

Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

On the Horizon for 2012 and Round-Up for 2011

Our experts select the highlights likely to impact businesses in the UK generally, so you can check quickly.

Business regulation

2011

- **Bribery Act:** The Bribery Act 2010 came into force on 1 July 2011. It created a new offence for any organisation that has a business presence in the UK that fails to prevent bribery. All businesses operating in the UK had to review their arrangements with contractors and suppliers and their gifts and hospitality policies and put in place measures to comply with the Act. No sector is excluded. (See [UK Bribery Act 2010 – the Final Countdown](#).)

For further information contact [Rosali Pretorius](#), [Emma Radmore](#), [Dominic Sedghi](#) or [Dominic Gilmore](#).

Contract, tort and disputes

2012

- **Arbitration - New ICC rules:** The new rules come into force on 1 January 2012. They include the power to appoint an emergency arbitrator to deal with any urgent interim or protective measures and codification of best practice in complex multi-party arbitrations. (See [New ICC Arbitration Rules – a commentary highlighting the key changes](#).)
- **Reforms to litigation funding:** Key reforms are expected to come into effect by October 2012. These are projected to include ending the recovery of conditional fee arrangement success fees and after the event insurance premiums from a losing opponent and introducing valid contingency fees. See [Legal Aid, Sentencing and Punishment of Offenders Bill \(HL Bill 109\)](#) for the current Bill.

- **Appeal on application of privilege to non-lawyers:** The Supreme Court will hear the appeal in the litigation between Prudential and HMRC in November 2012. The Court of Appeal held legal professional privilege does not extend to professionals other than qualified lawyers, even if those professionals advise on points of law. (See [Endeavours Obligations – Can You Take Your Commercial Interests Into Account?](#))
- **Common European sales law:** The EU Commission aims to adopt its proposal for a common European sales law. This would exist as a “second regime” of contract law (alongside national law) and apply to cross-border sales of tangible movables, supplies of digital content and related services. The UK currently seems set to opt out. (You can read the proposal, in its full glory: [European Commission: Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law](#).)

2011

- **Contractual interpretation:** The Supreme Court held that, where a commercial contract can bear two competing meanings, the one most consistent with business commonsense will be preferred: *Rainy Sky SA v. Kookmin Bank*. For more details and the practical drafting implications, particularly when including unusual provisions in an agreement, see [The Sky Clears: Common Sense in Interpreting Contracts](#).
- **Endeavours clauses:** The Commercial Court in *Jet2.com Ltd v. Blackpool Airport Ltd* clarified when a party with a duty to use reasonable or best endeavours can take its own interests into account

in performing. For drafting advice to ensure an endeavours clause meets your requirements see [Endeavours Obligations – Can You Take Your Commercial Interests Into Account?](#)

- **Arbitration clauses:** In *Jivraj v. Hashwani*, the Supreme Court overturned the Court of Appeal by deciding that arbitrators are not employees and therefore not subject to the anti-discrimination regulations. Appointment clauses can once again legitimately provide for arbitrators to have specified nationality or other qualifications. (For more details see [Supreme Court decides Arbitrators are not employees under English law](#))
- **Litigation settlements:** The Court of Appeal continued the series of cases clarifying – and occasionally confusing – the requirements for a valid Part 36 offer to settle litigation. It held in *C v. D* that an offer only open for a specified period does not satisfy the rules and therefore won't attract the Part 36 costs and interest consequences (unless the court can interpret the offer as not in fact being time-limited). For guidance through the minefield, see [Part 36 Offers: Do Not Limit in Time \(Do Limit the Risk\)](#).

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

Corporate

2012

- **Company charges:** In early 2012 the Department for Business, Innovation and Skills (BIS) expects to publish proposed regulations to modernise the rules on the registration at Companies House of security created by UK companies. It is likely that those regulations will come into force on 1 October 2012. (See [Registering Securities at Companies House](#))
- **Financial and narrative reporting:** BIS is proposing to bring forward legislation to replace the current Business Review and Director's Report with a Strategic Report and an Annual Directors' Statement for financial years beginning on or after 1 October 2012. This change is likely principally to affect quoted companies. (See [Consulting on a new reporting framework](#).)
- **Audit exemption:** BIS is also likely to bring forward legislation to allow more small and medium-sized enterprises and subsidiary companies exemption from the need to undertake an audit. The legislation will also allow companies greater flexibility in moving from IFRS to UK GAAP. Its proposal is that these changes should apply

for financial years ending on or after 1 October 2012. (See [Consultation on audit exemptions and change of accounting framework](#))

- **Prospectuses:** By 1 July 2012 the UK must make changes to the Financial Services and Markets Act 2000 to reflect EU changes to the Prospectus and Transparency Directives. The FSA must also update its Handbooks (principally the Prospectus Rules). The EU changes are designed to reduce the burdens imposed on issuers and intermediaries, without compromising investor protection, and to improve the clarity of the legal framework. (See [Consultation Paper CP11/28](#))

2011

- **Takeovers:** Significant changes to the Takeover Code came into force on 19 September 2011. The purpose of the changes is to give target companies greater protection. Key measures include a prohibition on break fees and other deal protection mechanisms, increased protection against "virtual bids" and increased disclosure. (See [The Code Committee's Response to the Takeover Panel's Review following the consultation on PCP/2011/1](#))
- **Company charges:** Security granted by an overseas company no longer has to be registered at Companies House. This applies to any security created on or after 1 October 2011. (See [Registering Securities at Companies House](#))

For further information contact [Richard Barham](#), [Jeremy Cohen](#) or [Candice Chapman](#).

Competition

2012

- **E-books investigation:** The European Commission is pursuing formal antitrust proceedings to investigate whether a number of international publishers have, possibly with the help of Apple, engaged in anti-competitive practices affecting the sale of e-books in the EU. This follows unannounced inspections at the premises of several companies active in the e-book publishing sector. In the UK the OFT, investigating in parallel, has now relinquished responsibility because of the Commission proceedings.

2011

- **OFT fines for price fixing:** Four supermarkets and five dairy processors were fined a total of almost £50 million, following OFT investigation into dairy products retail pricing (August 2011). However, in December 2011, the Competition Appeal Tribunal handed down its judgment overturning the OFT's

tobacco retail pricing decision, in which record fines of £225 million were imposed.

- **OFT fine for abuse of dominance:** The OFT decided that Reckitt Benckiser abused its dominant position by withdrawing NHS packs of Gaviscon Original Liquid with the intention of limiting pharmacy choice and hindering competition from suppliers of generic medicines. The OFT imposed a fine of £10.2 million (April 2011).
- **Merger Assessment Guidelines:** In September 2011, the OFT and the Competition Commission published joint Merger Assessment Guidelines. The guidelines are designed to assist companies and their advisers by providing greater clarity on how the competitive impact of mergers is assessed by either authority.

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

E-commerce

2012

- **E-Signatures Directive:** The European Commission is reviewing the Electronic Signatures Directive with “a view to providing a legal framework for cross-border recognition and interoperability of secure e-authentication systems”. The Commission wishes to encourage “e-invoicing” as the predominant method of billing across Europe. A proposal to revise the Electronic Signatures Directive is expected in the second quarter of 2012. Also expected during 2012 are the Commission’s legal measures allowing citizens and businesses to use eID (Electronic Identification) to access online services. For more information see [Community Framework for Electronic Signatures](#).
- **Digital Economy Act 2010:** The Digital Economy Act 2010 covers issues such as online infringement of copyright; public service broadcasting and content; network infrastructure; and digital safety. Controversially, it was rushed through parliament without full debate during the wash-up period in 2010 and has since run into significant delays. The likely pace of developments in 2012 is not yet clear. The delay is in part due to the judicial review by BT and TalkTalk (listed for hearing in the Court of Appeal on 16 January 2012). If the Court decides to refer any questions to the ECJ further delays are likely. Also, Ofcom is due to provide an Initial Obligations Code, the final form of which is still awaited.

2011

- **Advertising - extension of the CAP Code:** On 1 March 2011, the Committee of Advertising Practice (CAP) Code was changed, expanding its remit to cover companies’ marketing communications on their own websites and social networking sites and other non-paid-for space online. The extension also gives the Advertising Standards Authority additional powers to “name and shame” offenders, and to remove paid-for search advertisements that link directly to any non-compliant marketing communication. For more information see [Weaving an untangled web – extension of the ASA’s online remit](#).
- **Consumer Rights Directive:** The new EU Consumer Rights Directive entered into force in December 2011. This applies to B2C sales contracts and includes provisions relating to refunds, delivery, pre-ticked boxes (e.g. for travel insurance), hidden charges and credit card surcharges and extends the “cooling-off” period to 14 calendar days. Member states have to adopt and publish the laws necessary to comply with this Directive by 13 December 2013. The Government has announced that the Directive will be transposed into UK law through a new “catch-all” consumer rights law, replacing the 12 separate laws and regulations which currently regulate consumer protection in the UK. For more information see [The proposal for a Directive on Consumer Rights](#).

For more information contact [Martin Fanning](#), [Nick Graham](#), [Ingrid Silver](#) or [Scott Singer](#).

Employment

2012

- **Employment law shake-up:** The Government proposes a major shake-up of employment law. The qualifying period for unfair dismissal will increase to two years on 6 April 2012. Other changes relate to tribunal rules and whistle-blowing and views are sought on other proposals, including TUPE, collective redundancy consultation, tribunal fees and “protected conversations”. (See [All Change for Employment Law](#))
- **Timing of obligation to consult on collective redundancies:** The ECJ will decide whether the obligation to consult in a collective redundancy situation arises before or after the commercial decision that will lead to the collective redundancies. (See [USA v. Nolan](#))

- **Dismissing employees to avoid windfalls:** The Court of Appeal should decide whether an employer could justify dismissing an employee early to avoid a “windfall” and the cost of an enhanced pension. The EAT doubted the existing principle that cost alone could never amount to objective justification in discrimination cases. (See [Woodcock v. Cumbria Primary Care Trust](#))

2011

- **Abolition of default retirement age:** The default retirement age of 65 was abolished on 6 April 2011 (subject to transitional rules) and retirement was removed as a fair reason for dismissal. Employers must now both objectively justify a chosen retirement age and show a “retirement” dismissal was fair for “some other substantial reason”. (See [Removal of the Default Retirement Age](#))
- **Greater rights for agency workers:** The Agency Workers Regulations took effect on 1 October 2011. From day one, agency workers should receive equal access to facilities and amenities and information on job vacancies. After 12 weeks they must receive the same “basic working and employment conditions”. (See [New Rights for Agency Workers under the Agency Workers Regulations 2010](#))
- **Tax on termination payments:** Income tax deductible by an employer in respect of termination payments made after the employee has left employment can no longer be limited to basic rate only and must be taxed using the employee's usual tax code.

For further information contact [Pauline McArdle](#), [Richard Nicolle](#) or [Simon Whysall](#).

Environment

2012

- **CRC Energy Efficiency Scheme:** Scheme participants should keep an eye out for information on the emissions trading element of this scheme in 2012. Organisations must participate in the scheme where they were supplied at least one half hour of electricity settled on the half hourly market and consumed at least 6,000MWh in 2008. 2011 saw first publication of Performance League Tables under the scheme (See [2010/2011 - CRC Performance League Table](#).) Ultimately

participants will need to comply with an obligation to offset consumption with allowances, though this element of the scheme, which will involve emissions trading, has been delayed.

- **Unconventional oil and gas resources:** With a greater drive to exploit oil and gas resources that are accessible other than through conventional well techniques, both the UK Government and the EU Commission will be scrutinising existing environment and health and safety law in 2012. Two key areas of development are likely to be deepwater drilling and shale gas exploration and production. (See [Petroleum Review – December 2011](#))

2011

- **Broad remediation obligations under Environmental Liability Directive:** A 2011 case demonstrated, for the first time since the introduction of the Environmental Liability Directive in 2009, the potential reach of broader remediation obligations. The polluter had polluted a 5km stretch of a river in Lancashire killing 6,000 fish. In addition to being prosecuted and fined for the offence under the Water Resources Act, the company restocked the fish and, according to some reports, took compensatory measures including improving the habitat and access for local fishermen. The Environmental Damage Regulations give the Environment Agency the power to pursue both compensatory and complementary remediation following environmental damage and is an important new addition to the Agency's enforcement armoury, which also now includes civil sanctions for certain environmental offences.
- **Group litigation for environmental nuisance – more case law:** In *Barr v. Biffa Waste Services Ltd* the High Court considered the connection between compliance with an environmental permit and claims for nuisance by neighbouring residents. In dismissing the claims for nuisance by a group action against a waste operator, the Court found that use of the site as a landfill, in accordance with its environmental permit, constituted a “reasonable use” of the land. The judge was also critical of the use of group litigation in the case, as only a couple of claimants (representing 152 families) could produce evidence of possible nuisance. This criticism of group litigation balances the success of

the claimants in the 2009 *Corby* Litigation, where the finding of negligence as a preliminary issue precipitated a settlement in favour of the claimants.

For further information please contact [Stephen Shergold](#) or [Sam Boileau](#).

Pensions

2012

- **Auto-enrolment:** The obligation to enrol employees into a pension scheme automatically and to pay employer contributions comes into force on 1 October 2012: the exact date depends on the employer's PAYE scheme size. (See [Are You Ready for Auto Enrolment?](#))
- **New ways for pension funds to invest in infrastructure projects?** It will be interesting to see how the proposal to facilitate investment in infrastructure by pension funds announced in the Chancellor's Autumn Statement on 29 November 2011 will be developed. (See [Autumn Statement 2011 and National Infrastructure Plan—New infrastructure scheme.](#))
- **Money purchase benefits:** Where is the dividing line between money purchase and final salary benefits? (See [The Dividing Line Between Money Purchase and Final Salary Benefits.](#)) In response to this issue, the Government has laid amendments to the Pensions Bill to clarify the definition of "money purchase benefit" in pensions law. These provisions are not yet in force but are expected to have retrospective effect when they do become law.

2011

- **RPI/CPI switch:** Public sector schemes can now use CPI rather than RPI as an indexation measure. Cases challenging the switch from RPI to CPI have failed for both the private and public sector. (See [The Prudential Case: A Legal Breath of Fresh Air and Staff Side of the Police Negotiating Board & Ors, R \(on the application of\) v. Secretary of State for Work and Pensions & Anor](#) [2011] EWHC 3175 (Admin).)
- **Bribery Act - implications for pension trustees:** (See [The Bribery Act – Can Pension Trustees Still Have a Free Lunch?](#))

For further information contact [Elmer Doonan](#), [Alan Jarvis](#) or [Andrew Patten](#).

Privacy and Data Security

2012

- **New EU Data Protection Regulation:** The official release of the draft of the European Commission's proposed new European data protection law is expected in January 2012. A draft leaked on the internet in December 2011 described strict new requirements, including that (i) local Data Protection Authorities (DPAs) will be given the power to impose fines upon organisations breaching data protection law of up to 5 percent of annual worldwide turnover; (ii) public authorities and large private companies will be required to formally appoint data protection officers; and (iii) organisations will be required to notify both the local DPAs and (where protection of the personal data or privacy of a data subject is likely to be adversely affected) the affected data subjects of any data security breaches within 24 hours of the breach. (See [New European Data Protection Law – A First Look.](#))
- **Consent for website cookies:** From May 2012 the new law that requires you to obtain a user's consent in order to deploy website cookies will be enforced. A cookie is a small file placed by websites on the PC of the user to help the website "recognise" the user and/or to make the website work. Cookies are used by most commercial websites. (See [New Opt-in Privacy Rule for Cookies.](#))

2011

- **Fining powers used:** The new £500,000 fining power has been used by the Information Commissioner's Office (ICO) on several occasions in 2011. The Information Commissioner is also calling for the implementation of a new custodial penalty for "data theft" (i.e. breaches of section 55 of the Data Protection Act) relating to unlawful obtaining or disclosing of personal data.
- **Data breach notification compulsory:** The amended ePrivacy Directive came into force in May 2011 and introduced a compulsory data breach notification requirement for internet service providers and telcos. The European Commission consulted on "technical implementing measures" – practical rules to complement the existing legislation - at the end of 2011. The results are expected in 2012.

- **First Data's BCRs approved:** SNR Denton helped First Data Corporation, a global leader in electronic commerce and payment processing, obtain approval from the ICO for its Binding Corporate Rules (BCRs) for data privacy – only the 11th company to achieve this gold standard. The BCRs will allow First Data to transfer personal data between its group companies worldwide in compliance with European law. (See [First Data gains European approval for BCRs](#).)

For further information contact, [Nick Graham](#), [Scott Singer](#), [Martin Fanning](#) or [Jan Willem van den Bos](#).

Real Estate and planning

2012

- **The Community Infrastructure Levy (CIL):** Local authorities can now choose to adopt CIL as part of the procedure for applying for planning permission. Some authorities have already begun to do so. Many planning permissions granted from now on will be caught by CIL. (See [Getting a Fair Deal Over Permissions](#).)
- **Private sewers flushed away:** The Government has ordered that most private sewers be publicly maintainable. In other words, responsibility for their repair and maintenance has been transferred from property owners to the water companies. The cost will be passed on to customers in the form of higher drainage charges in water bills. (See [Briefing On Rules For Transfer Of Private Sewers And Lateral Drains: Notes On Draft Guidance On Appeals And The Final Version Of Rules](#).)
- **Village greens:** To establish a site as a village green (and kill off the possibility of any development of the site), local residents must show that a significant number of them have indulged in sports and pastimes on the site as of right for an unbroken period of 20 years or more. The Government has published a consultation on proposals to reform this law, so as to reduce the burden on landowners and developers. (See [Developers Strike Back: Town or Village Greens](#).)

For further information, contact [Richard Budge](#), [Stephen Webb](#) or [David Cox](#).

Reform of financial services and banking

2012

- **Basel III implementation, and higher borrowing costs, moves closer:** Basel III, a revised international framework of banking regulation, is scheduled to be implemented throughout the EU on 1 January 2013. Among other things, it will require banks to hold more capital against their exposures, and so is likely to push up borrowing costs. The changes it introduces will not all take effect immediately. Many will be phased in between 2013 and 2019.
- **Living wills:** The UK proposals, and now also the international designations of Global Systemically Important Financial Institutions (SIFIs), will mean most banks and large investment firms must conduct detailed planning exercises to satisfy their regulators how their customers and their assets would be protected in the event of the institution's failure. (See [Recovery and Resolution Plans – Breaking up the Banks by Stealth?](#) and [Financial Stability Board Identifies 29 Global SIFIs and Announces Agreed Policy Measures](#).)
- **Segregation of retail banking gets closer:** The Independent Commission on Banking's Report (the Vickers Report) confirmed recommendations to ring-fence high street banking activities to protect them from the losses of "casino banking", impose capital requirements exceeding even Basel III, and make banking easier and more transparent. Groups with retail operations will need to plan for restructuring their business to comply with the recommendations. The Government confirmed it would action the recommendations and consult during 2012 on plans to put the retail ring fence in place by 2015. (See [What the Vickers Report Means to You](#).)
- **Major changes for funds and investment firms coming soon:** The EU continues to drive ahead on financial reform. During 2011, measures were adopted or proposed that will make major changes to the way financially regulated firms do business. These include the Alternative Investment Fund Managers Directive, the Capital Requirements

Directives, Solvency II, the proposed Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR) and proposed changes to the Markets in Financial Instruments Directive (MiFID) and the Market Abuse Directive (MAD). Most changes are likely to be adopted during 2012. We track developments in our weekly, award-winning e-newsletter, FReD. (See the [FReD page](#) on our website.)

- **All change for the FSA:** The Financial Services Bill, which will split the FSA into separate prudential and conduct authorities (PRA and FCA), is undergoing pre-legislative scrutiny but the Government still hopes it will be passed in 2012. Banks, insurers and large investment firms will need to plan for dual regulation, and all firms will have to plan for new rules and increased appetite for regulatory intervention at structural and conduct levels. (See [Financial Regulatory Developments \(FReD\) - 17 June 2011](#).)
- **FSA gets tough on products:** The FSA intends to use its enforcement powers to force firms to consider the suitability of products at development stage. If necessary, the FSA will ban certain products, at least if sold to certain markets. All businesses involved as providers or distributors of retail products should consider the impact on them of these proposals as well as the changes to FSA rules made by the Retail Distribution Review, which takes effect from the end of 2012. (See [Product Intervention – Hitting the Wrong Note, FSA's Product Design Consultations and Product Bans - A Radical New Power, But Will We See It Used in Time?](#))

For further information, contact [Rosali Pretorius](#) or [Emma Radmore](#).

Tax 2012

- **General anti-avoidance rules proposed:** The UK looks to be getting a general anti-avoidance rule of sorts (see [A GAAR is born.](#)) If it is enacted in its proposed form, currently effective tax-saving schemes may be struck down by HMRC.
- **Residence rules:** The UK will also get a statutory residence rule for individuals, although it appears that we will have to wait until 2013, meaning that legal advisers will still need to grapple with complex case law for another year. (See [UK Residence and the Law.](#))
- **Reform of the controlled foreign company rules to increase attractiveness of UK for international businesses:** These reforms will be contained in the 2012 Finance Bill (and ultimately Finance Act).

For further information, contact [Alex Thomas](#), [Jeremy Cape](#) or [Andy Collins](#).