

Q3 Commercial Forecast

Welcome to the summer edition of our [Commercial Forecast](#) for 2017.

The last few months have been marked by political changes and uncertainty, which makes it ever more challenging to try to stay ahead of the game and anticipate those changes to the legal and regulatory framework that are likely to affect your business. There are two pervading themes that we highlight in this edition: Brexit and taxation. These will no doubt be recurring themes throughout this Parliament and we expect to return to these topics in future updates.

In this edition we look at the Great Repeal Bill; proposals from the European Commission and the UK to resolve the issue of EU citizenship after Brexit; the new corporate offence of failure to prevent tax evasion; recent business rates revaluation; the recent announcement of a Data Protection Bill; and increasing transparency in the UK Property market.



Brexit and Citizens' Rights

Brexit negotiations between the UK and the EU finally got under way on 19 June. The European Commission and the UK have both published their proposals to resolve the vexed issue of the status of EU citizens in the UK and British citizens in the EU after Brexit. There are significant differences between the two sides. For instance:

- The European Commission wants the Court of Justice of the European Union to have jurisdiction over these citizens' rights after Brexit. The UK says it must be the British courts.
- The EU wants all EU nationals in the UK and all British citizens in the EU on 29 March 2019 to retain their existing free movement rights in perpetuity, without any need to obtain documentation. The UK wants to end free movement absolutely on 29 March 2019, and replace current EU rights of residence and permanent residence with leave to remain and settled status under UK immigration law respectively. This will curtail EU rights for existing residents, such as their automatic right to bring their families here in the future. All EU nationals in the UK will be required to apply for new UK residence documentation within two years of Brexit, even if they already have EU residence cards issued by the UK.
- The EU wants the cut-off date for citizens' rights to be 29 March 2019, the day the UK leaves the EU. The UK says it wants the date to be somewhere between 29 March 2017 (when Article 50 was triggered) and 29 March 2019. Only people arriving before the cut-off date will be guaranteed a right to stay here.

These fundamental disagreements suggest that the matter is unlikely to be resolved soon, meaning continued uncertainty for those whose rights are dependent upon the ultimate outcome.

For further information please contact [Lee Jackson](#).



Failure to Prevent Tax Evasion – a new Corporate Offence

If you think tax evasion crimes can only be committed by the tax evaders themselves, think again.

From 1st September 2017, it will be a criminal offence for a business to fail to prevent the facilitation of tax evasion of either UK or foreign tax.

The principal targets of the new law are fiduciary, legal and corporate services, however general commerce is within the scope of the broadly drafted provisions.

What is the offence?

The new facilitation offence is a corporate offence, i.e. committed by a company or a partnership. It is a strict liability offence meaning that the motive of the offender is irrelevant.

The three elements of the new offence are:

1. evasion of tax by a taxpayer (whether or not the taxpayer is actually convicted);
2. facilitation by an 'associated person' of a business (i.e. its agents, subcontractors, employees). The facilitation must involve deliberate action to assist the taxpayer's evasion;
3. failure of the business to prevent the facilitation.

In addition to the above, a foreign tax facilitation offence requires:

1. a UK nexus (e.g. the taxpayer carries on business in the UK); and
2. dual criminality (i.e. the evasion is criminal in both the UK and the foreign country).

What are the potential consequence of conviction?

- criminal conviction;
- unlimited fines; and/or
- confiscation of assets.

Protection

It will be a defence against conviction if the business has in place reasonable procedures to prevent facilitation, provided these have been properly implemented beforehand. HMRC has issued guidance on what constitutes reasonable prevention procedures, as follows:

1. Risk assessment

- Document assessment of specific risks of facilitation from a 'bottom-up' perspective.
- Identify both internal and external risk sources.

2. Proportionality

- Produce an implementation strategy and timeline which prioritises the highest risks.

3. Top level commitment

- Senior management must demonstrate adherence to the prevention procedures and foster a culture of compliance.
- Commit not to work with non-compliant organisations.
- Designate responsibility for prevention at a senior level.

4. Due diligence

- Carry out due diligence procedures (tailored to identify tax evasion risk) in respect of all persons who will perform services on behalf of the business.

5. Communication and training

- Train employees, owners and agents on necessary policies and procedures.
- Training should include advice on reporting concerns and include a message on the social and economic effects of failing to prevent tax evasion.

6. Monitoring and review

- Carry out ongoing reviews of the implemented procedures.
- Always involve the management responsible for delivering any changes.
- Seek internal feedback.

For further information please contact [Charlotte Black](#).



The Great Repeal Bill

When Theresa May called the snap election, she intended to strengthen her hand in the Brexit negotiations. An increased majority would also have eased the implementation of legislative projects such as the Great Repeal Bill. However, the Conservatives' loss of majority following June's election is likely to make what was already a daunting task, significantly more difficult.

On 29 March 2017 the government triggered Article 50, starting the process of taking the UK out of the EU in March 2019.

New legislation is required to ensure that domestic law accommodates and reflects the UK's withdrawal from the EU. Following the triggering of Article 50, the government set out details of the Great Repeal Bill in a [White Paper](#). This states that the Bill will transpose existing EU legislation into domestic law. In doing so, Parliament will have power to amend and repeal laws as necessary, given that some legislation will no longer work (for example, legislation referring to an EU institution). With this in mind, the government intends that the bill "will create a power to correct the statute book where necessary".

This proposition to use secondary legislation to "correct" laws that will not operate appropriately once the UK has left the EU is controversial. There is a concern that the government will be able to enact its corrections to the statute book without the usual level of parliamentary scrutiny.

The announcement in June of the cancellation of next year's Queen's speech indicates that the government recognises the complexity of the task ahead (particularly in light of the election result); Brexit-related legislation cannot be passed and scrutinised in a single year.

Business is arguably one of the most affected sectors by this period of legislative change. The sooner there is certainty for the sector, the better. However, during this period, there is an opportunity for all to engage and influence the UK's legislative developments, the outcome of which remains to be seen.

For further information please contact [William Charrington](#).



Business Rates: Revaluation, Reform, Relief?

The recent business rates revaluation and the lack of promised reform have drawn sharp criticism from the business and property press, and the lobbies representing business taxpayers. Business rates have never been popular in these quarters, but why the latest clamour and what is the net effect on UK business?

Revaluation

Business rates are pegged to property values every five years – a reductive method as valuations are clearly not uniform across the UK. The South East will see greater hikes than areas in the North East and South Wales (which have seen a drop). Compounding this is the new "large properties" classification. The double impact on, say, an Amazon warehouse in Kent rather puts paid to the notion that online businesses are unfairly advantaged when it comes to rates liability.

Reform

The outcry has been amplified by the fact that the system will not change any time soon. The reform proposals – embodied in the Local Government Finance Bill – became notable by their absence in the recent Queen's speech.

Relief?

Transitional relief is available and caps on annual increases. However, the press has reported this week that the fund intended to assist those hardest hit has not yet made any hand-outs.

Delays to reform also mean that the cumbersome appeals procedure will remain so, not helped by the recent switch to a new three-stage appeal system, which can take up to 18 months.

Any good news?

- as differing property values give rise to regional biases, the net effect on business is neutral.
- rents adjust in line with rates fluctuations so landlords are exposed when rents align with revalued rates. Savvy tenants renting in affected locations can use the hike as a negotiating tool to secure lower rents, inducements, and favourable rent reviews.
- the small mercy that rates reform is at least on the agenda.

For further information please contact [Fred Lee](#) or [Jamie Goldberg](#).



Brexit and Data Protection Regulation

One element of the Queen's Speech that fell somewhat between the Brexit and non-Brexit agenda was the announcement of a Data Protection Bill. In summary, this was characterised as follows: *"a new law [that] will ensure that the United Kingdom retains its world-class regime protecting personal data"*. It was noted in the Queen's Speech that over 70% of all trade in services are enabled by data flows, meaning that data protection is critical to international trade. In 2015, the digital sector contributed £118 billion to the economy and employed over 1.4 million people across the UK. The keynote message is to *"ensure that our data protection framework is suitable for our new digital age, and cement the UK's position at the forefront of technological innovation, international data sharing and protection of personal data."* What this means, inevitably, is that we adopt the stringent EU standards that will enable business in the UK to trade and transact in databases and ecommerce contexts across Europe, and beyond – for the time being at least.

In many ways, of course, the law referred to is not "new". It has been with us overwhelmingly since 25 May 2016 in the final form of the General Data Protection Regulation (GDPR); and we have simply been counting down the two years ever since before it becomes effective law across the United Kingdom. That said, Brexit considerations and snap elections have since distracted the government comprehensively from its job of making the necessary preparations for the other legislative measures that will need to sit alongside GDPR. The regulation, whilst having direct effect, does not represent a complete package: various exemptions and definitions within GDPR are derogated locally to member states, and so far UK Plc has not been quick off the block to indicate its intentions.

Some of these are very sector-specific issues which will not necessarily apply to core commercial sectors: there are notable questions to resolve around media and the arts, children, public authorities and law enforcement. But there are also questions of general concern, like the role of legal privilege and other exemptions to rights of subject access. Legal practitioners will be watching closely to see whether the intention to *"establish a new data protection regime for... data processing, replacing the Data Protection Act 1998"* will in practice mean scrapping all the familiar (and not so familiar) wording of the 1998 Act and its various supporting pieces of legislation, or transposing some of the existing wording so as to fill in the gaps that GDPR leaves.

The most immediately noticeable effect of the announcement of the Data Protection Bill may be that UK business starts talking in terms of the Data Protection Act 2018, rather than GDPR. Whether that is less of a mouthful, or less of a compliance burden for business going forward, seems doubtful at best.

Please see our [article](#) in January's Commercial Forecast for further information and tips on how to prepare for the GDPR.

For further information please contact [Owen O'Rorke](#).



Transparency in the UK Property Market

As part of a move towards greater transparency, the Government has issued a call for evidence on its proposal to require an overseas company (and other legal entities) to file details of its ultimate beneficial owner on a public register before it can acquire or dispose of UK real property.

All UK companies and certain other legal entities are currently required to maintain a register of persons with significant control (**PSC**). The Government is now conscious that more should be done to ensure the integrity of the UK property market, and sees a register of beneficial ownership of UK property as key to achieving this. Although described as a beneficial ownership register, our understanding is that the Government will follow the existing PSC rules, and therefore persons with significant control will be recorded, rather than beneficial owners.

The call for evidence is a preliminary stage in the process for implementing law, and the proposals may change. However, some of the current proposals are:

The regime will apply to all overseas companies and entities capable of holding property, in relation to freeholds, leaseholds with an original term of more than 21 years and properties subject to first registration.

After a one year transitional period, an overseas entity wishing to sell, lease or mortgage their property will have to update the register in order for the transaction to be registered.

Once the rules are in force, overseas entities must complete the register before acquiring property. They will then be given a registration number which will be required to be registered at the Land Registry as the property owner.

It will be a criminal offence not to provide information when required to do so.

If implemented, this is potentially a drastic change for the UK property market. However, there are options for purchasers such as buying property in the name of individuals or UK companies, which need to maintain a PSC register.

For further information please contact [Anthony Turner](#).



Tell me more...

If you'd like to discuss any of these issues further, please contact the authors or speak to David Fletcher on 020 3375 7117 or email him at david.fletcher@farrer.co.uk