Yesterday. Today. Tomorrow.

Linklaters

Year in Review, Year to Come
English Law

December 2018
Year in Review

English Law in 2018

2018 has seen a broad range of legal developments, with GDPR, the EU-UK negotiations over Brexit, corporate governance reform and evolving financial regulation featuring heavily. The snapshots below provide an extensive review of English law (and key EU law decisions) over the year with links to further information where available.

**Brexit:**
EU-UK negotiations have resulted in the Withdrawal Agreement text and Political Declaration on the framework for the future relationship. In June, the EU Withdrawal Act was passed, preparing the UK’s legal system for Brexit. The Government began tabling statutory instruments to amend existing laws to fix deficiencies arising from Brexit. Acts providing for post-Brexit policies were passed in relation to data protection, nuclear safeguards, customs, sanctions and anti-money laundering.
Read more here and here...

**Gun-jumping under the EUMR:**
Deal-makers must carefully monitor compliance with the standstill obligation during the merger review process until clearance and closing of the transaction. In April, the European Commission issued a record fine of €124.5 million on Altice for gun-jumping.
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**Gender pay gap reporting:**
Employers with 250 or more employees must produce annual information on their gender pay gaps. The deadline for publication of the first reports was April and the data of more than 10,000 organisations is now available.

**Employment status:**
The Supreme Court held that a plumber engaged by Pimlico Plumbers was a worker and not an independent contractor and so was entitled to paid annual leave and protection from unlawful deductions and discrimination. The case is one of a series of challenges brought by individuals engaged as independent contractors in the gig economy.

**Corporate governance reform:**
A revised Corporate Governance Code and new Regulations came into effect in July. Large UK companies must report on their stakeholders. Listed UK companies must also report on CEO/average UK worker pay ratios and large non-listed companies on their corporate governance arrangements. New Wates Principles to help with this will be finalised in December. The provisions apply to reporting years from 1 January 2019.
Read more here and here...

**IPO process reform:**
New FCA rules came into force in July which aim to put connected and unconnected research analysts on an equal footing in IPOs and restrict contact between an issuer and research analysts connected to investment banks in the pitch phase for syndicate roles.

**Sovereign wealth segment:**
The Listing Rules were amended to accommodate sovereign controlled companies wishing to have a premium listing on the London Stock Exchange.

**Right to act clauses banned:**
The FCA banned the use in mandate letters of “right of refusal” and “right to act” clauses which seek to limit clients’ choice in relation to future corporate finance services.
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**Shanghai London stock connect:**
A new segment of the London Stock Exchange/Shanghai Stock Exchange is expected imminently, providing Chinese companies with access to global investors through a depository receipt programme listed on the LSE and London premium-listed companies with access to the PRC market.

**The Insurance Distribution Directive:**
This applied to firms within scope from October. The Directive replaced the 2002 Insurance Mediation Directive and is intended to improve the way that insurance products are sold.

**Pensions Regulator’s powers:**
In June, the government consulted on strengthening the Pensions Regulator’s powers in relation to defined benefit pension schemes, including proposals to introduce punitive fines and criminal sanctions, and to change the existing anti-avoidance regime.
Read more...

**Ongoing BEPS implementation:**
Implementation of the OECD’s recommendations targeting tax base erosion and profit shifting (BEPS) and the related EU Anti-Tax Avoidance Directive (ATAD) continued.
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**2018 highlights**
There has been no let-up in the volume of financial regulation during 2018 with key changes introduced by PRIIPs, EMIR, MiFID II and MiFIR. This trend is likely to continue in 2019.

**2018 highlights**
In May, the General Data Protection Regulation resulted in the biggest upheaval of European privacy laws for 20 years. It had a significant impact on businesses and attracted widespread media comment.
EU data single market:
In November, the EU adopted a Regulation on free flow of data in the EU. This seeks to remove data localisation restrictions within the EU to help create the Digital Single Market.

The General Data Protection Regulation:
This applied across the EU as of May 2018 marking the biggest shakeup for European privacy laws for 20 years with new obligations for businesses, new rights for individuals and new enforcement powers for regulators.

Read more...

Cyber security:
This year has brought sweeping changes to the way businesses must respond to cyber-attacks. There are new obligations to notify regulators of data breaches and significant decisions on class action liability in the Morrisons and Lloyds judgments.

Read more...

Sanctions:
In August, the European Commission updated the EU Blocking Regulation in light of US extra-territorial secondary sanctions re-imposed in connection with Iran.

Read more...

Financial collateral:
In Aviabaltika v Ukio Bankas, the EU Court of Justice confirmed that where a collateral taker enters insolvency it must recover its claim first from the collateral and only after that from other assets of the collateral provider, unless the arrangement provides otherwise.

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Company voluntary arrangements:
In 2018, distressed retailers increasingly looked to use Company Voluntary Arrangements to deal with their store portfolios with implications for landlords and property investors.

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PRIIPs regulation:
PRIIPs started to apply in January imposing requirements for pre-contractual, standardised disclosure for packaged retail and insurance-based investment products.

Asset managers:
In April, the FCA published rules and guidance implementing the Asset Management Market Study, focusing on the duties that Authorised Fund Managers have as the agents of investors in their funds.

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FCA investigations:
In March, the FCA published its Approach papers on Supervision and Enforcement.

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LIBOR:
The FCA and PRA requested assurance from major banks and insurers over their preparations for the transition from LIBOR to alternative rates ahead of end-2021.

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EMIR:
Clearing and initial margin obligations under EMIR continued to be phased in during 2018. Regulatory forbearance has been granted for certain market participants pending implementation of some aspects of EMIR REFIT.

MiFID II and MiFIR:
MiFID II and MiFIR started to apply in January 2018. The FCA published its report and the PRA consulted on the supervision of algorithmic trading.

Crypto assets regulation:
The Treasury Select Committee undertook an enquiry into digital currencies and a Crypto Assets Taskforce was convened comprising the Bank of England, FCA and Treasury. The Taskforce published a report calling for robust regulation of crypto assets and proposed various consultations/guidance on crypto regulation and recommendations for supporting DLT.

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Retail banking:
FCA rules requiring current account providers to publish standard information about the quality of their service came into force in August. The FCA is also consulting on whether a new duty of care is needed for current account providers.

Regulation of claims management companies:
The FCA is consulting on proposals to regulate CMCs when it assumes responsibility for their regulation on 1 April 2019. The final rules will be set out in a new ‘Claims Management: Conduct of Business sourcebook’ in Q4 2018.

Business Contract Terms (Assignment of Receivables) Regulations 2018:
A revised draft of the Regulations was issued in July and are intended to apply to contracts entered into on or after 31 December 2018.

Legal professional privilege:
In September, the Court of Appeal handed down judgment in ENRC v SFO, one of the most significant recent rulings on litigation privilege in the context of internal corporate investigations.

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Variation clauses and contract formalities:
In Rock Advertising v MWB Business, the Supreme Court held that a clause requiring variations to be in writing is effective and will prevent oral modifications.

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Damages:
In One-Step, the Supreme Court altered the law on damages by recognising the availability of “negotiating damages” for breaches of certain categories of contractual rights.

Read more...

Parent company liability:
In Okpabi, the Court of Appeal returned to the issue of parent company liability in negligence for the activities of subsidiaries.

Read more... Its approach was then echoed in AAA.

Prospectus liability:
In September, in the case of Löber, the EU Court of Justice returned to the question of where jurisdiction, under the Brussels I Regulation, may sit for claims brought in tort/delict, against EU domiciled issuers, by secondary market purchasers of interests in securities.

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SFOs powers:
In September, the High Court confirmed that the SFO’s investigatory powers to compel disclosure of documents have extraterritorial reach.

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EU Benchmarks Regulation:
The EU Benchmarks Regulation came into effect 1 January 2018. Under the Regulation, regulated entities in scope must produce and maintain robust written plans to address material changes to, or cessation of, a benchmark and reflect these in their contracts. In the context of derivatives, ISDA published the ISDA Benchmarks Supplement in September to assist market participants in complying with this obligation.

Read more...
Year to come

English Law in 2019

With the Withdrawal Agreement with the EU not yet ratified, the consequences of Brexit will continue to resonate through 2019. Along with a controversial new EU directive on copyright, further developments on interest rate reform and key merger control decisions expected, the pace of regulatory and legal change shows no signs of slowing.

**Brexit:**
The UK is set to leave the EU on 29 March 2019. If the Withdrawal Agreement with the EU is ratified there will be a transition period until at least the end of 2020, during which the UK will for most purposes be treated as a member of the EU. Read more here, here and here...

**Foreign investment control:**
The EU institutions have reached a political agreement on the content of a new regulation to screen foreign investments in the EU, which is expected to become law in 2019. In the UK, the National Security and Investment White Paper published in July proposes far-reaching reforms to foreign investment deals which raise national security concerns and primary legislation is expected in 2019. Read more here and here...

**Workers' rights:**
The Court of Appeal will determine whether Uber drivers are workers, with entitlement to paid annual leave and the national minimum wage. Further developments are expected following the consultation on the Taylor review, which addresses reform of workers' rights and status.

**Shareholders Rights Directive:**
Rules for more transparency of ownership, voting and investment strategies and Europe-wide 'say on pay' are expected to enter UK law by June 2019.

**Prospectus Regulation:**
The remaining parts of the EU Prospectus Regulation are due to be implemented in July 2019. Key areas of change will be the exemptions from the requirement to produce a prospectus, the treatment of risk factors and the regime for secondary issuances.

**Corporate governance:**
The Government is set to publish further reform proposals focussing on reducing the risk of major company failures through poor governance or stewardship and strengthening the UK insolvency regime.

**Supervision of internationally active insurance groups:**
In November 2019, the International Association of Insurance Supervisors is expected to adopt requirements on the supervision of "Internationally Active Insurance Groups", alongside a new capital standard that will apply to such groups. Read more...

**CGT for non-resident investors disposing of UK property:**
From April 2019, non-resident investors will be subject to UK tax on gains from disposals of both residential and commercial UK real estate. Direct disposals and certain disposals of other assets (such as shares) which derive 75% or more of their value from UK land will be caught. Read more...

**ePrivacy Regulation:**
During 2019 the EU is expected to adopt this Regulation which supplements the General Data Protection Regulation and contains specific rules on the use of cookies and electronic marketing.

**Proposed EU Copyright Directive:**
The EU has proposed a controversial new Directive which will reform online copyright by, among other things, placing greater liability on platforms that allow users to share content.

**Changes to lease accounting take effect:**
IFRS 16 comes into effect for accounting periods beginning on or after 1 January 2019. The new accounting standard aligns the treatment of operating leases and finance leases. Read more...

**EU Insolvency Harmonisation Directive:**
The EU is expected to agree its position on the proposed EU Directive on business insolvency reform (the EU insolvency law harmonisation project). Read more here and here...

**High court disclosure:**
In January, a new disclosure regime will come into force in the Business & Property Courts, designed to encourage greater flexibility in process and co-operation between litigants.

2019 highlights

With the UK set to leave the EU on 29 March 2019 and the Withdrawal Agreement with the EU not yet ratified, Brexit seems likely to dominate the legal landscape over the coming year.
Bank recovery and resolution:
The EU is expected to finalise proposed amendments to the Bank Recovery and Resolution Directive. Changes include new pre-resolution moratoria, clarification on the contractual recognition of bail-in requirement and alignment of European MREL requirements with TLAC.

EU NPL reforms:
In March 2018, the European Commission published a draft Directive and Regulation, aimed at accelerating the reduction of NPLs in Europe. The proposals in the draft Directive would require implementation by 2021. The UK has opted-out of some of the proposals.
Read more...

EMIR:
Changes to EMIR under the REFIT proposal are expected to come into force early in 2019 and amendments to CCP supervision are anticipated later in the year.
Read more...

EU Securitisation Regulation:
The Regulation which consolidates existing risk retention, disclosure and due diligence requirements and establishes a new regime for simple, transparent and standardised (STS) securitisations will apply from 1 January 2019.

Anti-money laundering:
MLD5 came into force in July and will need to be implemented by January 2020.
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SMCR extension:
The Senior Managers and Certification Regime will be extended to insurers in December 2018 and to all other regulated firms in December 2019.
Read more...

Payment services:
The revised Payment Services Directive (PSD2) applied from January 2018 (except for the security measures on Strong Customer Authentication and Secure Communication, which is scheduled for September 2019). The FCA is consulting on proposed standards and communication requirements for PSPs and e-money issuers.

Clarity on co-operation with regulators:
The FCA is expected to publish its finalised Approach to Enforcement and will review its penalty policy and Enforcement Guide.
Read more...

Overseas entities register:
The Registration of Overseas Entities Bill, which will introduce a new register of the beneficial owners of overseas entities that own or wish to buy or let UK property, is expected to be laid before Parliament in early 2019 with the new register operational in 2021.
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Global reach of the “right to be forgotten”:
In 2014, the EU Court of Justice decided that individuals had a right to ask that their personal information be removed from Google’s search engine in certain circumstances. In 2019 the EU Court of Justice is expected to decide if that right just applies to search engines available in the EU or should apply on a global basis.
Read more...

Merger control:
In July 2017, the European Commission issued Statements of Objections to each of Merck/Sigma-Aldrich and General Electric for allegedly providing incorrect or misleading information during a merger review, and to Canon for the alleged early implementation of Toshiba Medical Systems Corporation before notification and clearance. The long-awaited decisions are expected in all three of these cases in 2019.
Read more...

CRR 2 & CRD 5:
The adoption of this update to EU bank prudential rules is expected in 2019. The legislation will implement agreed Basel standards such as the leverage ratio and net stable funding ratio. However, the legislation also includes EU specific measures including requirements for non-EU banking groups active in the EU to establish EU intermediate parent undertakings. Many provisions will be subject to a two-year phase-in, potentially applying from 2021.

Prudential regulation of investment firms:
The new EU prudential framework for investment firms is expected to be concluded in the first half of 2019. The framework includes new remuneration rules and simpler capital rules for smaller investment firms.

PRIIPs regime review:
EU institutions are expected to take legislative action to avoid the duplicating information requirements from 1 January 2020 under UCITS KIID and PRIIPs KID, and to address issues that have arisen from the practical application of the PRIIPs Delegated Regulation on KID. An amendment to PRIIPs Regulation pushing back the review deadline and the UCITS exemption is expected to be adopted by mid-2019. The European Commission is also expected to adopt targeted amendments to PRIIPs Delegated Regulation on KID by mid-2019.

Digital services tax:
A proposal for an EU Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services could be adopted by April 2019. The UK is also consulting on its own domestic 2% DST to apply from April 2020.
Read more...

Interest rate reform:
With continued regulatory emphasis on transition away from LIBOR, and IBORs more generally, further developments are expected during the course of 2019, including the publication of ESTER (the euro risk-free rate). Initiatives to support market participants in this transition, including work to identify appropriate adjustment spread methodologies and consideration of term risk-free rate structures for use in certain cases, in particular corporate borrowing and securitisations, are expected to continue.
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Expanding FOS jurisdiction:
The Financial Ombudsman Service will assume jurisdiction from 1 April 2019 over complaints by larger SMEs, charities and trusts. A corresponding increase to its maximum compensation from £150,000 to £350,000 is also proposed.

EU clean energy package:
Legislative proposals within the Clean Energy Package are expected to be adopted during 2019. This includes new rules for the electricity market design, renewables, risk preparedness in the electricity sector, the EU Agency for the Cooperation of Energy Regulators, as well as for the governance of the Energy Union.

Airline insolvency review:
In April, the Government announced a review to examine protection for air passengers in the event of an airline’s insolvency. The Government is looking at what practical arrangements are needed to get passengers home if sufficient capacity does not exist in the market and how passengers and taxpayers can best be protected from the financial impacts of an airline failure. An interim report was published in July, with a final report expected by early 2019.

Sustainable finance:
Further developments are expected in relation to the EU’s sustainable finance action plan. The plan includes a proposed Regulation which would introduce disclosure obligations on how institutional investors and asset managers integrate environmental, social and governance factors in their risk processes and a proposal for a Regulation amending the Benchmark Regulation to create a new category of benchmarks comprising low-carbon and positive carbon impact benchmarks.
What now?

Your contacts

We hope that you have found this guide useful. Please contact your usual Linklaters contact, if you would like to discuss any of these matters further.