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How will 2017 shape up for the transport sector?

Risk issues to focus on in the months ahead

February 2017



As 2017 gets underway, we take a look at how we expect the year to shape up for the transport sector and consider what should be on your risk checklist for the months ahead.

Over the past few months a number of clear trends are emerging in the legal arena:

Courts and tribunals are taking a tough stance reining in new disruptive employment models

2016 saw Sports Direct criticised widely; from the standards of its lorry drivers to zero hours contracts and treatment of workers. In January 2017 two men who recruited for agencies supplying workers to Sports Direct were convicted under the Modern Slavery Act. In October 2016 Uber was handed a ruling that its drivers were not self-employed and should receive the minimum wage (to learn more, see '[The gig economy: key decision on employment status](#)', and '[2016: a year in review](#)'). Other companies have faced similar criticisms.

The early signs are that this tough stance against disruptive employment models will continue into 2017, with a determination having already been issued against haulage contractors, RS Dhillon & GP Dhillon Partnership¹,

confirming that the HMRC was correct to regard its drivers as employees and not independent contractors, and the Court of Appeal having found Jet2.com obliged to recognise the British Airline Pilots Association for the purposes of negotiating pilots' pay, hours and holidays². However with Uber having announced it is appealing the decision against it, many will be watching with interest to see how this trend develops through 2017.

In the meantime caution is required when relying on unconventional employment practices. It will be worth looking out for the Taylor review of Employment Practices in the Modern Economy which is expected to be published in mid-2017. Also of interest will be outcome of the national survey of lorry parking, which transport minister David Hayes expects to be completed by the spring, and which prompted calls from Unite for a statutory, legally-binding code of practice ensuring safe, secure and clean lorry parks with modern facilities including showers and toilets, for lorry drivers across the country.

¹ *RS Dhillon and GP Dhillon Partnership v Revenue and Customs Commissioners* [2017] UKFTT 17 (TC)

² *British Airline Pilots Association v Jet2.com Ltd* [2017] EWCA Civ 20



Companies need to bear in mind their duties to consumers and to the public

October 2016 saw the application of the Consumer Rights Act 2015 (CRA) to contracts for transport services, with the effect that passengers are now entitled to expect transport services to be performed with 'reasonable care and skill', and have a statutory entitlement to a price reduction (including a full refund) where the implied term is breached.

Following a recent report to the Association of British Commuters by a frustrated Southern Rail commuter who had been refunded by his credit card company (which in turn is expected to claim back part of the cost), transport operators should bear in mind the ongoing nature of their obligations to consumers even in circumstances not entirely within their control.

Wheelchair users are claiming a victory following a Supreme Court decision against FirstGroup plc³. The Court held that a policy in which the bus company's drivers requested, but did not require, non-wheelchair users to vacate a wheelchair space if a wheelchair user required the space, did not fulfil FirstGroup's duty under the Equality Act 2010. The decision has implications for all public passenger transport operators, and offers practical guidance on the appropriate approaches drivers might use to 'move recalcitrant passengers' in different situations.

So far as duties to the general public are concerned, Highways England is considering imposing the UK's first pollution-related speed limits from March 2017 in an area around Sheffield where the M1 runs close to

residential areas and air pollution already breaches UK and EU limits. It seems likely that we will see more such environmental schemes in recognition of duties owed to the public at large, with air pollution in London recently being reported to have passed levels in Beijing.

Data Protection and Cyber Security

Data protection and cyber security remain high on the agenda, and with good reason. In October 2016 the UK's Information Commissioner's Office (ICO) issued a record fine of £400,000 against TalkTalk following security failings that allowed a cyber attacker to access TalkTalk customer data 'with ease', and in so doing issued a stark message about the seriousness with which it treats data breaches by companies. Tough new government plans intend to further strengthen the ICO's hand, with it having the power (from April 2017) to fine directors (personally) up to £500,000 where their business has been involved in nuisance calling.

We expect to see courts and regulatory bodies adopting an equally robust approach with companies which have fallen foul of data protection regulations, whether maliciously or inadvertently. In the case brought by the International Air Transport Association against Accelya World SLU in 2016 the court considered whether data obtained during a contract could be used by Accelya for purposes outside of those specifically set out in the parties' agreement and held that the data could not be used by Accelya for its own commercial purposes.

In May 2018 the EU's General Data Protection Regulation (GDPR) will be implemented across the EU, and the UK has confirmed that despite Brexit it intends

³ *Paulley v First Group Plc* [2017] UKSC 4



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to implement the GDPR by that deadline also. By doing so the UK should ensure that even when it ceases to be a member of the EU, it will be able to demonstrate having a regime in place that meets the data protection requirements necessary for it to continue trading in the EEA. Accordingly, businesses need to familiarise themselves with the key features of the GDPR, and the changes required to ensure continued data protection compliance. The Information Commissioner's Office (ICO) has published a number of useful features, including an [overview of the GDPR](#) and a [12 step guide to compliance](#). You can also take a look at our Law Nows on the subject: [The General Data Protection Regulation is coming...](#), and [Brexit – Is the General Data Protection Regulation still the shape of things to come?](#)

Companies face ongoing scrutiny into their corporate practices

VW first hit the press in relation to the emissions scandal back in September 2015, but in 2017 the scrutiny continues. VW agreed last year to settle claims brought by its US customers for a total of £12bn, and a substantial settlement in Canada has also been agreed. Customers in the UK are now set to take action in the High Court against VW for their own compensation. The fully funded group action, which could result in VW facing a multibillion pound bill, will proceed on the basis that consumers were misled about the environmental damage caused by their cars, and that the cars did not conform to the specifications advertised or the regulatory requirements. The repercussions of the VW emissions scandal are not necessarily limited to consumers seeking damages. Criminal investigations have taken place in the US with the previous head of VW's regulatory compliance office having appeared

before the US District Court on charges of conspiracy to default the US.

Other companies in the transport sector have also faced corporate scrutiny. Criminal investigations by the Serious Fraud Office (SFO) were revealed in August 2016 as being underway against Airbus over allegations of fraud, bribery and corruption involving third party consultants. And in January 2017 we saw the SFO's criminal prosecution of Rolls Royce conclude with Rolls Royce agreeing to pay £671m in fines and penalties to the SFO, the US Department of Justice and prosecuting authorities in Brazil to avoid charges of criminal conspiracy.

Companies need to ensure that they have the necessary systems and policies in place to deal with this threat. On 15 October 2016 a new international standard for anti-bribery management systems was published by the International Organization for Standardization (ISO) following a lengthy process of development. ISO 37001 (the Standard) applies to small, medium and large organisations, whether private or public, in all sectors anywhere in the world. It provides a set of verifiable requirements which in turn allow an independent third party to audit an organisation's anti-bribery management system and policies and certify compliance with the Standard where appropriate. Being able to demonstrate certification is expected not only to provide internal assurance of compliance with legal obligations, but also be important to stakeholders and insurers.

Companies need to keep abreast of changes in the law

Changes facing the transport industry are always challenging because of the international nature of the sector and the number of interested parties – consumers,



insurers, politicians, contracting counterparties, etc. The Scottish Government has recently issued 'A Consultation on the Long Term Management of the Crown Estate in Scotland'. As the long term management of Scotland's seabeds and foreshores will undoubtedly affect the maritime sector, this will be an area to watch for those doing business in the sector. The '[Consultation on the Safe Use of drones in the UK](#)', launched by the UK Department for Transport shortly before Christmas, marks the start of one such potentially challenging but equally exciting development affecting the transport industry, with views currently sought from a broad range of interested parties including commercial and leisure drone users, the aviation industry, manufacturers and others in relation to the development of a UK policy and regulatory framework for the civil use of drones.

Another long-awaited development, affecting the maritime sector in particular, is the International Code for Ships Operating in Polar Waters (the Polar Code) which came into force on 1 January 2017 and provides a code of practice for ships operating in Arctic and Antarctic waters as well as risk mitigation directives. Companies involved in shipping in polar waters will be interested to see how this development affects the maritime sector generally, including how it affects the availability of marine risk insurance. Those involved in the maritime sector will also be watching with interest the UK Government consultation on its proposed regime for enforcement of the EU regulation on monitoring, reporting and verification of carbon dioxide emissions from maritime transport. The UK's proposed penalties for non-compliance include criminal liability, and are worth being familiar with – you can read our Law Now outlining the proposals here.

Where companies fail to keep abreast of legal changes, it can result in embarrassment not to mention penalties. In late 2016, the Rail Accident Investigation Branch (RAIB) questioned whether certified Entities in Charge of Maintenance (ECMs) fully understood the importance of their role and also the legal obligations that came with it. The comments arose following investigation of a rail incident earlier in the year, which RAIB deemed to have arisen as a result of a lack of maintenance by the ECMs concerned. There is a broader lesson to be taken from the RAIB's conclusions on this particular investigation – the importance of a company ensuring a full understanding of the nature, extent and implications of the obligations for which it is contractually responsible, and to ensure that appropriate systems and procedures are in place to address those. Failure to do so can give rise to events that may trigger regulatory penalties, claims for breach of contract, and loss of reputation to name but a few.

Companies which have included arbitration into their contracts to deal with disputes should remain up to date on changes in the rules of the arbitral institutions. These can be useful, such as the new ICC expedited procedure which will be available to cases below US\$2m from March 2017, provided the arbitration agreement was concluded on or after 1 March 2017. It is hoped the new procedure will limit the number of procedural steps and shorten the time and costs spent in arbitration, and is seen as a positive step forward for business keen to use alternative means of dispute resolution. At the same time changes to the rules of the various arbitral institutions to provide emergency remedies early on in the arbitral process, may result in limiting the ability of parties to turn to the courts for such emergency processes⁴: see our earlier [Law Now](#).

⁴ *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch)



The business environment looks set **to remain challenging** for the transport sector...

Political uncertainty continues as we await clarity on the implications of Brexit following the Supreme Court's decision in R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 – more commonly known as 'the Article 50 Brexit appeal'. Understanding as early as possible potential legal and ramifications will be essential. Our '**Brexit Next**' website is regularly updated with features and events addressing many of the issues that you may want to consider over the months ahead.

Conclusion

The themes identified show there is much to think about in 2017 in terms of legal and regulatory requirements. The business environment looks set to remain challenging for the transport sector, and at the same time companies need to keep informed of potential changes and risks. Understanding how to navigate your business through the uncertainty to create and make the most of opportunities will be key.

If there are areas in which we are able to assist you to do this, please get in touch.

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