course of last year mean that the issue of international data transfers is likely to remain uncertain for the foreseeable future.

On 12 July 2016, the European Commission adopted an "adequacy decision" allowing for the transatlantic transfer of personal data from the EU to the US in accordance with the framework and principles of the EU-US Privacy Shield (**Privacy Shield**). However, two privacy advocacy groups have since filed actions in the European General Court to annul the adequacy decision, arguing that the Privacy Shield

does not provide an adequate level of protection for EU citizens' rights under EU law where their data is transferred to the US.

In addition, the validity of the so-called Model Clauses is also subject to legal challenge and may be referred to the CJEU. As a result, further clarification is awaited in 2017 on the status of these various international data transfer mechanisms.

EPRIVACY REFORM

In April 2016, as part of its Digital Single Market Strategy, the European Commission launched a public 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.

The European Commission's new legislative proposal is expected in early 2017. According to a leaked version of the proposal, it is expected to take the form of a regulation that will replace the existing ePrivacy Directive and seek to align ePrivacy law with the incoming GDPR (refer to Data Protection Regulation above). As with the GDPR, it is likely to have extra territorial effect and increased sanctions to include fines of up to EUR 20 million or 4 per cent of total worldwide annual turnover. The regulation is also likely to apply to over-the-top service providers (such as WhatsApp) as well as traditional telecoms companies.

Once the final form of the proposed regulation is adopted and it enters into force, it is likely to have a six month implementation period before it comes into effect. At this stage it is unclear whether this timing will align with the GDPR taking effect.

INVESTIGATORY POWERS ACT COMES INTO FORCE

The Investigatory Powers Act (**IPA**) was given Royal Assent on 29 November 2016. The IPA consolidates previous legislation such as the Data Retention and Investigatory Powers Act 2014 (**DRIPA**), the Regulation of Investigatory Powers Act 2000, and certain provisions of the Telecommunications Act 1984. It also significantly extends existing requirements in relation to the bulk retention of data and the ability of public authorities to access such data. For the first time, the IPA requires the collection and retention of internet connection records by communications service providers which can also be accessed without a warrant but for limited purposes.

The Government has commenced certain provisions in the IPA, largely those required to replace DRIPA which expired on 31 December 2016. The Government has also confirmed that other provisions in the IPA will require extensive testing and will not be in place "for some time". The Home Office is expected to announce its plans for implementing the remaining provisions during the course of 2017.

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS (TMT) AND DATA PROTECTION

DIGITAL ECONOMY BILL TO RECEIVE ROYAL ASSENT

The Digital Economy Bill seeks to improve internet connectivity and protections for internet users through a range of measures, including: (i) further regulation of direct marketing through a new Direct Marketing Code (although note the potential overlap with the ePrivacy Reform described above); (ii) the introduction of directors' personal liability for "nuisance call" fines; (iii) a new Broadband Universal Service Obligation, which aims to give citizens the legal right to request a specified broadband connection; and (iv) a new Electronic Communications Code to modernise regulation of communications operators' rights to access public and private land to install communications apparatus.

The Bill is currently going through the legislative process with the Government aiming for it to receive Royal Assent in spring 2017.

2.3 AND 3.4 GHZ SPECTRUM AUCTION

The forthcoming 2.3 GHz and 3.4 GHz spectrum auction was originally expected to take place in early 2016, but was delayed due to market uncertainty. The spectrum bands are being made available for auction as part of the Public Sector Spectrum Release (**PSSR**) Programme which aims to make 500 MHz of spectrum below 5 GHz available for civil users by 2020.

In November 2016, Ofcom issued a consultation on competition issues and regulations relating to the auction which will make available: (i) 40MHz of spectrum in the 2.3GHz band (available for immediate use as it is already supported by mainstream mobile devices and will provide extra 4G capacity); and (ii) 150MHz of spectrum in the 3.4GHz band (likely to become available in two to three years' time as it is not currently supported by most mobile devices and is expected to support the initial deployment of 5G mobile services).

The consultation closes on 30 January 2017 and Ofcom intends to proceed with the auction "as soon as practical" after publishing its final statement on the award. Ofcom's proposed Annual Plan for 2017/2018 also confirms that the spectrum auction remains one of its priorities during this period.

REFORM OF THE EU TELECOMS REGULATORY FRAMEWORK

In May 2015, as part of its Digital Single Market Strategy, the 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 (**BEREC**); and an action plan for the development of 5G in Europe.

In October 2016, the Department for Culture, Media and Sport issued a call for views on the proposed European Electronic Communications Framework. Stakeholder responses were submitted by 30 November 2016 and will be used to develop the UK's position on the reform during the course of 2017. On 13 December 2016, BEREC issued a high level opinion on the Code which will also input into the European legislative procedures which the Code is currently following.

It is likely that ongoing consultations and legislative proposals will take up most of 2017 and, whilst exact timing is unclear, regulatory aspects of the reform are therefore unlikely to be finalised and approved earlier than spring 2018.

END OF ROAMING CHARGES IN THE EU

In November 2015, the European Commission's Regulation on roaming and net neutrality came into force and then applied from 30 April 2016. It set out a new retail pricing regime for regulating roaming services with the objective of ending retail roaming charges by 15 June 2017.

The Implementing Regulation came into force on 7 January 2017 setting out detailed rules on fair use policy and sustainability mechanisms to meet the 15 June 2017 deadline. The Council of the EU and the European Parliament are also expected to adopt and vote on the wholesale roaming rules early in 2017 to protect telecommunications operators in the run up to abolishing the retail roaming charges.

REVIEW OF AUDIOVISUAL MEDIA SERVICES DIRECTIVE

As part of its Digital Single Market Strategy and following extensive consultation in 2015, in May 2016 the European Commission proposed new legislative amendments to the Audiovisual Media Services Directive. The proposals sought to modernise the Directive to reflect "market, consumption and technological changes", largely arising from convergence between television and internet services and the increase in on-demand content consumption.

The proposals are currently being considered by the Council of the EU and the European Parliament before being agreed and the Commission has called for the proposals to be adopted swiftly in order "to strengthen the independence of regulatory authorities of the media". Once the final form of amendments is adopted, each Member State is likely to have 12 months to implement it. It is therefore unlikely that any changes will be effective at a national level before late 2018.

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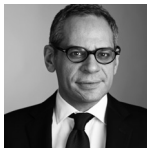


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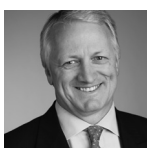


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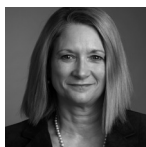


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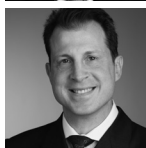


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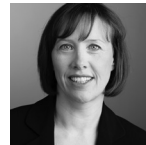


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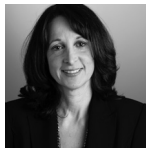
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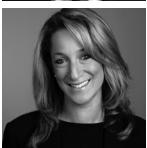
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