



thinking
— Business

ISSUE FIVE

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Welcome to our fifth edition of Thinking Business with a UK focus, where we aim to share our expertise and ideas with you to support growth and sustainability in your business.

In this edition, we are focusing on the theme of resilience, and considering some of the many ways in which businesses across the United Kingdom can build more safeguards in to their day-to-day operations in the face of a wave of uncertainty. As we move towards Brexit, business leaders are operating against a backdrop of heightened macroeconomic tension, while also facing intense media scrutiny in areas such as gender diversity and inclusion. A number of high-profile business failures in the first half of 2018 have also thrown the role of corporate leaders back into the spotlight of public discourse.

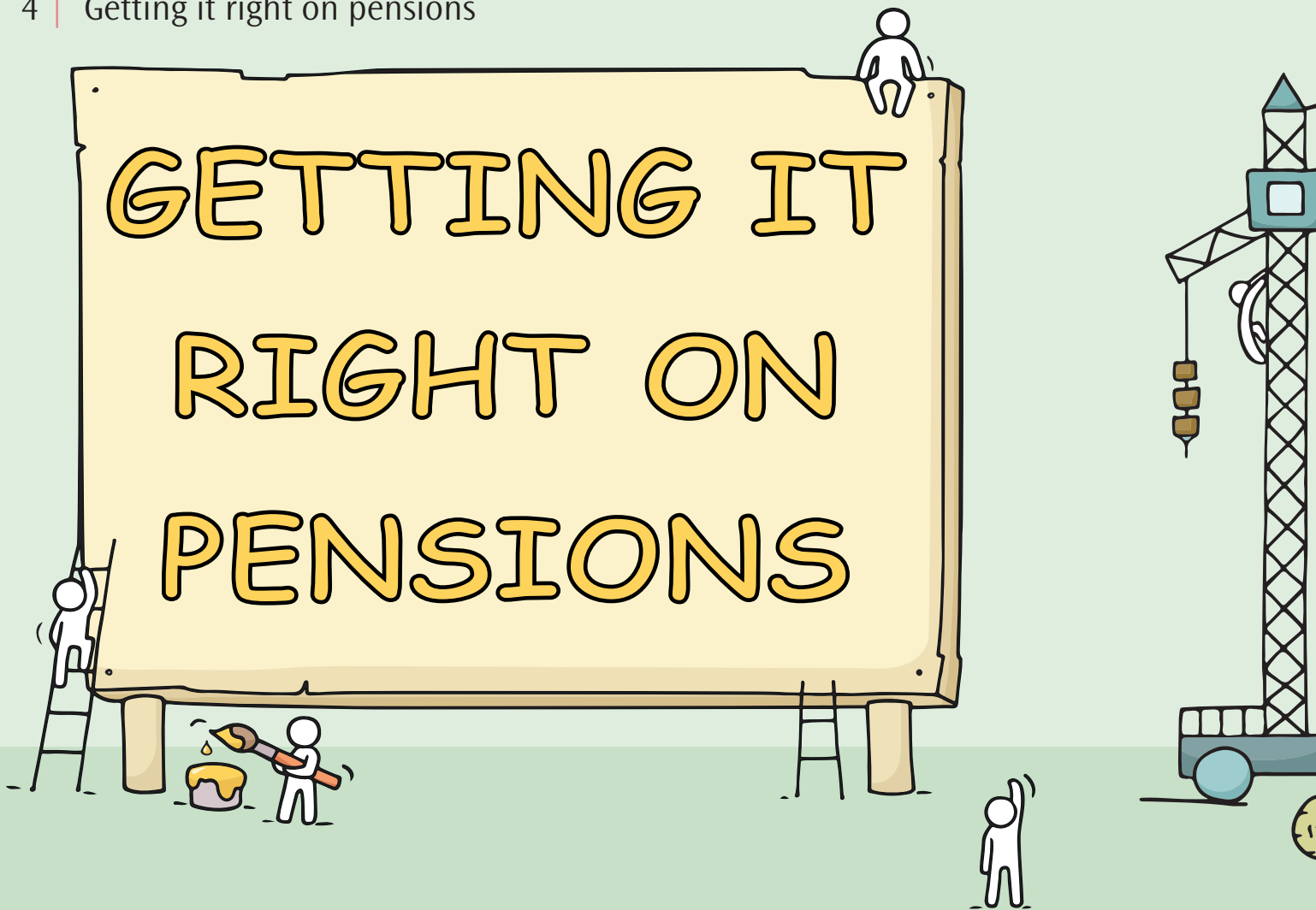
This publication looks at resilience across the board, and we have chosen to focus on some of the key things our clients are talking to us about, namely:

- Getting things right with regards to pensions, and the responsibility of directors and officers to give proper ongoing consideration to pensions liabilities;
- The arrival of Europe's General Data Protection Regulation (GDPR), and what companies really need to know as the deadline fast approaches;
- Building sustainable corporate relationships across the supply chain, to mitigate the risks associated with customers or suppliers encountering financial difficulties;
- How to build the right culture around gender diversity and inclusion, and where the focus should be, in light of gender pay gap reporting and the #MeToo campaign; and, finally,
- The changing face of government outsourcing, and how the demise of a big player in that market is creating opportunities for new entrants.

We hope you'll enjoy reading this and that you'll find some interesting food for thought over the course of the following pages.

Should you wish to discuss anything in more detail, or ask any questions, please do get in touch with your usual Trowers & Hamlins contact, or feel free to email any of us directly at thinkingbusiness@trowers.com. You can also follow us on Twitter @Trowers.

JUNE 2018



With a number of corporate failures in recent years forcing a spotlight on the management of pension scheme liabilities, it is becoming increasingly clear that directors and officers need to be much more mindful of their pensions responsibilities.

When Carillion collapsed into administration in January 2018, it was reported that its pension deficit had become equivalent to the company's entire stock market value, and its directors were heavily criticised for having prioritised shareholder dividends over funding the scheme. Likewise, both Toys R Us and BHS have failed in part as a result of their huge pension scheme shortfalls.

Both the Pensions Regulator and politicians are now putting significant pressure on business leaders to give much more consideration to their pensions liabilities before entering into deals or paying dividends, and this is an area where directors need to be increasingly on the ball.

Rebecca McKay is a partner in the corporate department at Trowers & Hamblins, where she specialises in pensions. She says: "There are actually now very few defined benefit pension schemes out there, so the first step for directors is to identify what pension schemes they have got and what risks they represent. If there is a defined benefit scheme, what's the funding position of that scheme."

Directors should also take time to really educate themselves on how the schemes run and what implications the liabilities have for decision-making within the business, particularly in relation to mergers and acquisitions and dividend payments.



Directors really need to make sure they bear in mind the impact of any decisions they make on a defined benefit scheme, and particularly if that scheme is underfunded" says McKay.



Directors already have legal responsibilities in this area, and there are plans for these to be tightened. At the moment, if a company makes a decision that has a detrimental effect on the pension scheme, then mitigating actions should be taken.

The Pensions Regulator offers a voluntary clearance process, whereby a clearance statement can be sought from the regulator to give assurance that corporate transactions will not result in enforcement action being taken against the business. A clearance statement is not an approval of a transaction, such as a merger, but it does say that the regulator will not use its anti-avoidance

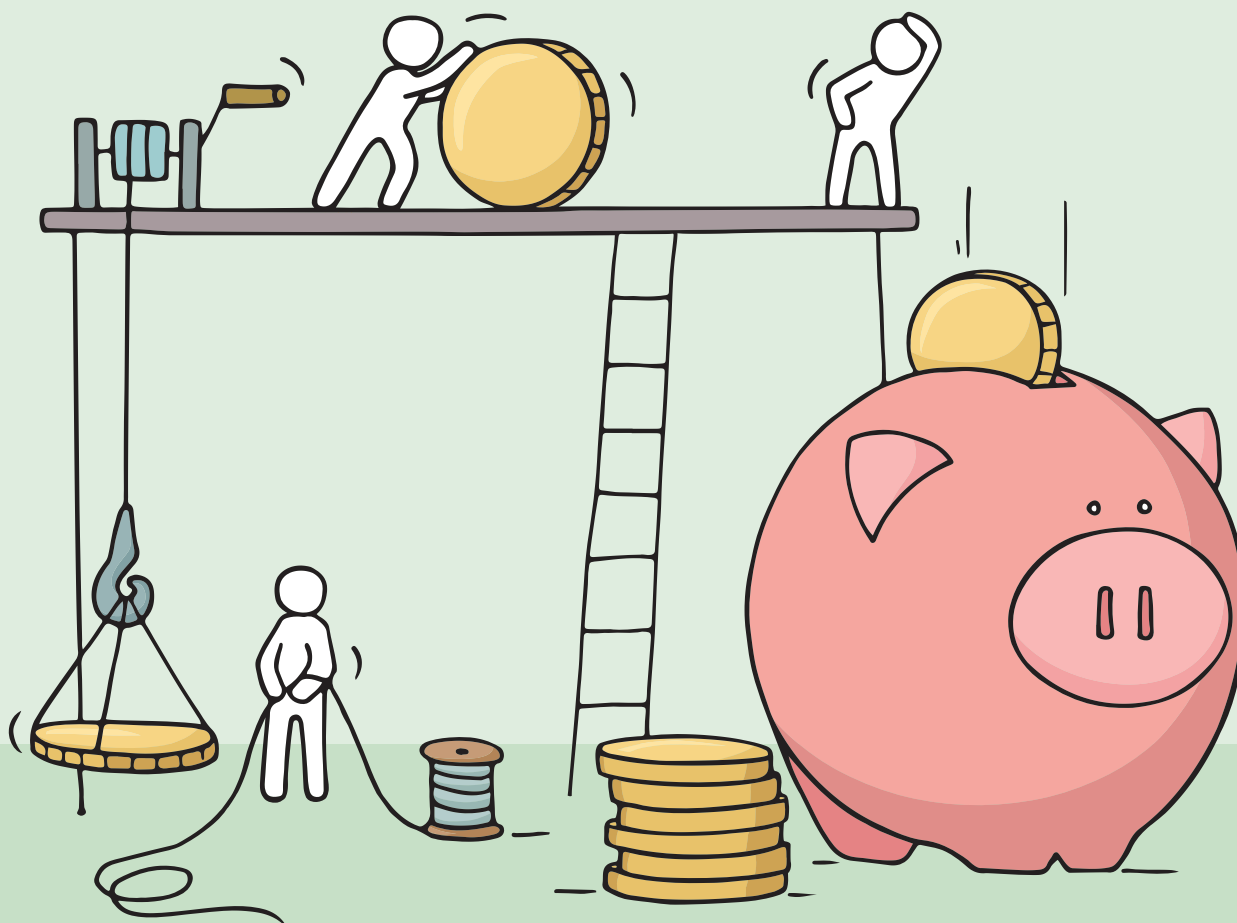
powers to issue either a contribution notice or a financial support direction against the company in relation to a defined benefit occupational pension scheme.

Very few companies have used the clearance process in recent years – fewer than 20 in 2017 – which could be down to either a lack of awareness of its existence, or the fact that companies are getting more up-to-speed with handling their pensions issues confidently in-house.

Nick Harrisingh is a corporate partner at Trowers & Hamblins working on transactions. He says: “Directors need

to be able to show documentation of the process leading up to a transaction or dividend payment, and need to be adequately minuting discussions to demonstrate that consideration was given to the impact on the pension scheme. Trustees should be involved in those discussions wherever possible.”

Directors also have duties under the UK Companies Act, which include a requirement to have regard to the impact of a transaction on company employees, which could be taken to include the implications for pension scheme beneficiaries.



In March 2018, the government published a white paper outlining proposals to increase the protections for defined benefit scheme members and make improvements to the system. Among its plans were the suggestion that the regulator be able to punish those who deliberately put their pension schemes at risk, by introducing punitive fines, and the introduction of a criminal offence to punish those who have committed wilful or grossly reckless behaviour in relation to a pension scheme. This would include building on the existing process to support the disqualification of company directors.

The white paper also sets out plans to strengthen the regulator's existing powers by beefing up the voluntary clearance procedures, so that employers give appropriate regard to pensions considerations in corporate transactions. There is no suggestion that mandatory clearance will be introduced at this stage, with the suggestion instead being that employers should make a statement of intent prior to a transaction to show they have given appropriate consideration to the impact of the deal on their pension scheme.

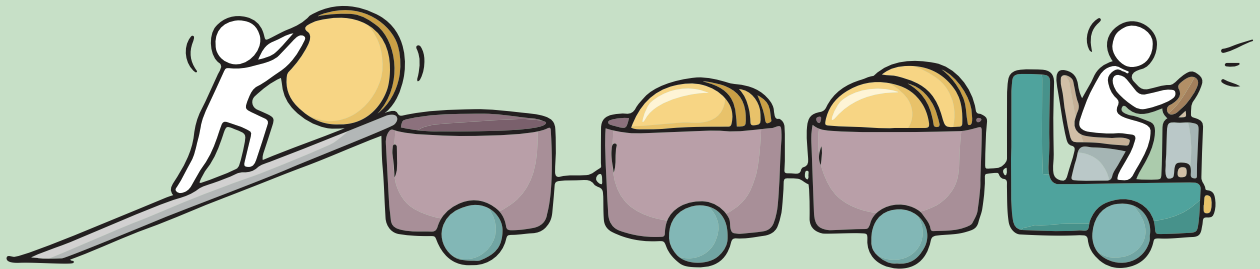
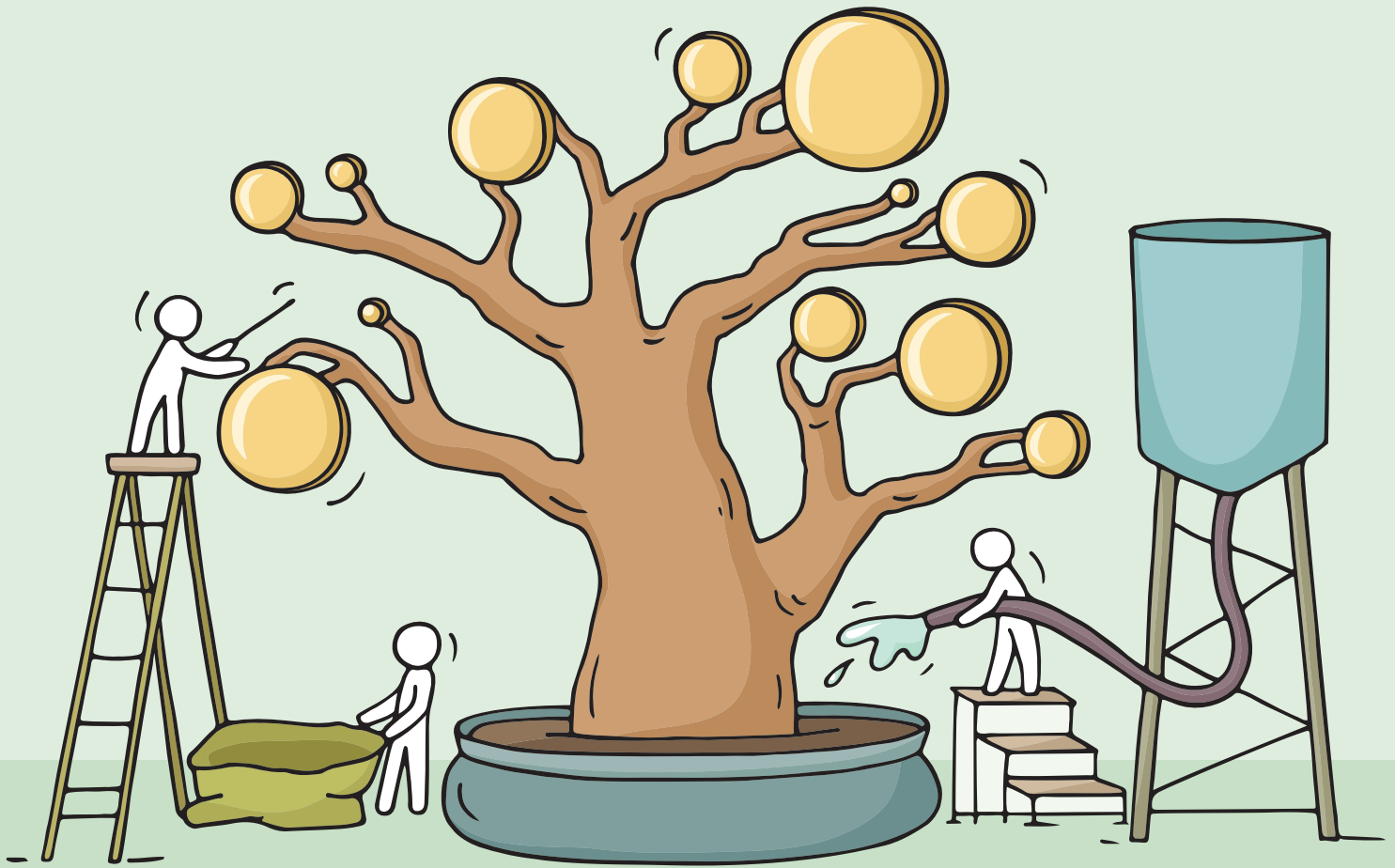
McKay says: "The white paper acknowledges that any strengthening of the regulatory framework must not damage legitimate business interests, harm the economy, or put those who are already fulfilling their pensions obligations under any unnecessary burden. Instead, the aim is to genuinely help trustees to get the best deal for scheme members and allow the regime to operate effectively and efficiently."

At the same time, the government has also published a consultation paper setting out proposals to improve the corporate governance of firms that are in, or approaching, insolvency, which includes new powers to investigate the conduct of directors in the event of company failures.

The abiding message is that directors need to be much more alive to how their actions impact pension schemes, and that includes those that have closed. Harrisingh says:



There are actually very few defined benefit schemes that are still open to new members, and you would want to shut those down to limit future accrual. But the regulator is interested in benefits that have already been accrued – it's a common misconception that the situation can be improved by closing a scheme, either to new entrants or to future accrual."



“The regulator would still have a duty to look at benefits already accrued by existing members.”

McKay concludes: “Directors need to make sure they have a proper understanding of what the pensions arrangements in the business are, and they need to realise that if they don’t consider those before making an acquisition or paying a dividend, there is the potential for very negative consequences. Those consequences can come not just from the regulator, but also from public opinion, given there seems to be a hunger out there to expose failings in this kind of corporate governance.”

Thanks to Carillion and others, pensions have been swiftly elevated up the corporate governance agenda.



WHAT YOU REALLY NEED TO KNOW ABOUT

GDPR

The EU's new data protection regime – the General Data Protection Regulation (GDPR) – comes into effect on 25 May 2018, by which time businesses across Europe will need to be compliant. As the deadline fast approaches, those companies that do not yet feel adequately prepared are advised not to panic, and to focus on some immediate priorities for compliance.

Alex Razak is an associate in the corporate department at Trowers & Hamlin, where he specialises in data protection, IT contracts and commercial transactions. He says:



I have met clients who are panicking about GDPR, but I have not yet met a client that is not compliant with the Data Protection Act 1998, which is the current law.”

“The GDPR builds on the Data Protection Act, and so if you are materially compliant with that then you are not far off complying with GDPR. The first message is one of reassurance.”

GDPR compliance should be seen as an ongoing process, with one of the fundamental principles of the new law being that an organisation has to demonstrate compliance, which means developing awareness of data issues across the business, right up to Board level.

Charlotte Clayson is a senior associate in our dispute resolution and litigation department, where she handles cyber and data breaches. She says: “For clients who haven't yet started to do anything in practical terms on GDPR, there is no need to panic. The best place to start is understanding exactly what personal information the business holds about people, where it holds that data, and why it has it.” She adds: “That initial audit is the most step towards understanding how GDPR will effect the company, which allows management to then go on to prioritise the key areas of risk in the business.”

Those risk areas will vary from organisation to organisation, and may be to do with reputational risk, strengthening cyber security technology or practices, or changing the cultural attitude of employees towards personal data. On the latter point, the Information Commissioner's Office (ICO) in the UK has been clear about the need for the protection of personal data to be at the heart of every business's strategy, given that data is typically one of a company's biggest assets. Any incidence of a data protection breach can impact employees as well as customers, and can have ramifications beyond just business and commercial, to include serious reputational harm.

Razak says: “The reality is that, from a cyber criminal's perspective, data is the new oil, and they will target organisations based on how susceptible they are to a breach. Making sure organisations are putting up the best defences possible and data is managed can minimise the impact.”

In the event that a data breach does occur, following the immediate challenge of managing the reputational issues, the ICO will be looking to a business to demonstrate how it complies with the regulations. The ICO has a range of corrective powers and sanctions to enforce the GDPR, including warnings and reprimands; imposing temporary or permanent bans on data processing; suspending data transfers to third countries; and ordering the rectification, restriction or erasure of data.

The GDPR also introduces fines of up to €20 million, or 4% of global annual turnover, which is higher, which can be imposed on a case-by-case basis.

Clayson says: “It is critical to have policies and procedures in place so that people in your business understand the best way to handle personal data, where it's particularly sensitive, where there should be additional controls and how it is stored on systems. If you can show

Essence of GDPR

Riccardo Abbate, a partner in the corporate team, explains the basic purpose of GDPR. He says “The fundamental essence of the GDPR and the Data Protection Act 2018 is to promote an effective and meaningful environment (operational and legal) in which people can have confidence that their personal data will be handled in an appropriate way, respectful of their rights at law, which have been enhanced under the GDPR and Data Protection Act 2018. The intention is that such legislation will enhance and promote the scope for business being conducted electronically in our ‘digital age’ by reinforcing the need for transparency and accountability in the way that individual’s personal data are processed.



these policies and procedures, and there's an audit trail showing you're not just thinking about the bottom line for the organisation but are also giving proper thought to protecting personal data, then you will be in a far better position if you find yourself talking to the ICO after something has happened.”

Demonstrating buy-in at Board level is also important, to illustrate company-wide commitment and avoid any perception that data is the responsibility of, for example, the IT department.

When it comes to the next steps that follow an initial data audit, it is important not to assume that seeking consent will always be appropriate, as there may be easier ways to legitimise holding data.

Clayson says: “There is a tendency to get a bit hung up with consent, which is entirely appropriate in some circumstances, but shouldn't necessarily be the starting point for how you legitimise what you are doing. If you are relying on someone's consent to process their information, and they withhold that, you need to ask yourself whether your whole business model falls down. What are the implications? It comes down to the legal basis on which you are holding or sharing information.”

Companies will need to be far more transparent with people about why they are holding their personal data, and what they are doing with it – often addressed through terms and conditions of doing business.

Razak advises business leaders to take a risk-based approach in the run-up to implementation date. “There seems like there is a lot of work to be done by 25 May,” he says. “It may not be possible for some companies to become entirely compliant. So, I'd advise businesses to update the information notices that they give to individuals, which inform them on how their data is being processed. Another piece of work that should be done is identifying impacted contracts between the company and third parties – inter-company contracts are priority two. It can be a lengthy due diligence process to identify the provisions that need to be updated in those contracts.”

While the deadline for compliance may be pressing, the reality is that GDPR requires ongoing work, with policies and procedures needing constant review to make sure that the data of customers and employees is being handled correctly.

Mark Kenkre, a partner in our dispute resolution practice whose work includes a focus on cybercrime, says: “This is really just about best practice in data protection, and people who aren't following the basic steps are leaving themselves vulnerable to breaches. More than one regulator will be interested in the event of the breach – the Financial Conduct Authority, for example, will do its own investigations and hand out fines, as well as potentially enforcing ongoing monitoring at a cost to the organisation.



The costs associated with a breach and recovery are potentially extremely serious.”

While no one need panic, now would certainly be a good time to get your data protection house in order.



BUILDING SUSTAINABLE

RELATIONSHIPS IN THE SUPPLY CHAIN

Two big news stories in the first half of 2018 have highlighted the growing importance of building resilience into the supply chain of any business.

First came the collapse of Carillion in at the end of January, the second biggest construction company in the UK, which led to many predictions of a rise in the number of construction companies going bust as subcontractors in the firm's supply chain missed out on payments. Carillion's failure caused ramifications across a sector in which profit margins are typically low.

Then, in February, came the story that fast food outlet KFC was being forced to close almost two-thirds of its UK branches as a result of the breakdown of a new supply contract for chicken with delivery network DHL. In one of the worst logistics failures of recent years, more than 560 of KFC's 900 UK restaurants simply ran out of chicken, as DHL took on a new delivery contract and hit teething problems.

What both stories highlight is how critical it is that management maintain close visibility across the supply chain, keeping close to both customers and suppliers and using contractual terms to monitor risks and build preparedness into their own business strategies.

At the same time, there is a lot more customer interest in the supply chain, and particularly in the provenance of products that have often been sourced and produced all over the world. Retailers, in particular, are closely scrutinised on the strength of their relationships with their suppliers and their local communities, and are expected to make efforts to maintain fair working conditions and promote fair trade.

Marks & Spencer, the UK food and clothing business, has a lengthy supplier management section on its corporate website, setting out what it sees as its responsibilities to suppliers. Customers want to know these things, as do regulators, with the UK's Modern Slavery Act 2015 introduced to tackle slavery in the UK, and placing new requirements on UK businesses to report on steps they are taking to ensure that slavery and human trafficking do not take place either in their own businesses, or in their supply chains.

Alison Chivers, a partner in the Trowers & Hamlins corporate practice, says:



Due diligence is extremely important at the outset of any relationship with a supplier or customer. You shouldn't just be going along with whatever you are told, but from the outset of your business relationship should be doing your due diligence, not just with a view to ensuring the financial longevity of the relationship, but also because of the importance of business ethics."

If things do go wrong with the solvency of a customer or supplier, by the time that liquidators are called in it is too late to act. At that point, the law takes over in asserting what payments can be made and the order in which creditors can be reimbursed.

It is therefore important to be monitoring profit warnings and any other indicators of financial problems: "Remain vigilant and take the time to monitor how your suppliers and customers are doing," says Chivers. "If things do look like they may be going south, consider strategies such as shortening payment terms, making sure you have reservation of title clauses in place, and securing upfront payment wherever possible. You need to prepare and look to be owed as little money as possible in the event of an insolvency."

One indicator that businesses are advised to pay close attention to is the availability of business credit insurance. Adrian Jones, partner in our corporate practice, says: "A lot of big supplier contracts will require a customer to have in place credit insurance. Often that's the first sign of problems, if a company is not able to renew their credit insurance. If it is not possible for a company to secure that insurance, that should be an immediate red flag."

A requirement for customers to have insurance might be one of the policies set out in a supply chain resilience strategy, and all businesses are advised to put such strategies in place. Typically seen as defensive documents, focused on risk management, they can in fact make a huge difference to resilience and long-term business success, and so should also be seen as offensive, according to Tim Nye, another partner in our corporate department. Nye says:



MANAGING GENDER DIVERSITY AND INCLUSION

In the past years, many high-profile individuals and several large institutions have fallen foul of public opinion thanks to gender issues in the workplace. Whether dealing with gender pay gap issues or allegations of harassment at work, it is clear that everyday sexism is now a big issue for employers, and it is important to be on top of the challenges to get ahead of any issues.

When allegations of sexual harassment or impropriety surface in a business, they are, by their very nature, serious. Nicola Ilnatowicz, partner in the employment department at Trowers & Hamblins, says getting the approach right at the outset is critical: "There is a danger in just approaching a complaint as a fire-fighting issue, and losing sight of it as anything more than an immediate and individual problem to be fixed. If you come to these things from wider cultural or organisational angles in the first place, they become easier to address."

So where should management be focusing their efforts in the current highly-charged environment if they want to make sure they are following the best practice?

The answer depends on where a business already sits on the development of its diversity and inclusion (D&I) strategy. The first step in the process will inevitably involve making sure compliance with legal obligations is correct – that managers know their obligations, that the right policies and procedures are in place, that employees know how to raise a grievance, managers know how to deal with issues when they are brought forward, and that the right kind of disciplinary procedures exist.

From a more cultural perspective, making the case for diversity and inclusion within the organisation, and demonstrating a commitment to equality of treatment and opportunity, is a good starting point.

Ilnatowicz says: "Actually valuing inclusivity as part of your culture is very important. That means understanding the fact that the business case for it has really come into sharp relief now that we have generational differences playing out as well. We have got early millennials moving into positions of management responsibility now, and they are saying that some of the things that Generation X had to put up with are not okay."

Having turned a lens on the business and assessed where it currently stands from a D&I perspective, management must then decide if they are where they want to be, and if not, what they intend to do about it.





“That may mean looking at things like particular development opportunities,” says Ihnatowicz. “Have you got an issue with women not progressing, for example, which is an interesting thing that is starting to come out of gender pay reporting. You can pay men and women the same for the same job and still have a gender pay issue if all your women are clustered at the bottom of the salary scale. That is a picture emerging in a lot of large organisations.”

Another subject that may require attention is retention of top talent.

Next comes the challenge of making sure that policies and procedures are not only followed but seen to be followed. This is where best practice has arguably moved on in the last couple of years – it is no longer acceptable to ignore an allegation, or to jump to conclusions, or to attempt to bury issues with warnings and non-disclosure agreements.



It can be very difficult for people to come forward and report allegations of harassment,” says Ihnatowicz.

“People fear for their jobs, so following through on an allegation is very important. It’s really critical to deal with a harassment allegation as quickly as possible, because it is both a horrible thing to be accused of and a horrible thing to be the victim of. An employer needs to establish the circumstances as quickly as possible and decide on the action to be taken.”

There is a danger of not reacting quickly or sensitively enough, and also of over-reacting.

Then comes the issue of accountability, which is particularly timely. “What happens if it comes to light that women have been complaining about a certain person for a long time, and lots of women have made similar allegations, but they do not know about each other?” says Ilnatowicz. “What if it has been brushed under the carpet because whoever it is has been deemed too powerful to sack? But then it all comes out. Dealing with an issue openly is the only way to do it and be accountable, and it has to be the right way.”

Consideration may need to be given to whether crimes have been committed, or whether the behaviour involved requires notification to the regulator, in the case of financial services, for example. There is an obligation to report criminal conduct to the police, but careful thought must be given to the wishes of the person making the complaint.

A common issue arises around the over-sharing or under-sharing of confidential information: an employee has the right to raise a grievance and have that matter dealt confidentially, but the person being accused also has the right to know the allegations being made against them. Usually when disclosing an allegation to the accused, it becomes clear who the accuser is, and so an employer should never guarantee complete anonymity to a complainant.

In the event that an investigation is needed, questions may need to be asked of other people, and it may also be necessary to separate the two individuals involved on a day-to-day basis. It is almost always the case that the person being accused is more senior, and so less mobile between departments or office sites, but any relocation made during an investigation needs to come with clarity that no judgement is being made.

Across the board, in difficult circumstances, the key to successfully managing gender diversity and inclusion comes in putting best practice at the heart of the company culture.





Getting the legal side right is just one part of it,” says Ihnatowicz.

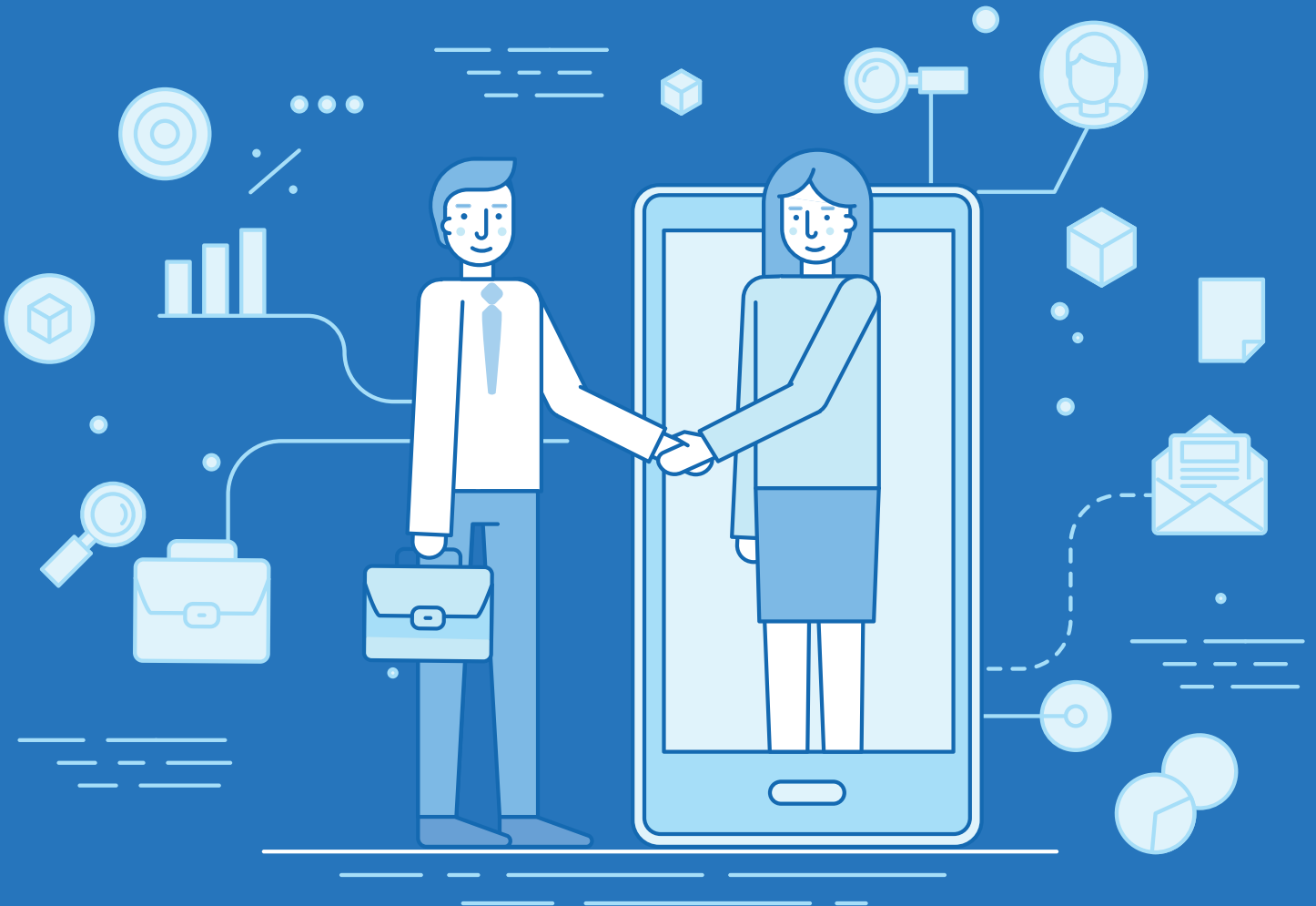
“There are other things that companies can do that are good ideas. I’ve seen lots of bigger employers introducing anonymous reporting lines, for example, as ways of helping them identify if they have problems within their workforce that they might not otherwise be aware of.”

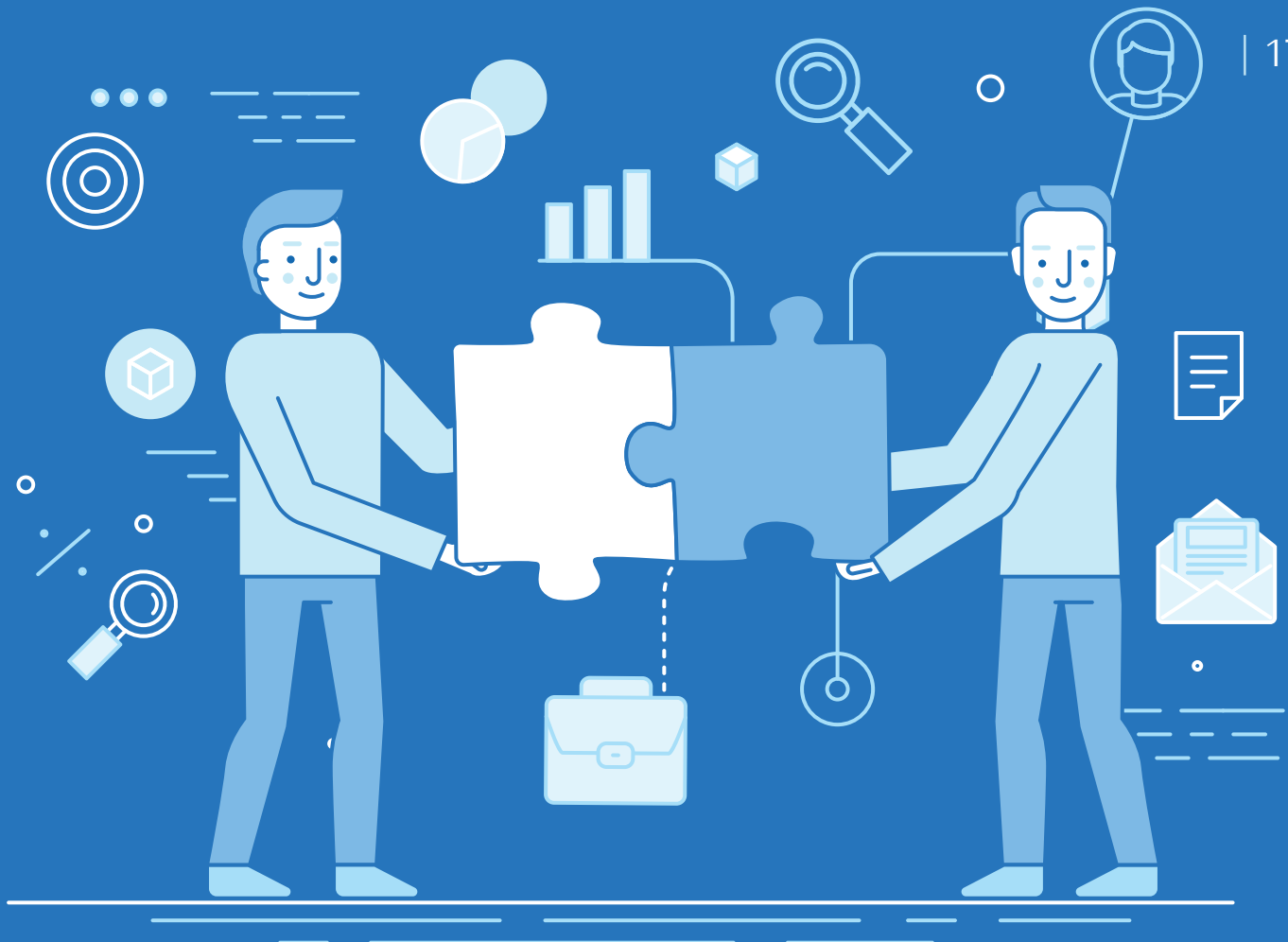
She concludes: “Having a governance process only gets you so far if people don’t have the confidence to raise issues. At the end of the day, this is not just about stopping harassment, it’s about mentoring programmes, talent development programmes, family-friendly policies, and encouraging women to return from maternity leave. It shouldn’t be about fire-fighting when things go wrong, but about getting the culture right in the first place.”



THE CHANGING FACE OF GOVERNMENT OUTSOURCING

When the construction giant Carillion collapsed into liquidation at the beginning of 2018, it not only left £1.7 billion of debt in its wake, but also threw over 450 public sector contracts into doubt. A supplier that had expanded well beyond construction, into facilities management, grounds maintenance and even legal services and IT, the company's failure has left a huge hole to fill and created many opportunities for new mid-market providers seeking public sector contracts.





There is a sense that the government outsourcing approach may change in the wake of Carillion's departure, which has highlighted many weaknesses in current practice, including an excessive focus on price, and a lack of early warning systems and transparency in public sector contracts.

For new entrants sniffing an opening up of the supplier side – so long dominated by the likes of Serco, G4S and Capita – the biggest challenge comes in getting an initial foot in the door.

Helen Randall is a partner at Trowers & Hamlins who specialises in advising both the public and private sectors on outsourcing, and she says: "The loss of Carillion will create opportunities, but public-sector outsourcing is very different from any other kind of outsourcing. The public sector is always looking for a public-sector track record and understanding, because the public sector really is different culturally." She adds:

““

They want to work with providers who understand that the public sector uses different language and has different rules that it has to follow, including its own internal governance rules.”

"All of that is perfectly navigable, provided a company has an expert on its side."

There are already signs of change sweeping through the procurement system, and outsourcing models are under pressure, not least thanks to the squeeze on the public purse. There is a trend towards the use of joint venture arrangements in preference to traditional outsourcing, with JVs being set up to cover everything from back office services to facilities management, white collar services and CCTV. JVs are also being used to rationalise public sector assets via disposals, the proceeds of which can be used to help finance efficiencies in the services. Randall says:

““

One of the things that businesses interested in public sector work should be getting their minds around is what it looks like to enter a joint venture vehicle with the public sector.”

"Again, the public sector is unique, with unique rules and a unique culture, so one has to be much more careful about how things are perceived, being alive to political sensitivities and taking great care to avoid conflicts of interest."

She adds: "It is also important to understand the normal contractual approach, because the market is constantly evolving, and while there might be standard terms and conditions, there will always be some that you can push back on and negotiate a better deal, and others that you can't."

One way for new entrants to break into the market is by taking on subcontractor roles, as in the majority of cases a prime contractor will look for support and will look to pass its terms and conditions of contract down to subcontractors. As a result, a subcontractor role is a good way of getting used to working under public sector rules and requirements, albeit with the benefit of a middle manager in between.

Furthermore, outsourcing arrangements often involve a transfer of staff under TUPE regulations, which preserve employees' terms and conditions when a business is transferred to a new employer. As a subcontractor, there may be an opportunity to take on staff that used to work in the public sector, and so to accrue knowledge.

"All of these can be helpful ways of building an understanding of the culture, demonstrating expertise, and getting an inside track," says Randall.

James Hawkins is a partner and head of Trowers & Hamlins' public sector commercial department. He says there are now clear signs that the public sector has to start paying closer attention to the financial wellbeing of its suppliers.

Hawkins says: "A number of the very big outsourcing firms have had difficulties of one kind or another in recent years. One of the issues for the industry has been that the public sector has been deeply hit in terms of resource availability, and clearly a contract, if it's well drafted, is only as good as the way it is operated.



We have reached a point where it has become clear that the public sector needs to actively manage these contracts and give a heads-up if there are issues, which may manifest themselves in a failure to comply with specific timetables."

It is also now the case that financial difficulties are no longer the sole domain of the private sector. Where once a company could feel fairly confident in the reliability of a public-sector counterparty to pay its bills, recent cases of local authorities facing bankruptcy have changed that. For example, Northamptonshire County Council announced in February that it would make nearly £40m of cuts after it became the first local authority in nearly 20 years to impose emergency spending controls.

Randall says: "People should not be scared of contracting with local authorities, because they can always raise funds, but they should just be aware that they might now have less revenue to spend than in the past."

There nevertheless remain plenty of opportunities for new mid-market suppliers to target government work, as the demise of Carillion and a new appetite for change leaves windows of possibility. There are also new fields opening up, such as govtech, or digital technology used to improve public services. While a relatively new area, the amount of venture capital being invested in govtech projects in Britain is already on a par with that in the rest of Europe combined, according to a report by PricewaterhouseCoopers.

The public sector also has access to some unique revenue streams, such as licensing, and there are openings there to capitalise on those revenues through joint ventures with the private sector.

Making the relationship work for both sides is undoubtedly the key to success. Randall says: "Given local authorities are going to be much more dependent on business rates now than they have been before, they are very keen to get businesses to invest locally. If you're thinking of doing business with the public sector, you have to think about whether it's possible to maybe locate a factory or some of your operations in its area. Authorities aren't allowed to say they won't do business with you unless you do that, but it certainly helps if you can show you are bringing economic benefits to the region."

Getting a foot in the door may not be easy, but there are certainly rewards to be reaped from public sector relationships over time.







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