

On the horizon for 2015 and round-up for 2014

What legal changes do you need to watch for in 2015? Did you miss any major legal changes in 2014? We select the highlights likely to impact businesses in the UK generally, so you can quickly check those that might impact you.

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Business regulation

A photograph of a long, classical colonnade of white columns receding into the distance, creating a sense of depth and order. The columns are part of a larger building structure, with a stone floor and a high ceiling visible in the background.

Business regulation

2015

Payment practices

The Small Business, Enterprise and Employment Bill is likely to receive Royal Assent in March 2015, with phased implementation over the following 18 months. It creates a framework for secondary legislation to require certain businesses to publish on their websites information about their payment practices and policies. The Government is consulting on the detail of the rules. It is proposing the new rules will apply to large and listed companies and large LLPs, and will cover invoices for contracts for goods, services or intangible assets. The proposal is for quarterly reporting.

2014

Bribery Act and financial crime prevention

The Bribery Act 2010 has been in force since July 2011, but we still await the first prosecution under the Act for the offence of failure to prevent bribery. The prosecuting authorities have, however, **hinted** at an imminent deferred prosecution agreement for the corporate offence of failing to prevent bribery. The Serious Fraud Office's director has also **said** he favours introducing a similar "failure to prevent" offence for other financial crimes.

For further information, contact Emma Radmore, Luca Salerno, Tom Harkus or your usual Dentons contact.

Competition



Competition

2015

Market investigations into key consumer markets

The UK's new competition regulator, the Competition and Markets Authority, has made two market investigation references into markets that have long been the subject of consumer complaints: **retail banking** and **energy**. The investigations will take place during 2015. They are likely to continue into 2016, with the possibility of the CMA making behavioural orders or even ordering divestments to "fix" any problems that the CMA may conclude exist.

State aid tax investigations

The European Commission has three current in-depth State aid investigations into the transfer pricing arrangements accepted by authorities calculating the corporate taxes due from Apple (in Ireland), Starbucks (in the Netherlands), and Fiat Finance and Trade (in Luxembourg). Although these investigations are obviously

of most immediate concern for the companies involved (who face having to pay back any State aid found with compound interest), the arrangements under investigation have long been common practice in each country. The final decisions will therefore have a serious impact on every business that has benefited from them within the 10-year limitation period for paying back State aid.

Financial services to remain a priority for authorities

On 1 April 2015, the Financial Conduct Authority and its subsidiary, the Payment Services Regulator, will gain **concurrent competition enforcement powers** in the UK. This will add to the suite of tools it has available to it to regulate the financial sector. From day one the Financial Conduct Authority will have similar resources to police competition in the financial sector as the Competition and Markets Authority does to police the rest of

the economy. With these resources and investigations into benchmark rigging continuing, we anticipate further competition enforcement in the sector.

Google is the new Microsoft

Following the "browser wars" of the late 1990s and early 2000s, the European Commission has found a new technological *bête noire*: Google. In 2010 it opened an investigation into Google's alleged abuse of dominance in search. It has twice since sought to close the case with significant commitments from the search company, and since 2013 has been considering a complaint related to the Android operating system. With some European lawmakers calling for break-up or a "Google-tax" and separate actions from data protection regulators, one might be forgiven for thinking the EU has declared war. Expect further shots in these battles in 2015.

2014

Follow-on damages directive agreed

After much negotiation, European Union (EU) Member States agreed to a Directive on third party damages actions in competition cases, with implementation by 27 December 2016. The Directive aims to create a basic standard for competition claims in Member States. Some measures (for example, the unequivocal protection of leniency statements from disclosure) were unsurprising. Others, however, such as the joint and several liability of cartelists for the entirety of the harm caused by the cartel, were more controversial.

Competition and Markets Authority launch

The Competition and Markets Authority launched on the inauspicious date of 1 April 2014, taking over the competition and some of the consumer functions of the Office of Fair Trading and absorbing the Competition Commission. On launch, the UK's new competition

authority published its [prioritisation principles](#), which stated that it would put its resources to work "deterring and influencing behaviour that poses the greatest threat to consumer welfare, and intervene in order to protect consumer welfare and, in the process, drive higher productivity growth".

Standards-essential patent-holders can be considered dominant

In early 2014, the Commission settled a case against Samsung and made a finding against Motorola in two standards-essential patents cases. These cases, and the "policy brief" published by the Commission in their wake, set out the Commission's position that a standards-essential patent-holder could be regarded as dominant and that its refusal to license to a willing licensee would be regarded as an abuse. However, the Advocate General's opinion in *Huawei v. ZTE* called into question the Commission's approach. The European Court's judgment in that case, which could well invalidate the

Commission's approach, is due in 2015.

Benchmark cases continued

While the record-breaking LIBOR fines imposed by the Commission in December 2013 dominated the headlines, the Commission has quietly been continuing its financial benchmarks enforcement activities throughout 2014. It sent Statements of Objections to the parties who did not settle in December 2013 in the Yen Interest Rate Derivatives and Euro Interest Rate Derivatives cartel cases. In October 2014 it announced a settlement (and a fine of €61.7m on JP Morgan) for a cartel based on Swiss franc LIBOR.

For further information, contact [Sam Szlezinger](#), [Rebecca Owen-Howes](#) or your usual Dentons contact.

Construction



Construction

2015

[Construction \(Design and Management\) Regulations](#)

Following an [evaluation](#) of the Construction (Design and Management) Regulations 2007, the Health and Safety Executive Board has agreed these regulations are in need of significant revision. As part of this, the Board is proposing to develop a reduced Approved Code of Practice, backed by tailored guidance. A big change

that the Construction (Design and Management) Regulations 2015 will bring is to replace the role of CDM Co-ordinator with a Principal Designer. This is to give the responsibility for CDM during the design phase to an individual who can influence the design. The plan is that these new regulations will come into force in April 2015. There will be a six-month “run-off” period for projects under construction when the regulations come into force.

For further information, contact [Alastair Young](#), [Jane Miles](#) or your usual Dentons contact.

Contract and tort



Contract and tort

2015

Consumer rights reforms expected to come into force

The Consumer Rights Bill is in the later stages of its legislative process. Current forecasts are for the Act to come into force in autumn 2015. This will reform consumer rights and remedies for goods, services and digital content. The Act will update the rules on unfair terms in consumer contracts and notices, and merge the relevant provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations. One impact will be to extend the fairness test to consumer notices (whether written or oral), though the rules on consumer contracts will remain more extensive. The Act will place the ability to seek enhanced remedies for consumers for breaches of consumer protection law in the hands of public enforcers.

2014

Courts continue to grapple with concepts of good faith in commercial contracts

In several decisions, the courts pondered when a duty of good faith should be implied into a commercial contract. *Bristol Groundschool Ltd v. Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) was the first example of a court unambiguously following *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB) and implying such a duty into a general commercial agreement. The court went on to develop the test for good faith, holding this required more than mere honesty. To decide if there had been a breach of the duty, the court

should consider whether reasonable and honest people would regard the conduct in question as commercially unacceptable in the particular context involved.

But several other decisions pointed the other way, and in *Knatchbell-Hugessen v. SISU Capital Ltd* [2014] EWHC 1194 (QB) the court confirmed that there is still no duty under English law to conduct negotiations in good faith.

Exercising a discretion in a "commercially reasonable" way

In *Barclays Bank plc v. Unicredit Bank AG* [2014] EWCA Civ 302, the Court of Appeal decided the scope of Barclays' discretion whether to consent to early termination of a finance transaction, which it had to exercise in a "commercially reasonable" manner. It held Barclays could have primary regard to its own interests in arriving at its decision. It was the way Barclays reached the decision that had to be commercially reasonable, not the outcome. But a clearly unreasonable outcome could legitimately call the process into question. An example would be demanding a price for early termination significantly higher than the return the bank could reasonably have expected had performance continued as originally anticipated.

Revisiting liquidated damages after a contract amendment

The traditional test for establishing whether a liquidated damages clause is an unenforceable penalty is whether, when entering the contract, the sum in question was a genuine pre-estimate of the likely loss on

breach. In *Unaoil Ltd v. Leighton Offshore Pte Ltd* [2014] EWHC 2965 (Comm) the Commercial Court struck down a liquidated damages clause that met this test. This was because the parties had later reduced the contract price, at which point the judge considered the liquidated damages were no longer a genuine pre-estimate of loss. Parties now need to consider whether amendments to a contract affect the level of liquidated damages previously agreed and if so whether they should formally adjust these too.

Negligent misrepresentation in pre-contractual negotiations

The Supreme Court considered the effect of a negligent pre-contract misrepresentation made by a defendant to an individual other than the eventual contracting party. In *Cramaso LLP v. Viscount Reidhaven's Trustees* [2014] UKSC 9, the defendants made an implied misrepresentation to an individual who wished to take a lease of their land. Later, that individual set up a limited liability partnership as a vehicle for the lease and acted as the LLP's agent in concluding the deal. The court held the misrepresentation implicitly continued until the parties signed the lease. It therefore had a causative effect even though the contracting parties were not the original representor and representee. A party guilty of a pre-contract misrepresentation cannot now safely assume it is off the hook if the person to whom it made the misrepresentation becomes the agent of the party concluding the contract.

Contract and tort continued

Liability in misrepresentation for statements in passed-on brochures

In *Webster v. Liddington* [2014] EWCA Civ 560 the Court of Appeal held doctors liable for untrue representations made in manufacturers' brochures which the doctors passed on to patients. It was relevant that there was a "stark imbalance" of knowledge between the parties. Absent any

disclaimer as to the accuracy of the brochures, a reasonable man would infer that the doctors had adopted the statements. The principle could apply in other circumstances where a similar imbalance exists (for example, consumer cases). It underlines the importance of including appropriate wording to disclaim responsibility for the accuracy of third party information passed on in this way.

For further information, contact [Tracey Petter](#) or your usual Dentons contact.

Corporate



Corporate

2015

Transparency of company ownership and control

The **Small Business, Enterprise and Employment Bill** is likely to receive Royal Assent in March 2015, with phased implementation over the following 18 months. It will require UK incorporated companies to keep a register of people with "significant control" over them. Significant control is likely to include those who hold, directly or indirectly, over 25 per cent of the shares or voting rights. For non-publicly traded companies these new rules will mark a major change in the law; for the first time there will be a duty to collect and disclose information on significant beneficial ownership. The Act will also, subject to certain **exemptions**, ban the use of corporate directors.

Removing red tape

Legislation to simplify areas of company formation and administration is likely to become law during early 2015. The Small

Business, Enterprise and Employment Bill (mentioned above) includes provisions that simplify annual returns; give private companies the choice of keeping certain information on the register at Companies House rather than on their own registers; simplify statements of capital; and create a streamlined company and tax registration regime.

The **Deregulation Bill** includes provisions reducing the regulatory burden of the notification rules which apply when an auditor resigns, is removed from office or not re-appointed.

Company names

On 31 January 2015 a **statutory instrument** will come into force which will introduce a reduced list of the sensitive words and expressions for which companies, LLPs and businesses need approval to use in their names. Words no longer on the list will include European, Group, National, Holding, International and United Kingdom. A further **statutory**

instrument will replace and simplify five existing sets of regulations dealing with the registered names of companies and LLPs, business names and making trading disclosures.

Takeover Code

On 1 January 2015 **miscellaneous changes** to the Takeover Code will take effect. The main changes concern: the disclosure of irrevocables, letters of intent and certain other shareholdings and dealings; issues that arise in competitive situations and on "no increase" and "no extension" statements; and further restrictions for potential offerors who "down tools".

It is also likely that changes to the Code to prevent a party to an offer from ceasing to be committed to undertakings given in respect of a post-offer course of action will come into effect in 2015. The Panel **has consulted** on these, following the public debate around Pfizer Inc's potential offer for AstraZeneca plc.

2014

Listing Rules

16 May 2014 saw the implementation by the Financial Conduct Authority of **new rules** designed to improve the effectiveness of the Listing Regime. A principal feature was a package of measures “to strengthen minority shareholder rights and protections where they are at risk of being abused”. These impose added requirements on premium listed companies that have a controlling shareholder. There were also more general changes covering the free float rules; measures to prevent use of corporate structures to evade the Listing Rules; increased transparency for smaller related party transactions and in the annual report; extension of the duty to report breaches to the Financial Conduct Authority; and extension of two listing principles to standard listed companies.

UK Corporate Governance Code

The Financial Reporting Council published an updated version of the **UK Corporate Governance Code** which took effect for financial years starting on or after 1 October 2014. Perhaps the most significant change is to require listed companies to publish a viability statement in their annual reports, as well as a going concern statement. A viability statement is a statement by the directors that they have a reasonable expectation that the company will be able to continue to operate and meet its liabilities as they fall due, drawing attention to any qualifications or assumptions as necessary. The Financial Reporting Council expects the period assessed will be significantly longer than 12 months, but it is for the directors to select.

For further information, contact **Richard Barham**, **Jeremy Cohen**, **Candice Chapman** or your usual Dentons contact.

Dispute resolution



Dispute resolution

2015

Changes to the Brussels Regulation take effect

The recast [Brussels Regulation](#) (Council Regulation (EC) 44/2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters comes into force on 10 January 2015. Among other matters this will:

- apply to jurisdiction agreements even if none of the parties are domiciled in a Member State;
- undermine the so-called “Italian torpedo” device, as a Member State named in an exclusive jurisdiction clause will be able to decide a dispute even if a party starts proceedings first in the courts of another Member State (in breach of contract);
- subject to certain restrictions, give courts of Member States discretion to stay proceedings if litigation involving the same cause of action and the same parties (or related proceedings) are already pending before the courts of a third state;
- clarify the arbitration exception by expressly preserving the right of Member State courts to rule on issues such as the validity of an arbitration agreement;

- make clear that the New York Convention takes precedence over the Regulation; and
- simplify the recognition and enforcement of Member State judgments in other Member States.

Anticipated changes to court rules and practice directions

Changes promised by the Civil Procedure Rules Committee include overhauls of the regime of Part 36 settlement offers; the practice direction on pre-action conduct; and various of the specific pre-action protocols. The latter include those relating to professional negligence, construction and engineering, and judicial reforms. We wait to see whether the more widespread reforms of judicial review procedure contained in the [Criminal Justice & Courts Bill](#) 2013-14 to 2014-15 will come into force in 2015. These are generally geared to reducing the time and cost of judicial review claims and weeding out unmeritorious claims more quickly.

2014

Relief from sanction

The Court of Appeal, in three cases decided together (including [Denton v. T H White Ltd](#) [2014] EWCA Civ 906), clarified the approach to

applications for relief from sanction. There had been confusion around this position following contradictory earlier decisions, including *Mitchell v. News Group Newspapers* [2013] EWCA Civ 1537. In *Denton*, the Court of Appeal set out a three-stage test for these applications:

1. Is the breach serious or significant?
2. If so, why did it occur?
3. In all the circumstances of the case, is it just to grant relief?

At the third stage, the court will consider, among other matters, the need for litigation to be conducted efficiently and at proportionate cost, and the requirement to enforce compliance with rules, practice directions and court orders. We wait to see if the new test will stem the flow of cases concerning relief from sanction applications.

For further information, contact [Richard Caird](#), [Felicity Ewing](#), [Liz Tout](#) or your usual Dentons contact.

E-commerce

A close-up, shallow depth-of-field photograph of two overlapping credit cards. The top card is dark grey or black with a fine, pebbled texture. The bottom card is a lighter, metallic silver color. Both cards have embossed numbers and logos, though they are out of focus. The lighting is soft and directional, creating subtle highlights and shadows that emphasize the physical texture of the plastic.

E-commerce

2015

Proposed Directive on Network and Information Security

The European Commission's proposal for a Directive on Network and Information Security has progressed during 2014. The European Council is "confident [*that the parties will*] reach a deal before the end of [2014]", so there could be updated language for 2015. Under the proposal, EU Member States would have to produce a national cyber security strategy, and businesses in certain sectors would have to report certain security breaches and adhere to more stringent IT security requirements.

Proposed Regulation on Electronic Communications

This draft Regulation sets out the regulatory principles and detailed rules to ensure a European single market for electronic communications and includes harmonised rights for end-users and obligations on ISPs. It has been the subject of review and substantial amendment in 2014, but "two core issues" remain: roaming and open internet/net neutrality. However, the Commission has said that in 2015 it will "present its strategy and prepare corresponding measures based on a clear assessment of the most urgent obstacles to be removed" for the single digital market. So, watch this space!

2014

New consumer rights of redress for misleading or aggressive practices

In October 2014 the Consumer Protection from Unfair Trading Regulations 2008 were updated to give consumers direct rights of redress if they are the victim of a misleading or aggressive practice. Consumers now have the following rights:

- A right to "unwind"; i.e., bring the contract an end and get a refund.
- A right to a discount. The level of discount depends on the seriousness of the practice, and amount paid by the consumer.
- A right to damages for additional financial loss, distress and inconvenience.

While we wait to see whether these new rights will lead to an increase in claims by consumers, traders should be mindful of their potential direct accountability to consumers.

New Consumer Regulations for online sales

In June 2014 the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into force governing contracts for sales of goods, services and digital content made online or otherwise at a distance (e.g., by email) in the UK. The new regulations

replace previous regulations known as the "Distance Selling Regulations" and "Doorstop Selling Regulations". They introduce changes to key consumer rights and new requirements in relation to distance sales. These include changes to the pre-contract information regime, regulation of order buttons and extension of the "cooling off" period to 14 days.

E-signatures update

The EU Regulation on electronic identification and trust services for electronic transactions in the internal market was finally published on 28 August 2014. The purpose of the Regulation is to build trust in electronic transactions, and make it easier for parties in different EU countries to identify themselves, sign documents and check the authenticity of online documents. It requires EU Member States to recognise and accept electronic identifications used in other EU Member States (subject to certain conditions). The Regulation will apply from 1 July 2016 (with some specific exceptions). The Department for Business, Innovation and Skills has signalled that it will issue further guidance during implementation.

For further information, contact Martin Fanning, Scott Singer, Ingrid Silver, Nick Graham or your usual Dentons contact.

Employment



Employment

2015

Collective redundancy consultation

We expect two important decisions on collective redundancy consultation in 2015. Collective redundancy consultation arises when an employer proposes 20 or more redundancies "at one establishment" within a 90-day period.

- In *USDAW v. Ethel Austin* the European Court will decide if the requirement that all 20 redundancies are at one establishment is enforceable. If this requirement goes, significantly more situations will trigger the collective consultation obligations and employers may have to conduct the same consultation process at several different sites.
- In *USA v. Nolan* the Court of Appeal must decide when the duty to collectively consult arises. Is this when an employer proposes the strategic business or operational decision that will foreseeably lead to 20 or more redundancies? Or not until the employer makes that strategic decision and proposes the redundancies? This will be significant for employers who will not necessarily wish to consult with staff at too early a stage.

Shared parental leave

New rules on shared parental leave will apply to all parents of babies born or placed for adoption on or after 5 April 2015. Qualifying employees can share between them a right to a maximum of 52 weeks'

leave and 39 weeks' statutory pay. (However, the mother must still take her two week compulsory maternity leave immediately after the birth.)

Shared parental leave is only available where a mother has shortened or given notice to reduce her maternity leave. Parents may take leave either consecutively or concurrently. In addition, they may request parental leave in one continuous block or a series of discontinuous blocks, although an employer may refuse a request for discontinuous leave. An employee must give eight weeks' notice of a request and may make up to three separate requests.

Bonuses

The upheaval on bonuses in the City of London has continued. All firms authorised by the Prudential Regulation Authority **must ensure** they can claw back bonuses for at least seven years after award under certain circumstances. This will only apply to bonuses awarded on or after 1 January 2015.

2014

Holiday pay

There have been **significant developments** in how employers must calculate a worker's holiday pay. All workers are entitled to their "normal pay" for any holiday and this is not just their basic rate of pay. The Employment Appeal Tribunal has held that "normal pay" is a worker's typical average pay. This includes any compulsory overtime (which a worker must work if their employer offers it), provided the worker undertakes it often enough

for it to be considered part of normal pay. An **earlier case** confirmed that normal pay should also include pay that is intrinsically linked to the tasks a worker must perform, e.g., commission and allowances.

This has an effect on holiday pay in the future but there is also a risk of claims from employees for holiday already taken. Helpfully for employers, the Employment Appeal Tribunal stated there must not be a break of longer than three months between each "deduction" (the periods of leave) and, if there is, the tribunal should lose jurisdiction to hear the claim.

Strictly all these cases only apply to the four weeks' minimum holiday under EU law. They do not apply to the extra 1.6 weeks' holiday in the UK or to any extra contractual holiday.

Flexible working

From 30 June 2014, all employees with at least 26 weeks' continuous employment have been able to make a request for flexible working, rather than only employees with caring responsibilities. There is a new scheme in place under which the employer has three months to decide. The employer has a duty to deal with requests in a reasonable manner. Employers are still able to reject the application on one of eight grounds, including legitimate business grounds.

TUPE

Changes to TUPE that came into force in January 2014 mean that:

- a service provision change will only take place if the activities

Employment continued

are fundamentally the same both before and after the transfer;

- changes to a workplace location can be an economic, technical or organisational reason for dismissal; and
- terms of employment derived from collective agreements can be renegotiated one year after the transfer.

However, there were no changes that make it easier for employers to harmonise terms of employment for other employees.

For further information, contact [Michael Bronstein](#), [Ryan Carthew](#), [Simon Whysall](#) or your usual Dentons contact.



Energy

Energy

2015

Risks and opportunities and not just for energy companies

2015 promises to be another year of new risks and opportunities for both established players and new entrants, funders and investors in the UK energy scene. Things to watch include:

- Winners and losers in the first **Capacity Market** and **Contracts for Difference** (CfDs) auctions will no doubt argue with Government and Ofgem about whether the process delivered the “right” results (the CfD auction having already been postponed from December 2014 to February 2015, to resolve appeals). There has already been litigation activity over both the **award of CfDs** and alleged bias against **demand response** in the Capacity Market regime.
- The Competition and Markets Authority will conclude their wide-ranging inquiry into GB energy supply markets in November or December 2015.
- After the 2014 Scottish “no” vote averted some potentially big changes, the 2015 General

Election may bring significant (and not necessarily predictable) changes in the energy field.

- Technology, Government incentives and rising energy costs put energy efficiency centre-stage for both businesses and policymakers. From energy audits to smart meters and demand side response, this is an area of huge commercial opportunity and likely growth in regulation. Meanwhile, more businesses may start to produce energy as technologies such as larger-scale **rooftop solar** and anaerobic digestion, as well as **community energy schemes**, gain momentum.
- The conclusions of some recent Ofgem enforcement cases and the policy behind the new oil and gas authority point towards regulators making more assertive use of their powers.
- The **detail** of EU regulation designed to make a single EU market in electricity and gas a reality will continue to unfold. There is the prospect of significantly increased **interconnection** between the UK

and (sometimes lower-priced) electricity markets elsewhere in the EU. An additional and partly geo-political challenge for EU policymakers is **energy security**.

- By the end of 2015 it should finally be clear which of the **coal-fired plants** will choose to upgrade to comply with the Industrial Emissions Directive. Those which choose to “opt out” of it will have to close after a limited number of hours. Current low prices for coal (a by-product of abundant US shale gas) mean the choices made by these plants have a significant impact on wholesale electricity prices.
- The EU will need to make its mind up about the “2030” **targets** to replace its goals for greenhouse gas emissions, renewables deployment and energy savings for 2020. The EU’s decisions (in the context of the hoped-for overall **international** deal on climate change matters) will have an impact on all businesses affected by current EU legislation in these areas.

2014

Oil and gas

The Government has made continued efforts to combat declining UK offshore oil and gas productivity; the challenges of falling oil prices; and potentially more attractive markets elsewhere in the world. Its efforts include a mixture of **tax breaks** (most recently in the Chancellor's **Autumn Statement**) and the implementation of a more **proactive approach** to regulation of the UK Continental Shelf.

Onshore, the Government remains keen to stimulate unconventional development (shale gas/fracking) with fiscal incentives and other facilitative measures, including new production, exploration and development licence conditions and a "statutory right to exploit "deep-level land".

Power

December 2014 saw the UK Government's **Electricity Market Reform** begin to go live. This will significantly alter the economics of the generating sector (for generators of both renewable and other types of electricity), and the mix of costs that make up any business's energy bills.

In June 2014, the Competition and Markets Authority began an **investigation** into the supply of electricity and gas in Great Britain. This could lead to significant changes in the structure and regulation of these markets. Various **concerns** prompted the inquiry, in particular: the pricing behaviour of the "Big 6" suppliers; their large shares of both generation and supply (retail); and the reported difficulties of smaller players seeking to enter or expand their share of the latter market. These concerns were set against a background of apparent consumer failure to switch when dissatisfied with the incumbent.

It was another year of steady progress for the Government's efforts to develop the UK nuclear industry. The CfD for the proposed new Hinkley Point C nuclear power station received **approval** from the European Commission. The **Court of Appeal** dismissed the challenge brought by the National Trust of Ireland against the development consent for Hinkley Point C. The Government launched a **new long-term plan** to deal with the UK's radioactive waste.

For further information, contact **Danielle Beggs, Charles Wood** or your usual Dentons contact.

Environment and safety



Environment and safety

2015

[Offshore Safety Directive implementation](#)

The Offshore Safety Directive establishes, for the first time, an EU-wide legal framework for offshore safety and environmental management in the oil and gas sector. It introduces pan-European requirements on [safety standards, reporting and safety/environmental regulation](#). It also extends the meaning of “water damage” under the Environmental Liability Directive. This change is significant for oil and gas companies in the North Sea because it increases the range of remediation actions that they can be required to carry out if there is a spill outside national territorial waters. The Health and Safety Executive and the Department of Energy & Climate Change completed their [consultation](#) on the implementing legislation in September 2014 and have published draft regulations ahead of the implementation deadline, which is 19 July 2015.

[Health and Safety Sentencing Guidelines consultation](#)

The Sentencing Council has issued [draft sentencing guidelines](#) for offences under the Health and Safety at Work Act 1974 and corporate manslaughter legislation. Following the new guidelines for environmental offences that became effective in July 2014, these draft sentencing guidelines provide clarity on the potential levels of fines for offences. The size of any fine depends on the offence category, based on levels of harm caused and the offender's culpability, and the size of an

organisation's turnover. It is likely that levels of fines for health and safety and corporate manslaughter offences (which will not be insurable) will increase under the new guidelines, which promote a more consistent approach to sentencing. The consultation closes on 18 February 2015.

[Payment to Governments Regulations 2014](#)

Under these [regulations](#), large or listed companies registered in the UK and active in the extractive or logging industries will have to report annually on payments they make to governments worldwide. These reporting requirements will apply to financial periods starting on or after 1 January 2015. The Department for Business Innovation and Skills published for consultation [draft guidance](#) prepared by various industry bodies and will issue final guidance in due course.

[Undertakings for breaches of environmental permits](#)

We expect an amendment to the Environmental Permitting (England and Wales) Regulations 2010 to allow the Environment Agency to accept enforcement undertakings from operators for breaches of environmental permits. An enforcement undertaking is a binding statement from an organisation which the Environment Agency suspects of having committed an offence to take prescribed action within a specified period. In return, the Environment Agency agrees not to prosecute for that offence. This will be an important development, as it will provide a potentially attractive

alternative to prosecution where regulatory breaches occur. The change should come into force on 6 April 2015, subject to Parliamentary approval and debate.

2014

[Environmental Sentencing Guidelines](#)

As of 1 July 2014 important new guidelines published by the Sentencing Council apply to sentencing for environmental offences. The Guidelines introduce [much-needed certainty](#) in a previously uncertain field. Companies charged with breaches of environmental regulations now have the ability to predict the likely fines (which will not be insurable) and know with more precision what they can do to mitigate any fine.

[Energy Savings Opportunity Scheme Regulations 2014](#)

The Energy Savings Opportunity Scheme (ESOS) Regulations, which came into force on 17 July 2014, implement the EU Energy Efficiency Directive 2012. These Regulations introduce a [framework of measures](#) for promoting energy efficiency and supporting and increasing good energy management. The ESOS requires organisations that employ at least 250 people or have an annual turnover of over EUR 50 million at 31 December 2014 to calculate their total energy consumption and carry out compulsory energy saving assessments. The first date for compliance with ESOS is 5 December 2015; by this date, qualifying organisations must carry out energy assessments and notify the Environment Agency.

Environment and safety continued

Parent company liability for asbestos exposure

An important judgment, *Thompson v. Renwick* [2014] EWCA Civ 635, on parent company liability was handed down in May 2014. This decision provided some welcome clarity on the scope of parent company liability towards employees of subsidiaries in connection with asbestos exposure, an issue raised by the groundbreaking case of *Chandler v. Cape* [2012] EWCA Civ 525 two years earlier.

Health and Safety (Fees) Regulations 2012

These Regulations, which came into force in late 2012, give the Health and Safety Executive the power to impose fees for the time it spends investigating issues that it considers are material breaches of the law. We have seen increasing use of these powers during 2014, with clients receiving Notices of Contravention and Invoices for HSE time. There is a [mechanism for challenging](#) any invoice received, which recipients can use to overturn the invoice and a finding of breach.

For further information, contact [Stephen Shergold](#), [Sam Boileau](#) or your usual Dentons contact.

Pensions

Pensions

2015

Defined contribution changes

In 2015 the UK defined contribution landscape will experience its **largest changes since 1921**. As of April, a member will be able to draw cash directly from his pension pot and will be able to use income drawdown products regardless of pension pot size, rather than having to buy an annuity.

The tax effects of taking cash directly from a pension pot will be complex. Each tranche of cash will be 25 per cent tax free. The balance will be subject to tax at the member's marginal income tax rate. Given the possibility of major tax consequences and associated major litigation, the Government is introducing a free guidance session for members at retirement on how to avoid running out of money in retirement.

There will be a limit to tax recycling on the tax-free cash lump sum through a yearly £10,000 limit on new pension savings where a member has taken cash from his existing pension. Where schemes choose not to offer access to the new pension freedoms, members will have an extended right to transfer their pension pots to an arrangement that does.

Public sector pensions

On 1 April 2015 the Government pension schemes, such as the Principal Civil Service Pension Scheme, switch to a new benefit structure with improved governance and stronger cost controls. The Government is also banning transfers out of these schemes.

Group personal pensions

There will also be a **shake-up of group personal pension governance** with the introduction of an independent governance committee requirement.

Other changes

Other big pension changes for 2015 include changes to the Pension Protection Fund risk-based levy for defined benefit pension schemes, caps on default fund investment charges and further simplification of auto-enrolment rules.

2014

VAT

HMRC finally brought in **changes to the VAT regime** for UK pension schemes for investment expenses following two recent cases. This is likely to trigger several disputes over backdated claims for VAT rebates.

Amendment formalities

The *Gleeds* case served as a warning on what happens when you do not execute your pension scheme deeds correctly. The Court threw out 30 years of pension changes including a change from defined benefits to a defined contribution arrangement.

Auto-enrolment

Auto-enrolment continued apace, with most small and medium employers becoming subject to auto-enrolment in 2014. The *Clyde & Co v. Bates van Winkelhof* [2014] UKSC 32 case led to questions over **who exactly is a "worker" for auto-enrolment purposes**. This is an area where we expect to see developments over the coming years.

Defined benefit pensions code

The Pensions Regulator introduced its **new defined benefit funding code**, which allows trustees to consider an employer's investment in its business as part of the statutory funding mechanism for defined benefit pension schemes.

For further information, contact **Alan Jarvis, Elmer Doonan, Andrew Patten, Jay Doraisamy** or your usual Dentons contact.



Planning

Planning

2015

[Community Infrastructure Levy: is it delivering?](#)

The [Community Infrastructure Levy](#) (CIL) is still in its early infancy. Fifty-seven authorities are currently charging the CIL, and around 200 authorities are in the twilight zone between examination and adoption. It is, clearly, too early to talk credibly about the CIL's effects on the delivery of either development or infrastructure. It is, clearly, time to engage with the workings of the CIL to ensure it works for sites big and small. The approach adopted to strategic sites is likely to be the next big debate. Should there be a high CIL and local authority infrastructure delivery, or a low CIL and developer infrastructure provision? We are likely to see both options explored in 2015. We expect to see the effects over the following three to five years as sites are developed out.

[Encouraging residential development](#)

It is difficult to keep up to date with the policy announcements (including repeats) aimed at securing more new homes. The permitted change from commercial to residential ends in May 2016. We will see an end to applications for prior approval in 2015 as the time available to carry out the change of use before May 2016 becomes too short. We expect a rash of applications in 2015 for changes of use to support existing prior

approvals, which will result in some interesting appeals.

[Wind farm community benefits](#)

[Wind farms](#) are being buffeted by many forces. The Department for Energy & Climate Change published *Guidance of Community Benefits from Onshore Wind Developments* in October 2014. The paper provides some great examples of how contributions from wind farm operators can help local communities. It builds on the 2013 industry protocol that suggested a minimum annual payment of £5,000 per MW output. If local planning authorities want to secure infrastructure on large schemes and to avoid some perceived constraints of the CIL Regulations 122 and 123, they should also put appropriate policies in place.

[Year of shale](#)

[Shale gas exploration](#) has been a defining part of the planning scene. Reforms, investment deals, planning applications and protests occurred throughout 2014. A workable planning framework is now in place if there is the will to encourage investment.

2014

[The year of the Development Consent Order](#)

Development Consent Orders for Nationally Significant Infrastructure Projects were plentiful in 2014 and

more will follow in 2015. The Thames super-sewer—the Thames Tideway Tunnel—was granted a Development Consent Order on 12 September 2014. It is set to be the most contentious [Development Consent Order](#) so far, with two [judicial review](#) challenges lodged.

[Judicial reviews](#)

We commented last year on the introduction of a reduced time period in which to make a judicial challenge in planning cases, from three months to six weeks. We successfully acted for Sainsbury's in defending a judicial review of a planning permission for the supermarket's new store in Whittlesey, Cambridgeshire. The newly formed Planning Court dismissed the application for permission on 22 May 2014 as "totally without merit", just under four weeks from Sainsbury's serving its grounds resisting the challenge. Several cases have been brought to the Planning Court and dealt with swiftly; a good sign that this reduced period for challenge is focusing minds on the merits and timing of challenges.

For further information, contact [Stephen Ashworth](#) or your usual Dentons contact.

Privacy and data security



Privacy and data security

2015

EU data protection reform

The EU plans to **reform its data protection laws** in 2015, including new rules requiring companies to implement privacy governance (policies, procedures, audit and training programmes). There will be a duty to report data breaches to both supervisory authorities and consumers. Penalties include fines of up to two to five percent of worldwide turnover. The EU institutions have stated they plan to settle the draft text by the end of 2015. Implementation will happen after a two-year transition period.

New technology

Expect more disruptive business models based on apps as well as social, mobile and location services. We have seen the beginning of “wearable tech” and we will see much more of this in 2015. Devices will need vetting for privacy compliance. The evidence suggests they often are not. There is a high risk of enforcement by the authorities.

2014

Cyber risk

2014 has witnessed many large data breaches and the resulting massive reputational impact on big brands.

US-based retailer Target's breach, for example, affected 70 million customers and resulted in a 49 per cent drop in profits, 90 class actions and both the Chief Information Officer and Chief Executive Officer losing their jobs. There could not be more compelling evidence that companies need to take data breach seriously and actively manage cyber risk.

EU right to be forgotten

The Court of Justice of the EU **ruled** that individuals have the right to have search engine links relating to them removed where information is inaccurate, irrelevant or outdated. This has caused uproar as the ruling also says that privacy rights generally trump freedom of expression. The ruling also establishes that search engines are data controllers in their own right and that EU data privacy laws can catch non-EU companies which have local subsidiaries. This is extra-territorial privacy risk.

Enforcement

2014 saw significant enforcement. In addition to the Google ruling, we saw nine fines in total worth £990,000 imposed by the Information Commissioner's Office. European and US regulators also imposed fines for data breaches and other consumer privacy violations. This included

recent enforcement by the Federal Trade Commission in respect of TRUSTe for failure to properly police the US Safe Harbor for personal data transferred from the EU.

The “Snowden Effect”

We saw the continued effect of the Edward Snowden story (about mass data surveillance by the authorities) throughout 2014. This has driven a new privacy lobbyist agenda and includes private actions against Facebook and a vote by the European Parliament to remove Safe Harbor, which is one of the few mechanisms allowing data transfers to the US. There is also high sensitivity to data privacy risk in many other jurisdictions such as Russia. Russia plans to implement its own data export ban.

The “Platinum Standard” tool to manage data privacy risk is Binding Corporate Rules. Dentons has been advising a large number of companies on applications for Binding Corporate Rules and gaining the necessary EU regulatory approvals.

For further information, contact **Nick Graham** or your usual Dentons contact.

Real Estate

Real Estate

2014

[Supreme Court guidance on damages instead of injunction](#)

The Supreme Court has in *Coventry v. Lawrence* [2014] UKSC 13 handed down a **seminal judgment** on the law of nuisance. In particular, the Court is to no longer rigidly to adhere to the *Shelfer* tests and instead is to exercise judicial discretion in deciding whether to award damages instead of an injunction. This has major implications for developers facing rights of light issues. Had the *Heaney* and *Regan* cases come before the Court after the Supreme Court's decision, they would in all likelihood have had a different outcome.

[Landlord liability for tenant nuisance](#)

In *Coventry and others v. Lawrence and another* (No. 2) [2014] UKSC 46A the Supreme Court **determined** a separate issue arising from the same dispute: that a landlord will not be liable for a nuisance caused by its tenant except where the landlord authorises or directly participates in the tenant's nuisance.

[Landlord and Tenant Covenants Act 1995](#)

In *Tindall Cobham 1 Limited & Others v. Adda Hotels and Others* [2014] EWCA 1215, the Court of Appeal **has held** that the Landlord and Tenant Covenants Act 1995 renders void a lease provision requiring a guarantor

to issue a repeat guarantee on assignment of the lease to a new tenant.

For further information, contact **Bryan Johnston**, **Virginia Glastonbury**, **Richard Budge** or your usual Dentons contact.



Reform of financial services and banking

Reform of financial services and banking

2015

Banking structure reform

The Financial Services (Banking Reform) Act 2013 is gradually coming into force. When in force it will, among other matters, require ring-fencing of retail banking and other core business. The Act will also create a **new accountability and compliance regime** for senior managers and other bank staff. Implementation will take into account the Bank Recovery and Resolution Directive, in relation to which the Treasury has published several pieces of draft legislation.

Insurance regulation reform

The UK Government and EU and UK Regulators are now proposing measures to implement the **Solvency 2 Directive**. The Prudential Regulation Authority is assisting insurers with their preparatory work. Separately, it is proposing to introduce a senior manager regime for insurers; similar, but not identical, to that proposed for banks.

Bank liquidity reform

The Prudential Regulation Authority will **update its rules** on liquidity to ensure UK banks comply with new EU standards by October 2015. Its reforms will include a repeal of the current rules, carrying forward the key principles and placing them within the new EU framework.

Financial regulatory reform

The EU's package revising the **Markets in Financial Instruments Directive** (MiFID 2) will take effect in mid-2016. It will introduce new organisational and conduct of business rules, new trading platforms and obligations relating to trading and transparency. Also, certain firms previously outside the scope of MiFID 1 will become investment firms. All firms should conduct a gap analysis to ensure they understand what changes MiFID 2 (and the continued implementation of the European Market Infrastructure Regulation) will mean for their business.

2014

Alternative investment funds

The transitional period under the **Alternative Investment Fund Managers Directive** expired in July 2014. All alternative investment fund managers wishing to sell unregulated funds in or into the UK should now have full authorisation as alternative investment fund managers. They should market their funds only in compliance with notifications required under the Directive. Many EU jurisdictions have still not fully implemented the Directive and, accordingly, pan-European marketing remains difficult.

Consumer credit regulation

The Financial Conduct Authority took over responsibility for **regulating consumer credit** in April 2014. All firms involved in the variety of activities relating to consumer credit, including lending, broking and administration, and who had an interim permission from the FCA, will know when they must apply for full authorisation. Businesses should not allow this application to lag as missing the end of the slot will result in an unauthorised firm.

Financial crime prevention

Recent reviews from the Financial Conduct Authority show that firms have not taken into account previous warnings on improving financial crime prevention procedures, particularly in terms of overall risk assessment and monitoring of key relationships. Enforcement action is likely to follow and all firms should review their procedures against Financial Conduct Authority's recommendations.

For further information, contact **Rosali Pretorius**, **Michael Wainwright**, **Emma Radmore** or **Luca Salerno** or your usual Dentons contact.



Tax

Tax

2015

International tax landscape

The OECD's base erosion and profit shifting project (BEPS) will move towards completion. BEPS is analysing whether and why the taxable profits of multinational enterprises are allocated to locations different from those where the business activity takes place. How the international tax landscape will look after implementation is unpredictable: expect some hiccups along the way to legislation of the recommendations.

A new "diverted profits tax" is intended to come into force in the UK on 1 April 2015, resulting in approximately 30 pages of legislation and 50 pages of guidance cutting across the BEPS project.

UK corporation tax

The main rate of corporation tax will finally reduce to, and we expect remain at, 20 per cent, meaning that even the most innumerate tax lawyer will be able to do corporation tax calculations in his or her head.

All returns made to shareholders through special purpose B share schemes will broadly be taxed in the same way as dividends.

Stamp duty

The tax advantages of structuring a takeover offer as a scheme of arrangement will be eliminated.

2014

General Anti-Abuse Rule

The UK courts continued largely to find in favour of HMRC rather than taxpayers in so-called "tax avoidance" cases. The impact of the General Anti-Abuse Rule, in its first complete calendar year, remains unclear.

Stamp duty land tax

An unexpected and immediate change to the rates and calculation of stamp duty land tax in the Autumn Statement meant a busy early December for some conveyancers. The tax hike for buyers of very expensive residential real estate is likely to have ramifications in terms of how they look to acquire their property.

US Foreign Account Tax Compliance Act

FATCA came into effect. Whilst an irritation for banks and US citizens, it does not appear to have had a meaningful impact on commercial transactions, or the world economy, as some feared it might.

For further information, contact [Jeremy Cape](#), [Alex Thomas](#) or your usual Dentons contact.

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