# Retail compass

Issue 6 September 2021

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

## Retail Reimagined

- Horizon scanning: retail timeline 2021/2022
- Green claims: new guidance
- The end of furlough
- Non-fungible tokens
- Other key developments

# Welcome to the 2021 Autumn Edition of Retail Compass

**Welcome to the Autumn edition of Retail Compass, where we guide you through key upcoming legal and policy changes affecting Retail and provide our thoughts on those crucial, need-to-know issues.**

We've been busy helping our Retail clients navigate the challenges and opportunities for the sector. In this Autumn edition we cover labour shortages, the CMA's guidance on environmental claims, HFSS ads, ESG finance as well as much more.

Alongside our horizon scanning pieces and other developments, we have guest contributions from:

- Lisa Byfield-Green, Research Director, Retail Week on navigating disruption in a rapidly-evolving market
- Kyle Monk, Director of Insight at The British Retail Consortium on key insights as Retail enters the crucial fourth quarter, and
- The Chancery Lane Project, on net zero supply chains.

We also include key statistics and links to our legislation tracker which list all of the UK Government consultations and inquiries relevant to Retail.

We hope you enjoy this Autumn edition and find it useful. As always, please do not hesitate to contact us if you have any feedback or queries.

FROM TOP
KAREN HENDY
JEREMY DREW

Retail Compass is edited by Rachael Ellis (Associate) and a team from RPC Retail.

**THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS**

**If you would like to receive a hard copy of this guide, please get in touch with your usual RPC contact.**

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# Foreword by Retail Week

## Navigating disruption and maintaining focus in a rapidly-evolving market

**By Lisa Byfield-Green, Head of Insight, Retail Week**

As predicted, the second half of 2021 has delivered a much more positive trading environment for many retail businesses and this is something to be celebrated. Consumer confidence in the UK has now accelerated ahead of the EU according to OECD figures, on the strength of the vaccine rollout. Footfall trends are increasing modestly, with footfall in August just 18.6% below the same period two years ago according to Springboard.

However, it is equally true that the return to normality will take some time longer than many of us had hoped and that some changes will be long-lasting. There are also ongoing challenges that retailers must navigate as we enter into the all-important golden quarter.

### Hybrid working and new trading dynamics

With office staff having proven their ability to work remotely throughout the pandemic, more flexible working patterns are now justifiably being demanded as the balance shifts to a stronger work-life balance.

As people increasingly divide their time between home and the city, we will see a fusion of home-based consumer trends with an uplift in opportunities for amenity-rich spaces where retailers can create compelling destinations to attract mid-week workers and weekend visitors.





Retailers such as Ikea are leading on this trend, reportedly set to develop a new flagship at the former TopShop store at Oxford Circus whilst at the same time investing to grow online and to open small format omnichannel stores on local high streets.

Meanwhile our connections to home remain strong, with a focus on cooking and socialising, creating a comfortable living space and enjoying time with family and friends. The online channel continues to serve this more home-based consumer, together with opportunities in click and collect and rapid delivery.

### Brexit challenges and supply chain disruption

Although almost a year since the Brexit deal was passed, the reality of trading under Brexit and its longer-term impact is only just beginning to be felt by retailers with the transition period set to end this month. At the same time the end of furlough this month brings up to two million workers back to the job market.

Grocery retailers in particular have significant challenges ahead and there are also ongoing difficulties for those exporting to Europe.

Meanwhile the primary challenge that many are looking to urgently solve is the crippling supply chain disruption within the industry – a perfect storm exacerbated by increased demand, worker shortages and Brexit.

These issues are set to occupy much time and effort by retailers, requiring support from policy makers to find realistic solutions and particularly ahead of the key golden quarter trading period.

### Technology with purpose

Retailers are continuing to focus on technology investment to optimise operational efficiency and many already brought forward planned investment to increase agility during the pandemic.

Supply chain solutions are particularly coming to the fore, with smarter supply chains supported by technology and focused on automation, shorter innovation cycles and local sourcing.

Taking advantage of the tax super-deduction to March 2023 we anticipate ongoing investment in IT and supply chain infrastructure, as well as investment in environmentally friendly infrastructure such as renewable energy and electric vehicles.

With a continued emphasis on operational efficiency, retailers will be looking to maximise return on investment in property, systems and IP – whether that means fulfilling online orders from stores, selling air rights or developing new services such as Next's recent tie-up with Reiss to manage its supply chain operations.

### ESG and health take centre stage

In the last update, I mentioned that sustainability and concern for the environment had continued to grow among consumers, businesses and policy makers.

We are seeing customers worldwide now scrutinising retailer strategies, demanding products that are sustainable and uncomplicated, with packaging that is less wasteful. As we work to the UK's target of net zero carbon emissions by 2050 we can expect to see an increased focus in this area and a requirement for retailers to measure their impact so that progress can be quantified.

On the plus side, retailers that are leading on purpose-led strategies can leverage this leadership position to engage with consumers and grow loyalty, provided the impact is meaningful.

At the same time, health remains another key focus area for retailers and policy makers. The big four grocery retailers are already introducing healthier foods, with Tesco committing to boosting sales of meat alternatives 300% by 2025 in support of healthier lifestyles.

Additionally, the HFSS legislation due to be introduced next October has huge implications for grocery retailers and suppliers, necessitating work now on creative strategies to reorganise store layouts and reformulate products ahead of time.

### Winning strategies to navigate disruption

It has been quite the long haul, but businesses now need to hold their nerve into the golden quarter, remaining agile and innovative, ready to change and evolve to meet the rapidly shifting demands of consumers as well as to face into industry challenges that threaten disruption.

At Retail Week we have identified five winning strategies for retailers and these will be particularly crucial during the golden quarter and into 2022.

Retailers need to be relevant and evolve their brands in line with the rapidly-changing needs of consumers. Partnerships will help retailers to become more agile and to do more. Customer experience is key, offering a seamless, frictionless and personalised experience across all channels. Innovation and investment will help retailers future-proof for the long term. And finally, culture and purpose remain intrinsically linked to successful growth, making it essential for businesses to define this within their organisation and to communicate it to their customers.

# Retail timeline 2021/22

| | |
|---|---|
| Immediate | Retailers are looking to the fast-growing ESG finance market, which may offer gains from both a financial and PR perspective. |
| Immediate | Shortages and the sharp rise of the price of building materials are causing delays to the refurbishment and re-opening of Retail stores. |
| Immediate | Retailers are exploring the use of blockchain-backed non-fungible tokens which customers can purchase in relation to digital offerings. |
| 4 Aug | The Government publishes the latest list of businesses that failed to pay workers the National Minimum Wage as part of its 'naming and shaming' scheme. |
| Sept | The CMA published guidance to help businesses comply with their existing consumer protection law obligations when making environmental claims. |
| 1 Sept | The International Accord for Health and Safety in the Garment and Textile Industry (Risks 1011) took effect. |
| 27 Sept | The European Commission's new Standard Contractual Clauses (SCCs) will become mandatory for all new data transfer arrangements after 27 September 2021. The old SCCs can remain in place for existing arrangements until 27 December 2022. |
| 30 Sept | End of restrictions on statutory demands and winding up petition. |
| 30 Sept | The UK's jobs furlough scheme ends. |
| 1 Oct | 'Natasha's Law' comes into effect, requiring that all ingredients and allergens are clearly labelled on all 'pre-packed for direct sale' foods. |
| 1 Oct | New dedicated sentencing guidelines in respect of modern slavery offences begin to be applied. |
| 28 Nov | Date by which EU Member States must transpose the Omnibus Directive into national law. Consumer protection for EU consumers is being strengthened, with increased enforcement and transparency measures. |
| End 2021 | Tech disputes between tech suppliers and customers are on the rise, a trend we expect to continue for the rest of 2021. |
| 25 Mar | Landlords can enforce debts accrued: (i) pre-March 2020 or (ii) in periods during the pandemic when business could legally open. |
| Apr | Plastic packaging made with less than 30% recycled materials will be taxed at a rate of £200 per tonne. |
| 6 Apr | 'Out of home' businesses with over 250 employees will be required to display the calorie content of their food and drink products. |
| 28 May | Date by which the national laws transposing the Omnibus Directive must come into effect. |

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JAN FEB MAR APR MAY

2022

# Horizon scanning

In this section we consider the key legal, regulatory and policy changes being faced by retail and what steps to consider taking, in light of these. We cover both purely domestic aspects and some which tie closely to European Union law and, as such, may impact upon retailers' European operations.

Strictly, when discussing these changes, we may not always be talking about the jurisdictions in which we advise as a firm. Therefore, whilst the following is intended to offer a helpful flag, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

## The Omnibus Directive – New EU consumer rights are on the way

by Anna Greco and Olly Bray

### 28 NOVEMBER 2021

#### WHAT IS HAPPENING?

The EU has committed to improving consumer protection in a strategy sometimes labelled the "New Deal for Consumers". As part of that strategy, the Enforcement and Modernisation Directive (2019/2161/EU), also known as the Omnibus Directive (**Directive**) came into force on 7 January 2020. Member States have until 28 November 2021 to adopt the Directive, and until 28 May 2022 to bring it into force. The Directive expands the scope of existing consumer rights legislation applying to physical goods and services to also cover digital goods, content and services – and introduces GDPR-level fines for non-compliance.

Following Brexit, the UK will not have to transpose the Directive into UK law and any UK implementation will remain to be seen. However, the Directive will apply to digital goods and services within the EU so it will have extraterritorial effect in the UK for retailers providing those goods and/or services to consumers in the EU.

In a previous edition of Retail Compass, we considered in detail the various EU directives being updated as part of the New Deal for Consumers – namely the Directive on Representative Actions, the Digital Content Directive and the Sale of Goods Directive. For an overview of these, see our article entitled 'EU consumer law reform: the "next GDPR"?'. This includes a summary of the new consumer protections being introduced, including consumer redress measures and bringing collective actions.

#### WHY DOES IT MATTER?

Retailers who provide goods and/or services to consumers in the EU should note in particular the following updates brought in by the Directive:

##### GDPR-level fines

If retailers don't comply with the Directive, they can face steep fines at similar levels to those levied under the GDPR. Firms can be issued fines of up to 4% of their annual turnover in the relevant Member State or €2 million if a calculation of turnover is not possible.

##### Prohibition on fake reviews

The Directive will prohibit the submission or commissioning of fake reviews, or deleting negative ones, and retailers will have to take reasonable and proportionate steps to verify user reviews before claiming that they are genuine. This puts a clear onus on retailers to ensure reviews are legitimate, and not to skew their perspective to only the positive – and also to hold verifiable evidence of reviews.

##### Was/now pricing: minimum timeframes

The Directive also addresses the issue of was/now pricing, setting a requirement that base prices must have been available for at least 30 days (or longer), and to disclose where a price is altered for a consumer based on automated decision-making (ie personalised pricing). However, there will be exceptions for goods which are liable to deteriorate or expire rapidly and it is unlikely that the transparency requirement will apply to techniques such as "dynamic" or "real-time" pricing and/or digital goods or services.

##### Digital goods and content

The following is of particular relevance to retailers selling goods or services with a digital element. Through updates to the Digital Content Directive and the Sale of Goods Directive, the Directive will also align consumer protections in relation to digital goods and services with their physical counterparts:

- **Goods**: the Sale of Goods Directive regulates goods, now including those with a digital element (eg smartwatches). Some significant issues include: requirement to be fit for purpose; consumers must receive all reasonably expected accessories and instructions, and any updates necessary to keep goods with digital elements, digital content and digital services in conformity; a two-year guarantee period in relation to defects following delivery; and the burden of proof in relation to non-conformity is shifted to the trader (eg goods defective within one year of delivery will be taken to have not conformed to it on delivery).
- **Content**: consumers of free digital content services (ie where individuals provide personal data as consideration) will benefit from consumer rights, which include: (i) the right to cancel a contract for digital services within 14 days; and (ii) the right to receive the necessary pre-contractual information. Although subject to some limited exceptions, consumers' personal data will now equate with money or digital currency as a valuable consideration in the online marketplace.

#### A final note on Brexit/UK sales...

The UK is not bound to implement the Directive and it is not yet clear how far the UK will embrace the changes, ie in relation to sales to UK consumers. In respect of the Directive, the UK Government has published the Green Paper "Modernising Consumer Markets" (April 2018). This broadly mimics the Directive but currently the proposal is for a cap on financial

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#### WHAT ACTION SHOU…

##### Consumer reviews

- Consider reviewing and … will be expected to be ve… verification (for example…
- Do not extrapolate posit…
- Ensure influencers can s… as by incentivising leavin… ruling in the UK on Vind…
- Be aware that certain products categories are restricted in terms of who can provide reviews, for example neither health professionals nor celebrities should be used to endorse medicines.
- For reviews relating to UK sales, also consider the UK's Committee of Advertising Practice's (CAP) guide to testimonials and endorsements entitled Avoiding Fake Views.
- As per the CAP guidance, consider holding evidence that any testimonials, endorsements/reviews are real (unless they're obviously fictitious) and that they accurately reflect what the person said. CAP advises advertisers to obtain the consent of the person featured in the testimonial or endorsement and to retain their contact details for as long as any related ads are used.
- Retailers may consider using a third party consumer review platform in order to try to shift the compliance burden around documenting customer reviews. However, we suspect many platforms will be alive to the new requirements and will therefore seek to limit their role to hosting reviews rather than taking responsibility for compliance with the Directive.

##### Was/now pricing

- Review and update your pricing processes as you will need to ensure that all "was" prices have been available at least 30 days (in respect of EU sales).
- Consider whether you currently use any personalised pricing, as this will need to be disclosed into listings where necessary.
- Remember the new was/now rules only apply to goods, not to (eg) digital content and digital services.

##### Digital goods and content

Review your existing T&Cs relating to any digital goods/services you sell to EU consumers as these will now need to incorporate consumer rights, including a right to cancel the contract and the provision of pre-contractual information.

CLICK TO REVEAL PAGE >

### Speed read

**The Omnibus Directive – New EU consumer rights are on the way**

Consumer protection is being strengthened for EU consumers, with increased enforcement and transparency measures and, critically, GDPR-style fines. This development is thanks to the EU Omnibus Directive. Whilst the updates to EU legislation are wide-ranging, of particular relevance to retailers are the updates in relation to consumer reviews, was/now pricing and digital goods and services. Whilst the UK Government has not formally announced its intention to transpose the changes, Government commentary indicates it is looking to introduce equivalent updates to UK laws which would capture UK-based sales.

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# Horizon scanning (continued)

## CMA publishes guidance on environmental claims – how can retailers avoid greenwashing?

by Sophie Tuson and Ciara Cullen

### JANUARY 2022

#### WHAT IS HAPPENING?

Regulators are taking action in respect of 'greenwashing' to help protect consumers from misleading environmental claims. Following an investigation last year that found that 40% of green claims made online could be misleading, the Competition and Markets Authority (CMA) has published guidance to help businesses understand and comply with their consumer protection law obligations in order to avoid enforcement action. Based on six core 'principles', the guidance broadly restates the position under existing UK consumer law (particularly under the Consumer Protection from Unfair Trading Regulations 2008) and includes examples of what compliance might look like in practice for green claims. Following a two-month consultation period, the CMA published its final guidance on 20 September 2021 and will expect businesses to comply by January 2022. The CMA has said there will be no 'grace period' come January 2022 – this is because they will be applying existing law and, strictly speaking, businesses should already be complying with this.

The CMA's final guidance was published just as this edition of Retail Compass launched. We are reviewing this closely and will publish further guidance in the coming months. We note from our initial review that the CMA has maintained its six 'principles' and notably says these "must" be complied with rather than "should". Following the consultation responses, the CMA also: clarified that the guidance applies both to B2C and B2B claims, updated some of the examples and added some slight extra detail eg on how it will go about its decision-making on claims, such as which parties to enforce against and which other authorities may be placed to investigation (eg ASA). The following should therefore be read in conjunction with the new guidance.

83%

of consumers feel misled by green and sustainable advertising; 90% think retailers need to be more transparent about their green claims.

Source: Retail Gazette

#### WHY DOES IT MATTER?

With consumers increasingly demanding greener and more sustainable products, many retailers are innovating to reduce the environmental impact of their business/ products (eg by reducing plastic packaging, switching to renewable energy sources, using recycled fabrics and using less water in their production processes). Retailers will naturally want to share these successes with consumers and tap into the growing ethical consumer market, however the risks of getting environmental claims wrong can be significant. Retailers face not only enforcement action from regulators (such as the CMA and the Advertising Standards Authority (**ASA**)) but also risk damaging brand loyalty with increasing numbers of consumers ready to switch allegiance where a brand does not live up to its purported environmental credentials.

The CMA has made it clear it expects businesses, including retailers, to take steps to comply with the new guidance by January 2022, although the CMA has confirmed that it intends to investigate particularly egregious examples of greenwashing now. The ASA is also reviewing its green claims guidance and has shown it is prepared to take enforcement action against businesses for misleading green claims. A number of recent ASA decisions have resulted in businesses having to pull their ads which can be costly as well as reputationally damaging (see for example: Hyundai were forced to withdraw ads that claimed their new car "purifies the air as it goes"; and claims by Ryanair about its CO2 emissions were deemed misleading, as were Gousto's claims that their new cool boxes were 100% plastic free).

#### WHAT ACTION SHOULD YOU CONSIDER?

With a tougher enforcement environment looming, retailers and consumer brands should review their environmental claims now to ensure they comply with consumer protection laws. Our 'top tips' for compliance are:

1. **ensure your business lives up to any environmental claims it makes**: any claims about your brand, products or services must be truthful and accurate. Ensure your claims are specific; avoid making broad, absolute claims (eg "eco-friendly") unless you clarify what they mean; explain any caveats/ qualifications that apply; and don't use visual symbols or imagery that might give consumers a misleading impression about the environmental impact of your products and/or services
2. **be transparent**: do not vague statements and information about the impact of your brand, or services is presented consumers can easily
3. **include all relevant info** not 'cherry-pick' or om about the environmental brand, products or services if it might prevent consumers from making an informed choice. If necessary, include additional information by linking to your website or using a QR code
4. **ensure comparisons are fair and meaningful**: make sure any comparative claims compare 'like with like' – ie products intended for the same purpose and using the same measures/metrics. Make the basis of any comparison clear

claims that relate to a product as a whole (eg "environmentally-friendly cheese") – these will be more likely to mislead consumers if they don't account for the full product life cycle; however claims that relate to a specific part of a product, such as packaging (eg "40% less packaging than [X product]") will be less likely to mislead and will not need to be substantiated across the full product lifecycle. Finally, avoid claims that focus on one aspect while ignoring others, or which do not reflect the overall environmental impact unless you clearly specify what they relate to

6. **substantiate your claims**: ensure your claims are supported by robust, credible and up-to-date evidence. Demonstrating that your claims have been independently verified and are based on accepted scientific evidence may help ensure they are robust.

CLICK TO REVEAL PAGE >

**Speed read**

**CMA publishes guidance on environmental claims – how can retailers avoid greenwashing?**

The CMA has published guidance to help businesses, including retailers and consumer brands, understand and comply with their existing consumer protection law obligations when making environmental claims. Retailers should review their existing claims now to ensure they are compliant as an uptick in the CMA's enforcement action is expected in early 2022.

# Horizon scanning (continued)

## International data transfers: time to update to the new standard contractual clauses

by Rachael Ellis and Jon Bartley

### 27 SEPTEMBER 2021

#### WHAT IS HAPPENING?

Retailers which rely upon standard contractual clauses for transferring personal data outside of the European Economic Area (EEA) will need to update their agreements to the new SCCs. This would apply, for example, to the following data transfers:

- a retailer which transfers its European entity's employees' personal data to its US headquarters
- a retailer's European entity which hosts its CRM database with a US-based cloud vendor, and
- a retailer's European entity which uses a market research agency in Asia to collect survey data from consumers about their preferences.

**Note**: below we consider the position for data transfers outside of the UK.

The old SCCs provided pre-approved contractual clauses that could be incorporated into contracts as an option to enable compliance with restrictions on transfers of personal data outside of the EEA. They were introduced under the regime of the 1995 Data Protection Directive and required updating to reflect the new terminology and requirements of GDPR. Also, the suitability of the old SCCs was thrown into question following the EU Court of Justice's (**CJEU**) 2020 decision in Schrems II, in which the CJEU invalidated the European Commission's adequacy decision for the EU-US Privacy Shield Framework. Thankfully, standard contractual clauses' validity as a data transfer mechanism was maintained but the CJEU questioned the efficacy of the old SCCs in providing sufficient protection for personal data without further investigation by data exporters. The new SCCs incorporate provisions to help to address the concerns raised in Schrems II. Remember also that, as a result of the decision in Schrems II, 'supplementary measures' may be required in respect of the data transfer, in addition to putting in place the SCCs, to ensure a GDPR-equivalent level of protection (this is addressed in the new SCCs – see below).

Some of the key changes in the new SCCs include:

- one single entry-point covering a broad range of transfer scenarios, instead of separate sets of clauses. Namely, there are 'modules' which contain the contractual terms relevant to the following transfers:
  - controller to controller
  - controller to processor
  - processor to processor
  - processor to controller

  the new 'modular' approach gives greater flexibility for complex processing chains by offering the possibility for more than two parties to join and use the clauses
- more detailed information on the data processing activities for the parties to complete in the Annexes, compared to the more generic requirements under the old SCCs, and
- the new SCCs contain examples of possible 'supplementary measures', such as encryption, that retailers could take where needed to comply with the Schrems II decision.

As discussed above, the new SCCs will become mandatory for new transfers on 27 September 2021, and the transitional period for the old SCCs used in existing agreement ends on 27 December 2022, after which all new and old agreements involving the transfer of personal data outside of the EEA will have to incorporate the new SCCs.

"When asked in a poll, **45%** of respondents told RPC that the biggest challenge of incorporating new SCCs would be identifying what supplementary measures might be needed on top of the Schrems II clauses; another **42%** said finding time to project manage the process and review the third party documents they'd receive."

#### WHY DOES IT MATTER?

The new SCCs aim to give companies further flexibility over their data transfers, in particular in relation to complex data chains. The new toolkit launched alongside the new SCCs by the European Data Protection Board also enables easier compliance following Schrems II.

However, considering Brexit, the new SCCs do not form a part of the retained EU legislation in the UK, as they were implemented after the end of the Brexit transitional period. Even so, the UK Information Commissioner's Office (ICO) is looking to adopt new, bespoke standard contractual clauses in the UK. It has proposed the following:

- a template addendum to the new SCCs (**UK addendum**), allowing organisations to adapt the new SCCs in order to work for transfers under the UK GDPR. This would mean that companies could use the new SCCs for data transfers from the UK subject to completing the addendum
- a standalone International Data Transfer Agreement (**IDTA**) which will be the UKs equivalent to, and replace, the SCCs. Companies could use the IDTA for data transfers covered by UK GDPR (only).

We expect many companies to favour putting in place the new SCCs with the UK addendum, so that data transfers outside the UK and EEA are covered "in one go" (unless they are a smaller company or it is a one-off arrangement, and the data flows are only ever expected to be from the UK, in which case the IDTA would be the appropriate solution).

Until such time as the above UK versions of the SCCs are finalised (likely later this year), technically businesses will have to keep using the old SCCs for transfers outside of the UK, and the new SCCs for transfers outside of the EU. The ICO's consultation on the UK SCCs closes on 7 October 2021.

The adoption of the new SCCs also follows on from the EU granting the UK adequacy for EEA-UK data transfers on 28 June 2021. The adequacy decision allows for data to continue to move freely between the EEA and the UK, and businesses can therefore avoid having to put in place measures to receive data from the EEA, such as the new SCCs, saving an estimated £1.6bn in extra costs for businesses.

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template of the new SCCs, so you may decide to prioritise smaller partners first, and issue them with your own 'paper'. There is no guarantee that the big providers will do this so we suggest diarising a long stop date (eg June 2022 – six months to the deadline) to follow up with them. Whether you adopt a partial "watch and wait" approach may be determined by how many data importers you have identified in your review, as no one wants to be cramming large volumes of contract reviews and negotiations into a short timeframe

- don't forget that, as noted above, the Schrems II decision requires an analysis of all third country data transfers that rely on a contractual mechanism such as the SCCs, and adopting SCCs (even the new SCCs) without undertaking the required Transfer Risk Assessment will not be a compliant approach.

CLICK TO REVEAL PAGE >

## Speed read

### International data transfers: time to update to the new standard contractual clauses

This is one of the biggest changes in data privacy law since the GDPR came into force and should be high priority within retailers' data privacy compliance agendas. The European Commission's new standard contractual clauses (**new SCCs**) will become mandatory for all new data transfer arrangements after 27 September 2021. This follows the EU's adequacy decision for EEA-UK data transfers given in late June 2021. The previous version of the standard contractual clauses (**old SCCs**) can remain in place for: (1) existing arrangements until 27 December 2022; and (2) transfers from the UK until the UK has its own bespoke standard contractual clauses (noting that the draft of the UK SCCs is out for consultation and is expected to be finalised before the end of 2021).

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# Horizon scanning (continued)

## Not before the watershed! New advertising restrictions for HFSS products from 2023
by Sarah Mountain and Ben Mark

### END OF 2022

#### WHAT IS HAPPENING?

In June 2021, the Government confirmed plans to ban all TV ads for HFSS products before a 9pm watershed. From the end of 2022, HFSS TV ads will only be allowed to run between the hours of 9pm and 5.30am. Restrictions will also be introduced on online paid-for HFSS advertising at all times.

#### WHY DOES IT MATTER?

The restrictions will apply to linear TV and UK on-demand services. The paid-for advertising of food or drink products high in saturated fat, salt or sugar (**HFSS**) online will also be completely prohibited, with very limited exceptions. As a slight silver-lining for some retailers and consumer brands, the regulations will largely apply to goods regarded as 'of most concern' to childhood obesity. Products such as honey, olive oil, avocados and Marmite, which, whilst technically deemed HFSS, can form part of a balanced diet when consumed in moderation, and will therefore be exempt. A further relief for SMEs is that the restrictions will only apply to businesses with more than 250 employees.

It seems unlikely that the impending restrictions will be the end of the story: The Government is currently considering a total ban for advertising HFSS products online (beyond just paid-for advertising) – which we are monitoring closely. The Government has stated that this would target the products that are significant contributors to sugar and calories in children's diet, whilst ensuring that staples such as oil, butter and cheese are exempt. Additional restrictions regarding the physical placement of HFSS products, in store and online, and price promotions (such as 'BOGOF' and '3 for 2') are also expected to be imposed from October 2022.

#### WHAT ACTION SHOULD YOU CONSIDER?

It goes without saying that the restrictions will significantly impact the food and drink industry, in particular. Think tank IRi, estimates that if all pre-watershed HFSS ads are simply pulled, advertisers would sustain collective losses of £192m.

Retailers and consumer brands advertising HFSS products should consider how best to mitigate the potential impact of the restrictions. For example:

1. by running HFSS ads after the watershed, albeit there will likely be increased competition (and potentially inflated costs) for these slots
2. re-allocating advertising spend to other channels, such as print media and radio. For now, the restrictions are limited to TV and online paid-for advertising
3. retailers should also review any agreements that they have with influencers regarding the promotion of HFSS products. Where required, those agreements should be amended to prohibit any activity that would breach the forthcoming restrictions and which could therefore cause reputational damage to the retailer's brand
4. for businesses with mixed product lines, focus on advertising non-HFSS products or simply the overall brand, to ensure that a level of consumer engagement is maintained, and/or
5. reformulating products currently deemed HFSS so that they no longer fall into this category. Obvious down-sides to this are the inherent costs and the fact that 'new recipes' are not always popular with consumers.



**450%**

increase in food and drink online advertising between 2010 and 2017; estimated 59% of online food and drink adverts are for HFSS products.

Source: gov.uk

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**Speed read**

**Not before the watershed! New advertising restrictions for HFSS products from 2023**

From 1 January 2023, TV ads for HFSS products will be banned before a 9pm watershed. Restrictions will also apply to paid-for advertising of HFSS products online. Businesses should consider how the forthcoming restrictions might negatively impact their marketing strategy and how best to mitigate against this.

# Horizon scanning (continued)

## New EPC rating requirements and the impact on retailers

by Julianna Khudoliei and Elizabeth Alibhai

### 1 APRIL 2023

#### WHAT IS HAPPENING?

Since April 2018 the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (the Regulations) have imposed minimum energy efficiency standards (**MEES**) for private rented properties (subject to a handful of exemptions). The energy efficiency standards are evidenced by an energy performance certificate (**EPC**). From 1 April 2023, the second phase of the Regulations will commence, and the requirement will be extended to include existing leases, even where such leases have been in place for years and the tenant will not be changing.

The more significant changes, however, were proposed in the Government's Energy White Paper published in December 2020. The planned measures are:

1. to prevent landlords from letting commercial property with an EPC grade of less than C from 1 April 2027 unless an exemption applies (and existing exemptions must be reviewed), and
2. to prevent landlords from letting commercial property with an EPC grade of less than B from 1 April 2030 unless an exemption applies (and existing exemptions must be reviewed).

#### WHY DOES IT MATTER?

According to the Government, 85% of commercial stock is currently estimated to be below a B rating and so this would force an enormous retro-fitting exercise on landlords, ie to upgrade the property's rating. Obvious considerations include:

- how are stores/other premises currently rated? Would they require an upgrade?
- How do leases currently deal with energy ratings/ECG certificates? Terms are likely to need close consideration if the term spans to 2027 and beyond
- how will landlords seek access to stores/other premises in order to conduct remediation works?
- will landlords try to make performing works conditional upon being granted access, and pass on liability for non-compliance onto the retail tenant if it doesn't grant effective access?
- will landlords expect tenants to conduct works themselves and/or bear some/all of the costs?
- how will landlords compensate retail tenants in relation to closed stores/properties?

The changes the Government have proposed are ambitious and we expect a bumpy ride for unprepared landlords and retail tenants over the coming years.

Whilst we focus on retail tenants here, we appreciate that some retailers will also be landlords and should consider taking their own specialist advice on the considerations for landlords which we have flagged. In a similar vein, we have concentrated to a large extent on retail stores in this piece, given the direct impact this could have for store visitors and staff, but the impact on the wider property portfolio should also be considered.

In terms of warehousing/distribution centre spaces, we do not expect the exemption covering any 'Industrial sites, workshop or non-residential agricultural buildings that do not use much energy' to change. However, most modern warehouses/distribution centres with a heating and cooling system will continue to require an EPC and so would be caught by the upgrading requirements.

#### WHAT ACTION SHOULD YOU CONSIDER?

1. **Disruption** – Landlords will be keen to reserve access rights to carry out necessary works. As the most common energy-efficiency works are to windows, insulation and heating and cooling systems, there is potential for huge disruption to a retailer's business. Retail tenants will want to limit landlords to required works only and to be able to enjoy a rent free period or other compensation. Retail tenants should consider the term of existing leases and how they can seek to best position themselves in preparation for the changes – when is the next renewal? Will there be an opportunity to negotiate favourable terms?
2. **Fit-Out** – Commonly a retailer will take a property in "shell and core" state, to allow its own installation of lighting, heating, ventilation and air conditioning to a standard pattern. The Government is proposing to offer landlords short term exemptions where letting on this basis to avoid wasted works on the part of the landlord which the tenant will then remove. However, since this leaves the landlord dependent on the tenant to meet the EPC target, the Government is considering imposing compliance duties on tenants for the first time, including a duty of cooperation with the landlord. This is of particular interest to retail tenants leasing on a "shell and core" basis.
We already see landlords refusing consent to alterations where they are not sufficiently energy-efficient, but this will only be exacerbated when landlords are shooting for an EPC rating of B or above.
3. specifically carved out of the list of provided services.

85%

The Government estimates that 85% of commercial stock is currently below a B EPC rating

Source: gov.uk



CLICK TO REVEAL PAGE >

**Speed read**

**New EPC rating requirements and the impact on retailers**

The current requirements for EPC energy ratings will be extended to cover existing leases from April 2023. More notably, significant changes have been proposed in the Government's Energy White Paper published in December 2020: to prevent landlords from letting commercial property with an EPC grade of less than C from 1 April 2027 and to prevent landlords from letting commercial property with an EPC grade of less than B from 1 April 2030. The possible impact for retail tenants could be material.

<< Home >>

# Horizon scanning (continued)

## The rise of ESG finance – what's in it for retailers?

by Sarah Snow, Ed Colville and Karen Hendy

## IMMEDIATE

### WHAT IS HAPPENING?

The concept of "green lending" is (of course) not a new one – the World Bank issued the first green bond in 2008 – but global pressures and investor-interest have seen demand push beyond 'green-lending' in the traditional sense of environmentally friendly projects (like renewable energy production) to social issues. We now refer to "ESG" finance (Environmental, Social and Governance) which takes into account wider social and governance targets such as treatment of employees and diversity in the workplace.

Typically an ESG-linked facility is a loan which includes ESG targets, similar to financial covenants, set by the lenders or investors. Example targets might include the level of the borrower's carbon emissions, its use of water or plastics or gender quotas for leadership positions.

Under the terms of the facility, the borrower is rewarded for meeting these targets, usually by a lower margin or interest rate being payable on the loan. In simple terms, the borrower has a financial incentive to hit the agreed ESG targets.

There's no standard version of an ESG-linked facility, but in the past 18 months industry bodies have started to standardise the use of these facilities. In particular, the Loan Market Association has released the Sustainability Linked Loan Principles (**SLLP**), which contain industry guidelines on the fundamental characteristics of sustainability linked loans.

Since publication of the SLLP, ESG-linked facilities have boomed in popularity, and are now offered by most major European banks. In March 2021, Virgin Money became the first bank in Europe to release sustainability-linked loans to commercial customers of all sizes.

### WHY DOES IT MATTER?

There are key potential benefits to retailers from an ESG-linked facility, namely financial and PR:

#### Financial

- A reduction in finance costs (usually through reduced interest rates) can be achieved if the borrower hits certain ESG targets. In reality, the reduction in margin may be minimal, and pricing on ESG-linked facilities may start higher than for other facilities, so hitting targets and reducing the margin may only mean a return to normal pricing.
- Attracting new investors or lenders to the business – the recent flood of funding into ESG investments means non-bank lenders have money to spend and are looking to lend to borrowers with ambitious ESG targets.

#### PR

- Gains from showing ESG commitments and credentials are clear to see, with public sentiment for environmental and social issues being stronger than ever.
- Consumers are becoming more knowledgeable on ESG issues and sophisticated in their requirements from retailers. An April 2020 consumer study conducted by Kearney showed 83% of respondents said they consider environmental impacts when making purchasing decisions, up from 71% in 2019. In the same Kearney study, 48% of respondents said the pandemic has made them more concerned about the environment.

### WHAT ACTION SHOULD YOU CONSIDER?

1. **Consider the options** – there are a number of ways we've seen retailers structure ESG-linked facilities. What may be appropriate for your retail business will depend a number of factors and your objectives, but to highlight some examples from the retail market, these include:
   – a £25m revolving credit facility and £9m term loan with Barclays. The margin on the facility is linked with the retailers' performance against targets for carbon emissions, use of sustainable materials and employee engagement, and
   – a £550m revolving credit facility with a syndicate of banks. Again, the interest rate on the facility will lower if the retailer achieves specific targets aligned with a responsible business plan – in this case reducing carbon emissions, creating more forests than it uses and helping to fight "bad housing". In both cases, the signing of the new loan facilities was accompanied by a press statement from the CFO, and publicity around how the company was acting responsibly and improving its environmental performance
   – issuing ESG bonds. Burberry became the first fashion label to issue an ESG bond, with proceeds utilised to help with the energy efficiency of Burberry's buildings and to source more sustainable raw materials
   – a leading car manufacturer also utilised the proceeds of its first ever green bond issuance to fund the design, development and manufacturing of fully electric cars. The bond was oversubscribed five times, showing again the public demand for ESG investment.
2. The trend from UK and European regulators to prevent green-washing means retailers entering into ESG-linked facilities will need to think carefully about setting meaningful and ambitious targets.
3. **Check your green claims** – if you make environmental claims in ads or press releases associated with your ESG-facility, there are clear compliance risks to be aware of if you can't properly substantiate these. We provide some practical guidance on navigating the UK's advertising and marketing rules in our article on page 7 (CMA publishes draft guidance on environmental claims – how can retailers avoid greenwashing?).

CLICK TO REVEAL PAGE >

**Speed read**

**The rise of ESG finance – what's in it for retailers?**

Green-finance has evolved beyond the financing of environmental projects, and into the broader world of ESG-linked finance, making it more relevant than ever for retailers. Consumers are becoming more knowledgeable on ESG issues and sophisticated in their expectations from retailers.

$53trn

Bloomberg predicts that ESG-linked assets under management will exceed $53 trillion and make up a third of all investments by 2025.

Source: Bloomberg

# Horizon scanning (continued)

## Attitudes tighten towards modern slavery compliance in the UK

by Brendan Collar and Jeremy Drew

## 1 OCTOBER

### WHAT IS HAPPENING?

The Modern Slavery Act 2015 (the **MSA**) positioned the UK as the first country in the world to require large organisations to report what steps they are taking to combat modern slavery in their supply chains and operations. The Government is now looking to give the MSA (and UK anti-slavery legislation more broadly) some teeth:

- the Home Office has launched the modern slavery statement registry which will make it easier to find retailers' modern slavery statements. Whilst currently voluntary, the Government is encouraging retailers to use the registry
- following the transparency in supply chains consultation, the Government is trying to introduce legislation to bring in measures to strengthen section 54 of the Modern Slavery Act 2015, and
- the Sentencing Council has now provided judges and magistrates with dedicated sentencing guidelines to follow in the event of an offence being committed under the Modern Slavery Act 2015.

To recap, the MSA requires commercial organisations who carry out business within the UK, and have a turnover of £36m or above, to publish an annual modern slavery statement. While retailers are not expected to guarantee that their supply chains are 'slavery free', a statement should detail what actions have been taken to tackle modern slavery risks or, alternatively, it should declare that no steps have been taken in that financial year. A modern slavery statement is designed to encourage accountability through increased transparency.

### WHY DOES IT MATTER?

The Government has previously estimated that one third of organisations that are required to publish a modern slavery statement under the MSA have failed to do so; those statements which were published were frequently found to be deficient.

In response, in March 2021, the UK Government launched an online modern slavery statement registry, to provide a platform for organisations to share the positive steps they have taken to tackle and prevent modern slavery. While it's not currently a legal requirement to register a statement, all organisations are strongly encouraged to submit their most recently published statement on the registry to demonstrate that they have reported.

Currently, organisations are relatively free to structure their statement as they wish. Going forward, to enhance transparency, the Government will mandate the specific areas that a modern slavery statement is expected to address – ranging from organisational structure and supply chains, to due diligence and risk assessment. Where an organisation has not taken steps in relation to one of these sections, it will be expected to explain this, and to give reasons as to why no steps have been taken.

Further recent activity can be seen as indicative of attitudes around modern slavery compliance tightening. In June 2021, the Modern Slavery (Amendment) Bill, a private members' bill seeking to address modern slavery which attempts to establish minimum standards of transparency in supply chains (under section 54), was introduced to the UK parliament. Separately, the Government announced its intention to create a powerful new worker's watchdog, responsible for tackling modern slavery, enforcing minimum wage, and more.

Turning to sentencing, with effect from 1 October 2021, judges and magistrates will apply dedicated sentencing guidelines where an adult offender commits one of the following offences under the MSA:

- human trafficking – transporting people for purposes of exploitation (s.2, MSA), which may involve recruiting, harbouring, receiving or transferring people cross-border
- committing an offence with the intention of committing a human trafficking offence (s.4, MSA)
- holding someone in slavery, servitude and forced labour (s.1, MSA), including physical restraint or imprisonment, threats or treatment which make escape from their position an impossibility, and
- breach of a slavery and trafficking prevention order or a slavery and trafficking risk order (s.30, MSA).

Under the guidelines, any offenders who are found to have been coerced or intimidated into committing slavery or human trafficking offences or are themselves victims, will have that fact recognised by the courts, which could see them receive comparatively lower sentences, where appropriate. Further, the guidelines direct the courts to take care to consider all the facts of the case, even where a victim is unwilling or unable to give evidence, as the harm caused to victims may not always be obvious.

### W

Ret

1. statement registry now? Some retailers may be keen to do so, to show their efforts in this area and help preparedness if this does become a legal requirement, and
2. how transparent are your suppliers and sub-suppliers in terms of addressing modern slavery and human trafficking? This could be a good moment to check your supply agreements and update the modern slavery terms in anticipation of the new legislation, as retailers would likely need to audit and seek disclosures from suppliers to demonstrate their own transparency. Similarly, understanding your suppliers' practices would help in the event of questions from stakeholders about your modern slavery statement or wider compliance programme.

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**Speed read**

**Attitudes tighten towards modern slavery compliance in the UK**

The Government is strengthening its position on modern slavery: it has launched the online modern slavery statement registry; is seeking to introduce measures to strengthen section 54 of the Modern Slavery Act 2015; and has issued dedicated sentencing guidelines for offences.

*"A third of organisations that come within the reporting obligations under the Modern Slavery Act 2015 have failed to publish their statement and those produced were frequently found to be deficient."*

Source: gov.uk

# Horizon scanning (continued)

## Employment – labour shortages and furlough

by Patrick Brodie and Kelly Thomson

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**Speed read**

**Employment – labour shortages and furlough**

We discuss the "triple challenge" currently faced by employers: the end of furlough after this month (September 2021); hybrid working; and labour shortages – and thoughts on how to respond.

## IMMEDIATE

### WHAT IS HAPPENING?

The triple challenge: the end of furlough; hybrid working; and labour shortages. Traditionally, it is our winters that bring the cold reality of industrial anxiety and concern. Our summers foretell new horizons and opportunities: the long toil of the spring translates into warmth and hope. However, this year, as with last, is different. So, how might these three influences play out, changing workforce models? Where will the solutions be found?



### WHY DOES IT MATTER?

At the end of September, the State's economic intervention, in the form of the furlough scheme – safeguarding jobs – will end. Trade unions, employer groups and industry bodies continue to push Rishi Sunak to review the decision. However, the position, currently, remains unchanged: employers with flexibly furloughed workers will have to decide whether those workers return to work or not; and, if they return, on what basis. It is estimated that there are currently just under two million individuals furloughed, the majority of whom are flexibly furloughed. The options available to employers are often positioned as a stark choice of two outcomes: return to full-time work; or redundancy. But how often are options genuinely binary? Infrequently.

Compromises and concessions can be made that achieve alternative outcomes. These solutions, when supported by discussion and debate, can produce results that support the needs of a business to have access to valuable skills and knowledge, on an economically stable basis, and of a worker to maintain a role that offers meaning and economic participation. Balanced estimates suggest there will be job losses of about 200,000, when the furlough scheme ends, accepting certain industry sectors – for example travel and some small retailers – will be harder hit than others. Unemployment has remained at just above 4.5%. The end of the furlough scheme will add to this percentage. By how much more may depend on where the balance is struck by employers in their workforce modelling and ability to engage workers in more flexible working arrangements, supported by knowledge and skills training, especially for those returning after a period of long non-participation in the workplace.

Many of us have, over the last 18 months, reflected on work and what it means to work. Tumultuous events create change. Rarely is that change temporary. There is often a wish to return to the tried and tested: it worked before; it will work again. But this ignores the differences created by the new circumstances and the effects of human reflection. As employers, we must look to respond to these changes. To do otherwise runs the risk of us being bystanders, watching the shift in economic evolution whilst others move forward, moulding themselves to the new reality. Our workplaces are ultimately collections of resources and people, as susceptible as any organism to environmental influences. Workforces, in response, adapt, finding an optimum shape and model that is best suited to its market niche. Employers can influence that adaptation. Likewise, the individuals, who comprise the workforce, will shape the optimum workforce model. Currently, one of the debates on new ways of working is founded on the term 'hybrid' working – put at its simplest, the interplay between working from home or in the office. However, does that term do justice to the subtlety and sensitivities of work, and the balancing of obligations and preferences? The term has the value of wide adoption and common usage. However, if organisations strive for innovation, distinguishing themselves positively from competitors, why should that principle not apply to the manner in which they describe the subtleties and importance of the working relationship they seek to foster and nurture with their people. Why not use language that better reflects the opportunities offered to people by dynamic working: opportunities to innovate; a chance to balance domestic and societal commitments, including the care of dependents; with effective management, the development of career opportunities without arbitrary limitations?

### W

1. leaving their jobs having reassessed their priorities, and, alongside that, their career ambitions and desires. For roles that are location agnostic, the ability for a person to move increases. The bargaining power shifts from the employer to the employee. This is even more acute in areas of skills shortages. An organisation that is able to design, and importantly reflect in the uniqueness of its words, a collaborative and values driven culture, may be ahead of the competition. This values proposition, for some roles, will help move the discussion about whether to leave or join away from one based solely on salary; it allows other metrics to be introduced to describe reward and engagement. It, also, seeks to align the interests of both business and employee, balancing the bargaining power – both want something the other offers. But even in a dynamic workplace with an increasing emphasis on homeworking, the importance of collective collaboration and community established by physical proximity – or, put another way, talking to each other in person – will continue to have relevance and significance. This benefit will continue for a little while longer.
2. For certain jobs – for example haulage and hospitality – there is a real shortage of relevantly skilled workers. The Road Haulage Association estimates a further 60,000 HGV drivers are needed. The causes are well described: the reduction in EU qualified drivers; the loss, because of Covid restrictions, of about 30,000 HGV driving tests. Here the power of the worker increases. The press has carried, over the last few months, stories of organisations offering material sign-on payments and pay rises. The economic landscape for some in the supply chain is bleak: join the wages war, meeting ever increasing salary demands, with the associated impact on company finances; or hold firm, hoping workers do not move and more HGV drivers join the labour market. The current emphasis is on the former strategy. Accepting that pay will always remain a factor, are there elements of the job that could be changed (and for which money is never going to be the relevant consideration), that might encourage retention or recruitment? For example, if the working hours are the greatest concern for those leaving, does an organisation seek to change those hours or pay more? Alternatively, are there cultural and governance factors that might be reshaped to establish a workplace that provides employees with a greater sense of belonging, appreciation and voice? Sometimes there is more to life than money.

# Snapshot of retail statistics #1

## UK AND EUROPE

### GREAT BRITAIN

In June 2021, retail sales in Great Britain totalled **£8.2bn** per week, about the same as in May. The volume of sales was **9.5% higher** than pre-pandemic levels (February 2020).

Source: Parliament UK

### UK

In advance of the Euro 2020 final, the British Beer & Pub Association estimated **13m** pints would be sold during the match.


Source: BBPA

### UK

About **45%** of shoppers feel they are responsible for reducing carbon emissions through making better choices, with British consumers prepared to pay more for locally sourced products.

Source: Retail Economics

### UK

The changing role of the physical store: nearly a quarter (**24%**) of consumers purchased a retail product online while in a store in 2021; this rises to almost half (**47%**) for 18-24-year-olds.

Source: Retail Economics

### EU

As a result of the pandemic, analysis suggests consumers across Europe are sitting on **€450bn+** of savings.

Source: Deloitte

### EU

The total sales volume in the EU is now equal to **99%** of the volume reached in February 2020 before the Covid-19 crisis (**98.8 %** in the euro area).

Source: Europa.EU





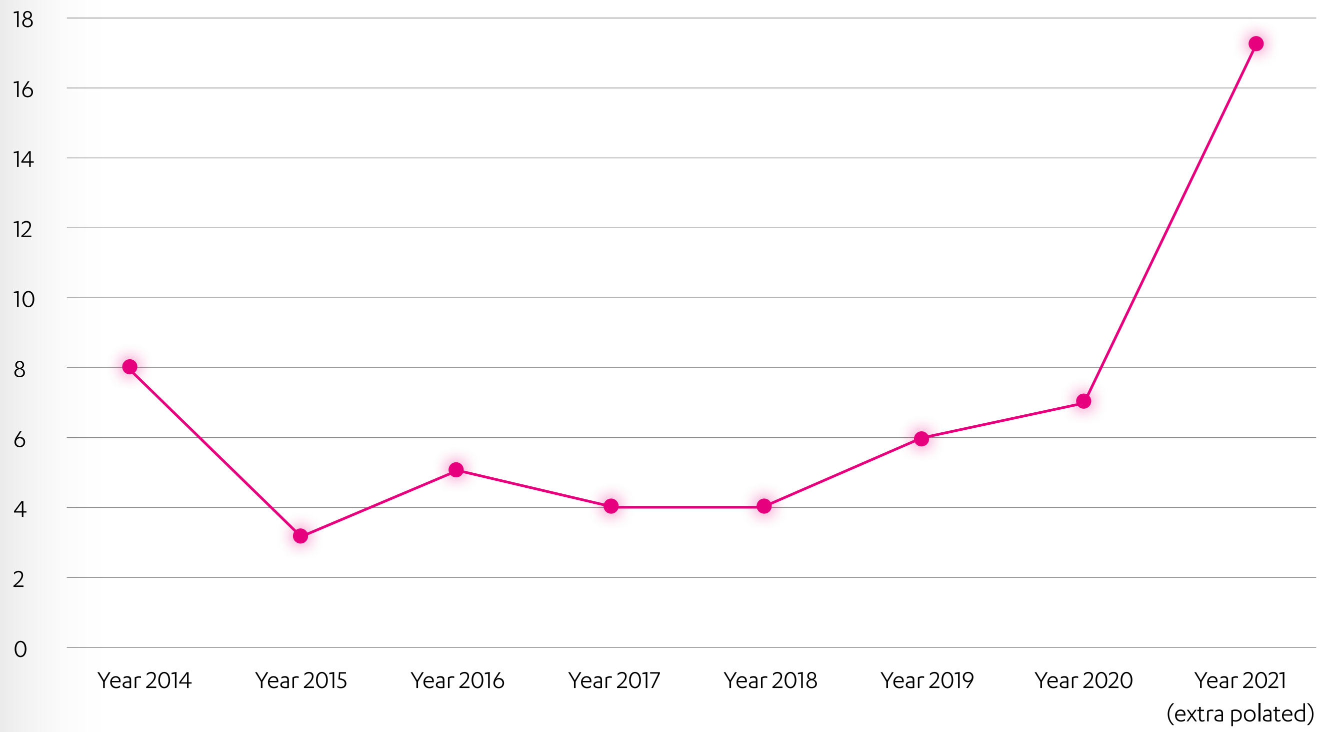

### EU OMNIBUS DIRECTIVE

Firms can be issued penalties of a minimum of 4% of a company's annual turnover in the relevant Member State or €2 million if a calculation of turnover is not possible.

Source: Bright Local

### THE RISE IN RETAIL TECH LITIGATION

Volume of litigation claims where at least one claimant is in the consumer products sector and at least one defendant is within technology, media and telecoms:




Source: Solomonic, August 2021

# Snapshot of retail statistics #2

## REST OF WORLD

### CHINA

Chinese consumers alone make more than a third of the purchases on the world's retail sites.

Source: Digital Commerce 360

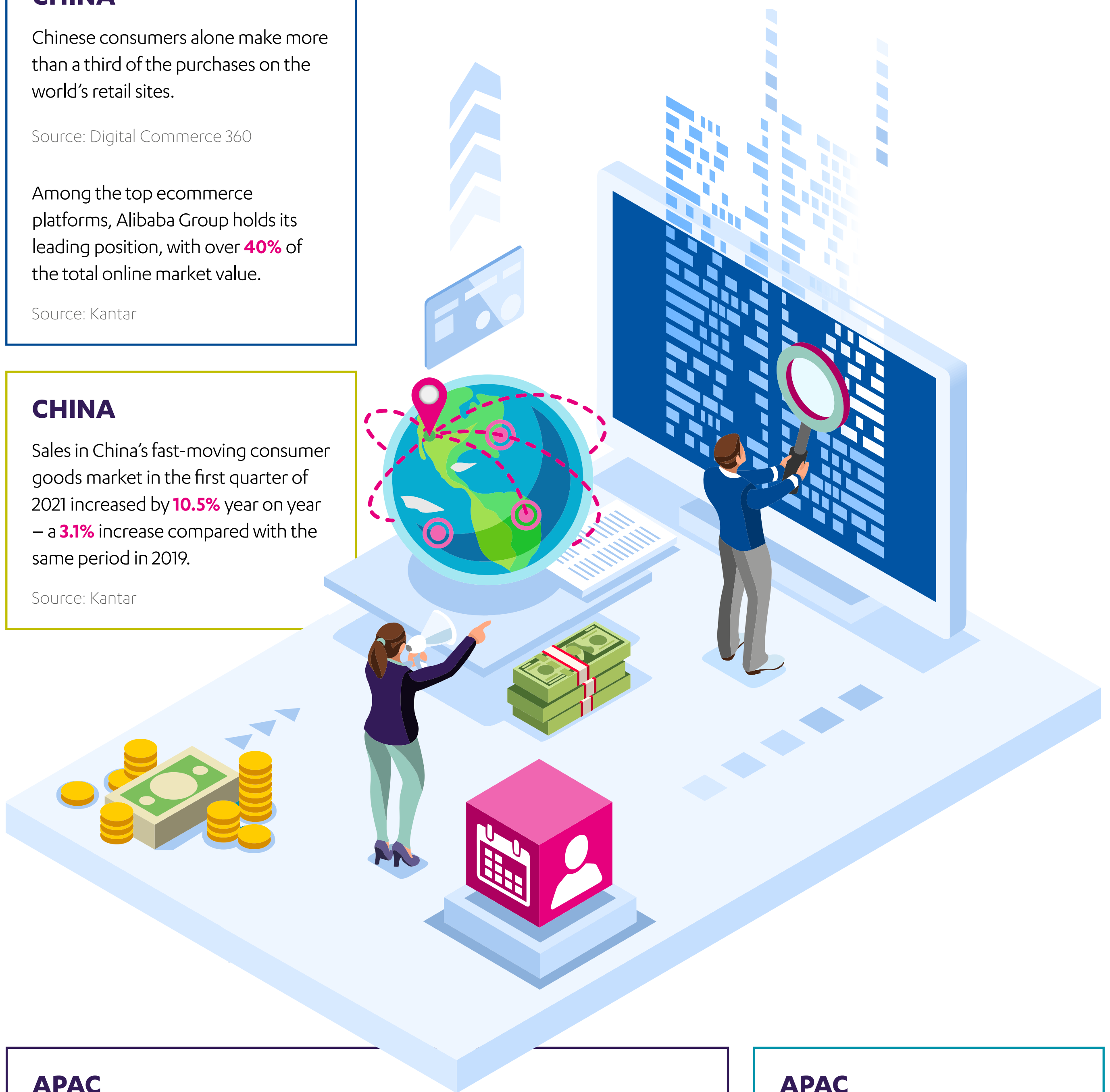
Among the top ecommerce platforms, Alibaba Group holds its leading position, with over **40%** of the total online market value.

Source: Kantar

### CHINA

Sales in China's fast-moving consumer goods market in the first quarter of 2021 increased by **10.5%** year on year – a **3.1%** increase compared with the same period in 2019.

Source: Kantar



### APAC

The economy continued to recover across Asia during the first part of 2021, with growth witnessed in many markets. Fast-moving consumer goods spend in the APAC region was up **5%** in the first quarter of 2021, which is higher than the increase in the first quarter of 2020 (**3.4%**).

Source: Kantar

### APAC

The Asia-Pacific food sector continues to lead market growth, doubling its value gain from **3.1%** in Q1 2020 to **6%** in 2021.

Source: Kantar





### LATAM

Online retail sales in Latin America have been around **$84bn** annually, representing only **5.6%** of total retail sales.

Source: Web Retailer

However, online retail sales in Latin America grew **63.3%** in 2020 to **$104.60bn**.

Source: emarketer

### US

**84%** of US online buyers review at least one social media platform before buying.

Source: Finances Online

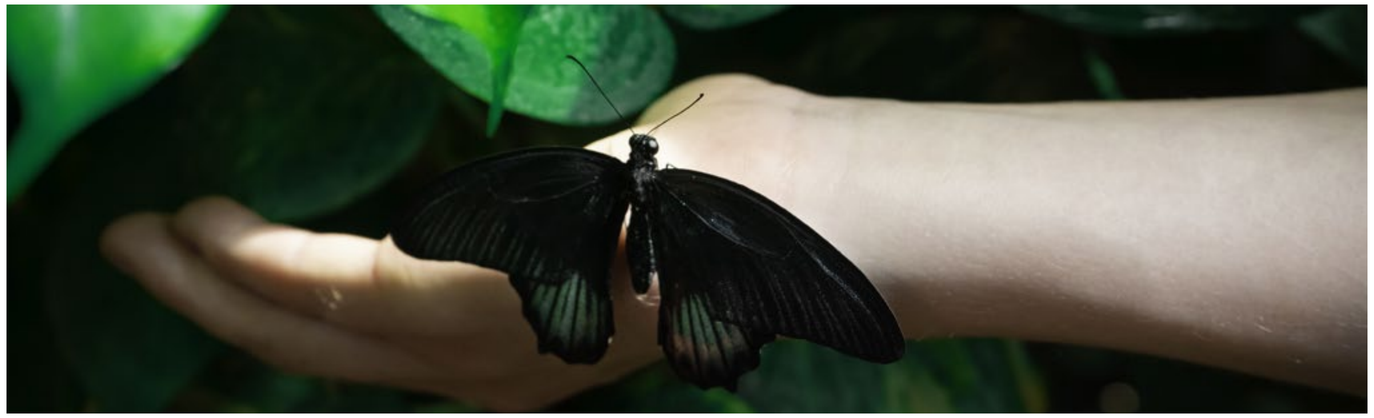
### US

Consumer spend online in 2020 rose **44%** year on year (to **$861.12bn**), nearly triple the **15.1%** jump in 2019.

Source: US Department of Commerce

# Other developments

**Here, we round up some other developments which have occurred since our last publication of Retail Compass (in February 2021). In the first few developments we look at hot topics for retailers in the UK and Europe. The final few developments should be of particular interest to retailers operating in (or considering operations in) Asia, the US and Australia. As always, we recommend tailoring your consideration of these international topics to your own specific circumstances as there may be local law considerations which affect you.**



## UK and Europe

### ESG reporting: the Financial Reporting Council sets out its thinking

The FRC has published a 'statement of intent' regarding the challenges for companies reporting on ESG issues. The paper observes that, to ensure ESG reporting is meaningful to stakeholders, it must be developed with a common conceptual framework. The comparison is drawn with financial information, which is underpinned by far more mature data systems than those currently relating to ESG.

Six challenges are identified:

- **production** – ensuring better internal information to lead to better decision-making and insight for stakeholders
- **audit and assurance** – clarifying what ESG information is assured
- **distribution** – ensuring ESG information is in an accessible and reusable format
- **consumption** – ensuring stakeholders have useful ESG information to aid decision-making
- **supervision** – ensuring companies and auditors meet relevant requirements in relation to ESG reporting
- **regulation** – achieving a coordinated and coherent reporting ecosystem at both the international and domestic levels.

The FRC will take certain actions to address these challenges including:

- considering the role of the UK Corporate Governance Code in ensuring boards are taking appropriate account of ESG issues
- developing guidance on climate-related issues for reporting under UK GAAP
- influencing the development of IFRS.

With policy-makers keen to use the regulatory regime to accelerate changes in companies' ESG reporting and behaviour, retailers will encounter considerable development in their ESG-related reporting obligations in the coming years, but reporting can only be as good as the underlying data. If a company has a commitment to meet a net-zero target, for example, can it produce information about progress and are its financial statements aligned? Specific data sets and using more advanced technology for ESG data capture and reporting will be key. Retailers of all sizes need to consider what processes and systems they have in place to measure and optimise the collection of data underpinning essential ESG activities.





### Further extension of measures introduced by CIGA 2020

On 16 June 2021, the UK Government extended some (but not all) of the measures introduced by the Corporate Governance and Insolvency Act 2020 (CIGA). A further announcement was made on 4 August 2021 when the Government published a policy statement regarding the position in relation to the forfeiture moratorium, the ringfencing of commercial rent debts and the introduction of a binding arbitration process.

The current position is:

#### Landlord remedies

- The moratorium on forfeiture will continue until 25 March 2022 unless further legislation is passed in the meantime, however retailers who have not been affected should continue to pay.
- Retailers who have been affected should be paying in full from when restrictions were lifted.
- From 25 March 2022, landlords can enforce debts accrued: (i) pre-March 2020 or (ii) in periods during the pandemic when business could legally open.
- Entirely new legislation is due to be brought in by the Government which will create a regime to deal with rent debt accrued during periods of mandatory business closures in the pandemic. The details of the process and how it will work are to be released in due course and we will be watching developments closely.

#### Code of Practice

- A more stringent and mandatory Code of Practice will be introduced setting out the principles the Government expect parties to adopt when negotiating. This will be published prior to the arbitration scheme becoming effective.
- Retailers and their landlords acting in accordance with the principles in the Code of Practice will be expected to share the costs of any arbitration. Arbitrators may be empowered to order a party to pay all of the costs of the arbitration if they do not act in accordance with the Code principles.
- The Government are hoping that by publishing the revised Code of Practice and the principles prior to introducing the binding arbitration, the vast majority of rent arrears will be dealt with by negotiation. Landlords will be expected to waive at least some of the rent where their tenants have been required to close and have no other revenue, but quite how considerations about on-line sales or fluctuations in sales throughout different periods will be factored into the new Code remains to be seen.

#### Statutory demands and winding-up petitions

Use continues to be restricted until 30 September 2021 except where a debtor has not been financially affected by the pandemic.

#### Suspension of personal liability for wrongful trading

The pre-pandemic regime now applies, and Directors again face personal liability for losses incurred by continued trading when insolvent. This is prospective and will not affect any losses incurred during the period in which the regime was relaxed.

### Countdown to the plastic packaging tax and new waste disposal regulation on the way

From April 2022, the UK Government will impose a tax on certain non-recycled packaging. The tax will apply to any plastic packaging manufactured in or imported to the UK that is not made up of at least 30% recycled material. Only companies that import or manufacture more than 20 tonnes of plastic packaging per year will have to pay the tax, which will apply at a rate of £200 per tonne of packaging.

The Government hopes to discourage consumption of new plastic packaging by businesses and to incentivise recycling to reduce landfill use and plastic incineration.

The move is part of the Government's overall 'net-zero' plans.

While the burden of paying the tax will fall on packaging producers, it is likely that the increased cost of producing new plastic packaging will be passed on to businesses/consumers. This could clearly impact those operating in the retail sector, especially online retailers and supermarkets who use large volumes of plastic packaging. Retailers may avoid having the cost of the tax passed on to them by buying packaging from smaller manufacturers that do not meet the volume threshold for taxation, or that produce recycled packaging.

Separately, the Government is set introduce changes to the Packaging Waste Regulations for 2023. Under the current regulations, the financial responsibility for recycling packaging falls across the supply chain. However, the new Extended Producer Responsibility legislation would see responsibility falling solely on producers, who would have to cover the full net cost of dealing with used packaging, including collecting, sorting, and reprocessing the waste. We are watching this area closely and will publish additional guidance in the coming months.

# Other developments | UK and Europe (cont.)

## Main rate of corporation tax to increase to 25% in 2023

With effect from financial year 2023/24, the main rate of corporation tax will increase to 25%. The current rate of 19% will continue to apply as a 'small profits rate' for businesses with annual profits of £50,000 or less. A taper mechanism will be introduced whereby businesses with profits between £50,000 and £250,000 will be able to claim an amount of marginal relief so as to taper their effective rate of taxation. An anti-fragmentation device applies to reduce these thresholds where companies are under common control.

Retailers will want to ensure that they take this rate increase into account when forecasting and making provisions for future years, ie, in the 2021 to 2023 years.

The UK's involvement with international tax initiatives means that further rate rises in the future should not be ruled out. We would expect any sector-specific relief efforts to focus on other taxes (notably business rates and national insurance contributions), since the headline rate of corporation tax is seen as an important marker with respect to the UK's international obligations.

## Key F&B updates to takeaway

Efforts to reduce impact and drive more consciousness remain high on the agenda across the F&B sector this year, with some notable developments:

- Foundation Earth, a non-profit NGO backed by many major brands from across the industry, announced that it will trial a new 'eco-scores' traffic-light system from September 2021. The scores will appear on the front of food packaging and will denote the environmental impact of the product, thereby allowing consumers to make more informed choices
- in the health and safety space, the Food Information (Amendment) (England) Regulations 2019 (aka Natasha's Law), comes into force on 1 October 2021. From that date, all ingredients and allergens will need to be clearly labelled on all 'pre-packed for direct sale' foods. This term refers to food that is packed before being sold by the same food business to end consumers. The Regulations will apply to products sold from both permanent establishments and temporary and/or movable premises (such as market stalls and food trucks)
- smart packaging is on the rise and is attracting significant investment. It can have a variety of uses including improving logistics, providing personalised content and enabling consumers to quickly re-purchase an item by simply scanning a QR code on product packaging. A range of businesses have recently announced their intention to trial smart packaging for the deposit return scheme (which we covered in the previous Retail Compass, see here), instead of using the proposed reverse vending machines
- the Calorie Labelling (Out of Home Sector) (England) Regulations 2021 is scheduled to come into force on 6 April 2022. From that date, businesses with more than 250 employees operating in the 'out of home' sector must display the calorie content of food and drink products, together with a statement that "adults need around 2,000 kcal a day" on menus and food and drink labels.





## Rise in tech disputes

We are seeing a growing volume of disputes between tech suppliers and their customers. Many of these relate to IT contracts and issues arising from these, including issues with software, delays in development projects and disputes over payment. We expect this to continue, particularly as many businesses leveraged new technologies or changed tech suppliers during the Covid-19 pandemic – throwing up potentially litigious issues. On page 22, our graph charts the rise in such disputes, showing the uptick between 2020-2021.

In the retail sector, a large contribution to the the rise in numbers of technology disputes has come from failed e-Commerce projects. With retailers increasingly seeking to expand their online presence (accelerated by Covid-19), and applications such as Magento allowing for relatively simple set-up, e-Commerce sites are growing in number. Despite such seemingly straightforward set-ups, however, retail customers unfamiliar with the software can find themselves caught out. The increasing volume of technology disputes in the retail sector appears to be driven, to a large extent, by:

- onboarding significant new systems and technology – often in short order and under commercial pressure, when there may not be time to fully plan and prepare for the resulting operational changes, and
- not all businesses have the time or internal expertise in order to help deliver such material projects. In our experience, those retailers which buy-in expertise to deliver transformative technical changes, whilst incurring a short term expense, often fare better in the long term.

Tip: Retailers looking to enter the e-Commerce space should therefore ensure that they have a robust understanding of their rights and obligations and the risks under the contract, as well as their options should things go sideways.

## UK and Europe-shortage in building materials

A shortage and sharp rise in the price of building materials is causing delays to refurbishments and re-openings of retail stores across the UK. Prices of key materials such as timber, steel, cement and roof tiles have risen by around 15% in the past year. The cardboard and plastic markets are also volatile. Recent supply issues due to Brexit and Covid-19 and the diversion of materials to the HS2 project have only exacerbated the issues.

The problems are causing much unease to those tied into fixed-term 'fit-out' obligations that they simply cannot fulfil. Some retailers are having to wait even longer before re-opening, while others are going beyond their rent-free period in order to get works finished.

Tip: The building contract should provide for Liquidated Assessed Damages (**LADs**) to be paid by the contractor for late delivery of works, including because materials were unavailable. Also consider asking landlords for longer rent free periods or lower rents where works are delayed due to material shortages.

## UK retailers sign up to protect garment and textile workers

Following the catastrophic collapse of the Rana Plaza factory building in Bangladesh in 2013, which killed and injured thousands of Bangladeshi workers, the Bangladesh Accord on Fire and Building Safety (**the Bangladesh Accord**) was created. The legally binding global agreement between brands and trade unions put forward a number of measures to ensure the safety of the Bangladeshi garment industry, including inspection programmes and the creation of health and safety committees.

Now, after the expiry of the Bangladesh Accord, the International Accord for Health and Safety in the Garment and Textile Industry (**the Accord**) has taken its place. The Accord, which will be legally binding for 26 months, came into effect on 1 September 2021 and over 100 retailers worldwide, including major UK names, have already signed up. In doing so, retailers pledge to support current health and safety programmes for garment and textile workers in Bangladesh as secured by the Bangladesh Accord, as well as the development of similar programmes in at least one other country within the next two years.

With fast fashion continuing to rise, particularly in the e-Commerce space, retailers appear to be keen to demonstrate their commitment to securing a safe garment and textile industry and their willingness to be held accountable for their supply chain, by signing the Accord.

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# Other developments | UK and Europe (cont.)

## NMW Naming and Shaming – how many retailers are being named?

Since the reintroduction of the National Minimum Wage Naming Scheme in December 2020, the Government has 'named and shamed' 330 businesses that failed to pay their employees the National Minimum Wage between 2011 and 2018. The 191 employers named in the most recent round (5 August 2021) owed a total of £2.1m to over 34,000 employees and were fined an additional £3.2m.

Our analysis reveals that retailers account for one in five (20.4%) of the businesses named. Common issues included wrongly deducting pay for uniforms and expenses, failing to pay overtime and paying an incorrect apprenticeship rate.

The scheme, which was paused in 2018, has returned under new rules, increasing the frequency of naming rounds as well as raising the arrears threshold from £100 to £500. The scheme is designed to act as a deterrent as part of the Government's plans to crack down on firms failing to properly pay their employees. Guidance on the key points to consider to avoid a breach can be found in our Spring 2021 edition of Retail Compass.

## Non-fungible tokens being offered by retailers and consumer brands

Retailers and consumer brands are exploring the use of non-fungible tokens, or NFTs, as an opportunity to better connect with their customers by offering NFTs for sale in relation to their digital offerings. NFTs allow for digital assets to be certified by the blockchain (individually identified by a 'token') and sold and owned just like their physical counterparts. With any novel opportunities retailers and consumer brands face new challenges and one such issue is what happens to IP rights in NFTs, since the assets can be infinitely copied and transferred.

NFTs are often backed by smart contracts, which can transfer ownership of IP in the NFT to the buyer, but this is not always the case. Unless this transfer is made expressly, the agreement can merely provide a licence to display the digital asset or artwork. This is something retailers and consumer brands will have to be keenly aware of if they wish to start selling NFTs and limit the transfer of any rights to prospective buyers.

Retailers and consumer brands should make sure that appropriate purchase agreements are in place which clearly outline the rights which it is intended that the buyer should obtain. You can also consider including an indemnity for any unauthorised use or breach of the agreement. If the NFTs can be resold, you should ensure the buyer has all the rights necessary to transfer ownership, and that specific rights are cleared and waived where appropriate.

As is evident, the world of NFTs is novel and the legal landscape is in its infancy, which means that retailers and consumer brands will have to have robust enough agreements in place to combat any inadvertent transfers of rights or potential misuses down the line once any NFTs are sold.

If you would like to find out more about the issues surrounding NFTs, please see our recent blog on this topic here.

RPC is hosting a series of in-person events and experiences in a multifunctional collaboration space around London Tech Week in September 2021.
The event will bring together a variety of thought leaders to discuss the vital role technology plays in the UK's retail, insurance and tech sectors, including a special session on the rise of NFTs and the potential they hold for retailers and consumer brands.



# LONDON TECH WEEK

## THURSDAY 23 SEPTEMBER 2021

Join us for an afternoon looking at the impact that tech is having on the retail and consumer industry, including:

14.00 – Buy now, pay later: what's coming down the line?
15.00 – Esports and gaming takeover
16.30 – NFTs masterclass: the tech transforming retail and consumer

For more information and to register, please visit our website.


REIMAGINE!
Beyond 2030: Sustainable Development Goals

**Friday 24 September 2021**

**14:00 – 20:00 BST**

The Soho Hotel, 4 Richmond Mews, London, WID 3DH

# Other developments | Rest of World

## Hong Kong – important changes to employment law now live

2021 saw significant changes to legislation in Hong Kong take effect, to enhance the statutory rights of employees. This included:

- maternity leave and paternity leave:
  - from 11 December 2020, statutory maternity leave was extended from 10 weeks to 14 weeks for eligible female employees under a continuous contract of employment, and
  - the period within which an expectant father may choose to take paternity leave now begins four weeks before the expected due date and ends 14 weeks (as opposed to the original 10 weeks) after the actual due date
- expanded discrimination protection: A number of amendments to the four discrimination ordinances (Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487), Family Status Discrimination Ordinance (Cap. 527) and Race Discrimination Ordinance (Cap. 602)) have taken effect (since 19 June 2020), including:
  - the scope of unlawful sexual, racial and disability harassment has been expanded to include unlawful conduct by "workplace participants" (ie those who work in the same workplace) and is no longer limited to those with an employment relationship
  - the scope of unlawful racial discrimination and racial harassment has been expanded to prohibit racial discrimination and racial harassment by imputation, and to prohibit direct racial discrimination and racial harassment of a person because of the race of his/her "associate", and
  - Plaintiffs are no longer required to prove that the Defendant(s) intended to discriminate in a claim of indirect discrimination
- discrimination against breastfeeding women:
  - effective 19 June 2021, the legislative provisions prohibiting discrimination against breastfeeding women came into force
- guidance from the Privacy Commissioner for Personal Data was issued in respect of data security and personal data privacy applicable to those who are working from home
- progressive yearly increase in statutory holidays from 12 days to 17 days.

**Tips**

- Retailers employing staff in Hong Kong should consider reviewing and, where necessary, updating their employment contracts, employee handbooks, and/or employee policies to ensure that they are up to date and comply with the refreshed Hong Kong laws.
- Consider giving employees and other workplace participants refresher training.

## Hong Kong – plastics proposals for the F&B industry

2021 has seen notable developments in the food and beverage sector in Hong Kong, from a legislative and consumer-growth perspective – all with a focus on reducing impact. These include:

- the Environmental Protection Department (**EPD**) has proposed a Producer Responsibility Scheme on Plastic Beverage Containers (the **PPRS**) in Hong Kong. Under the PPRS, it is proposed that retailers of plastic beverage containers will be required to make available return points for used plastic bottles, for which consumers will receive a rebate. Manufacturers and importers will bear the operational costs of the PPRS through an imposed levy. It is also proposed that Reverse Vending Machines will be used, and a pilot scheme is currently underway; however, it is not intended that the PPRS will come into effect until 2025, giving retailers and suppliers time to prepare
- the EPD also launched a public consultation on the Scheme on the Regulation of Disposable Plastic Tableware (the "Scheme"), which concluded on 8 September 2021. The aim of the Scheme is to reduce the use of plastic items such as expanded polystyrene (**EPS**) tableware, straws, stirrers, forks, knives, spoons, plates, cups, cup lids, food bowls, boxes and container lids by introducing a phased ban on these items, initially for eat-in services and eventually for takeaway services as well, and
- like the UK, Hong Kong has seen the development and rise in consumption of plant-based meat alternatives, such as Omnipork, Beyond Meat, Impossible, and the newest Tindle, which are now sold across supermarkets and restaurants. Recent reports predict that consumer demand for plant-based meat across Asia-Pacific markets will increase by up to 200% in the next five years.





## Two new data protection laws in China: The Personal Information Protection Law

*These pieces were co-authored by David Pan, Partner from our Terralex network firm in China, Linklaws Law Offices*

In our Summer 2020 edition of Retail Compass, we highlighted upcoming changes to personal information security laws in China. In August 2021, China passed the Personal Information Protection Law (the PIPL), which will take effect from 1 November 2021 and makes further changes to personal information protection. The PILP:

- **has extra territorial effect**: it applies to anyone who processes personal information about Chinese individuals inside or outside of China
- requires the **storage** of certain personal information in China and imposes restrictions on the **cross border transfers of data**, including requiring the individual's consent for the transfer
- requires persona information to be **processed** under one of seven legal bases (as set out in Article 13) including processing:
  - of "personal information already disclosed", although an individual can still refuse this
  - that is "necessary to conduct human resources management under the labour rules" ie for HR to process employee personal information, and
  - when individuals have voluntarily and explicitly provided consent to such processing, which they still have the right to withdraw
- specifies that separate consent from data subjects be obtained when processing sensitive personal information such as biometric data, medical and health data and financial accounts
- sets out specific rights for individuals in respect of their personal information, including the rights to:
  - **access** and copy their personal information
  - **correct** and **delete** personal information, and
  - **restrict** or **refuse** the processing of their personal information
- imposes obligations on data processors who process personal information, and
- increases the penalties for breaching the PILP, which include:
  - for data processors, a **fine** of up to RMB 50 million or 5% of its annual revenue of the last year for serious cases
  - for concerned individuals, a fine of RMB 10,000 to RMB 100,000, disqualification of acting as director, supervisor, senior manager or DPO, and
  - other criminal and civil liabilities.

### ...And The Data Security Law of the People's Republic of China

The Data Security Law of the People's Republic of China (the DSL) came into effect on 1 September 2021. This is intended to regulate "data activities", ensure data security, and protect individuals' and organisations' lawful rights and interests. We highlight below some of the key principles of the DSL:

- **extra territorial effect**: the DSL applies to data handling activities outside of the PRC that may "harm the national security or public interests of the PRC, or the legitimate rights of Chinese citizens or entities" (Article 2)
- **key definitions**:
  - **data**: any record of information, in electronic form or otherwise
  - **data activities or data handling activities**: the collection, storage, usage, processing, transmission, provision or disclosure of data, and
  - **data security**: the ability to ensure that data is effectively protected and lawfully used through adopting necessary measures, and remains continually in a secure state
- general obligations on companies and individuals that carry out data activities include:
  - establishment of a **comprehensive data security management system** to implement measures to ensure data security, and conducting regular assessments of the same
  - providing data security **training** to staff, and
  - **notifying** users and authorities of security incidents

- **non-compliance** could result in fines of up to **RMB 2m**, up to **RMB 10m** for any organisations or individuals found to have endangered national security or harmed state sovereignty through their activities, and/or revocation of their business licence. Responsible personnel may also face fines up to RMB 200,000.

The PILP and the DSL, together with the new Automobile Data Regulation (issued under the DSL, which defines what constitutes "important data" and will take effect on 1 October) and the Regulation on the Protection of Security of Critical Information Infrastructure (which came into effect on 1 September 2021 under China's Cyber Security Law, enacted in 2016) fit together to create a new comprehensive data protection framework in China. This highlights the need for companies with businesses or customers in China to consider the impact of these new regulations on their operations and, in particular, data processing activities, so that they may take appropriate steps towards compliance as soon as possible.

# Other developments | Rest of World

## Singapore – introduction of mandatory data breach notifications

Retailers operating in Singapore should be aware that if you suffer a personal data breach, it may now be mandatory to report the breach to Singapore's data protection authority.

The Personal Data Protection Act 2012 (**PDPA**) was amended to include a mandatory reporting regime for certain types of data breaches. The amendment took effect from 1 February 2021.

Where an organisation has reason to believe that a data breach affecting personal data in its possession or under its control has occurred, it must conduct, in a reasonable and expeditious manner, an assessment of whether the data breach is a notifiable data breach.

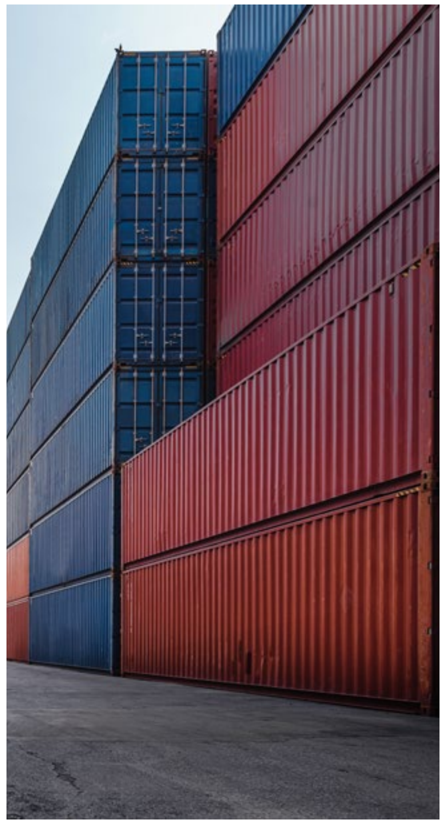
A data breach is notifiable if the data breach either results in or is likely to result in: 1) significant harm to an affected individual; or 2) is (or is likely to be) of a significant scale. To break this down:

- a data breach is deemed to result in significant harm to an individual if the data breach relates to an individual's:
  - full name, alias and/or identification number and any of the personal data or classes of personal data relating to the individual set out in the Schedules of the PDPA, or
  - account with an organisation containing the individual's account identifier (such as an account name or number), password, security code, access code, response to a security question, biometric data and/or other data that is used or required to allow access to or use of the individual's account
- a data breach is deemed to be of a significant scale if the data breach affects 500 or more individuals.

The Personal Data Protection Commission (**PDPC**) is to be notified of the data breach within three calendar days (after the organisation makes its assessment). If the data breach results in, or is likely to result in, significant harm to an affected individual, the affected individual is to be notified as soon as practicable.

Tip:

- Singapore retailers should consider updating data breach policies and procedures to reflect the new rules – particularly given the short timeframes involved – and ensure eg staff are aware of what constitutes a breach, to whom this should be escalated internally and who determines within the organisation what and how breaches should be notified.
- Retailers may also wish to consider whether some data can be stored in a non-identifiable form, such that a breach would not involve personal data, ie taking it outside the scope of notification.



## Consumer law changes in Australia

*This piece was co-authored by Lisa Fitzgerald, Partner from our Terralex network firm in Australia, Lander & Rogers*

As of 1 July 2021, the definition of a 'consumer' under the Australian Consumer Law was broadened to those purchasing goods or services up to a monetary threshold of $100,000, increasing from $40,000.

A person or business is considered a "consumer" for the purposes of the Australian Consumer Law if they purchase goods or services:

- with a price of up to $100,000, or
- which are ordinarily acquired for domestic, household or personal use or consumption, or
- consisting of a vehicle or trailers acquired for use principally in the transport of goods on public roads.

Under the new rules, the increased price threshold means that many more consumers (including businesses) will qualify for the various protections under Australian Consumer Law.

This change now captures more business-to-business transactions and is likely to impact suppliers of high-value goods (between $40,000 and $100,000). Suppliers should consider whether their offerings are affected by the change. For impacted products and services, suppliers should consider reviewing their contracts, policies, terms, conditions, guarantees and warranties to confirm that they are sufficient to cover their obligations under the Australian Consumer Law.





## USA – Coast to coast data protection law looming for United States

*This piece was co-authored by Staci Jennifer Riordan, Partner from our Terralex network firm in the USA, Nixon Peabody LLP*

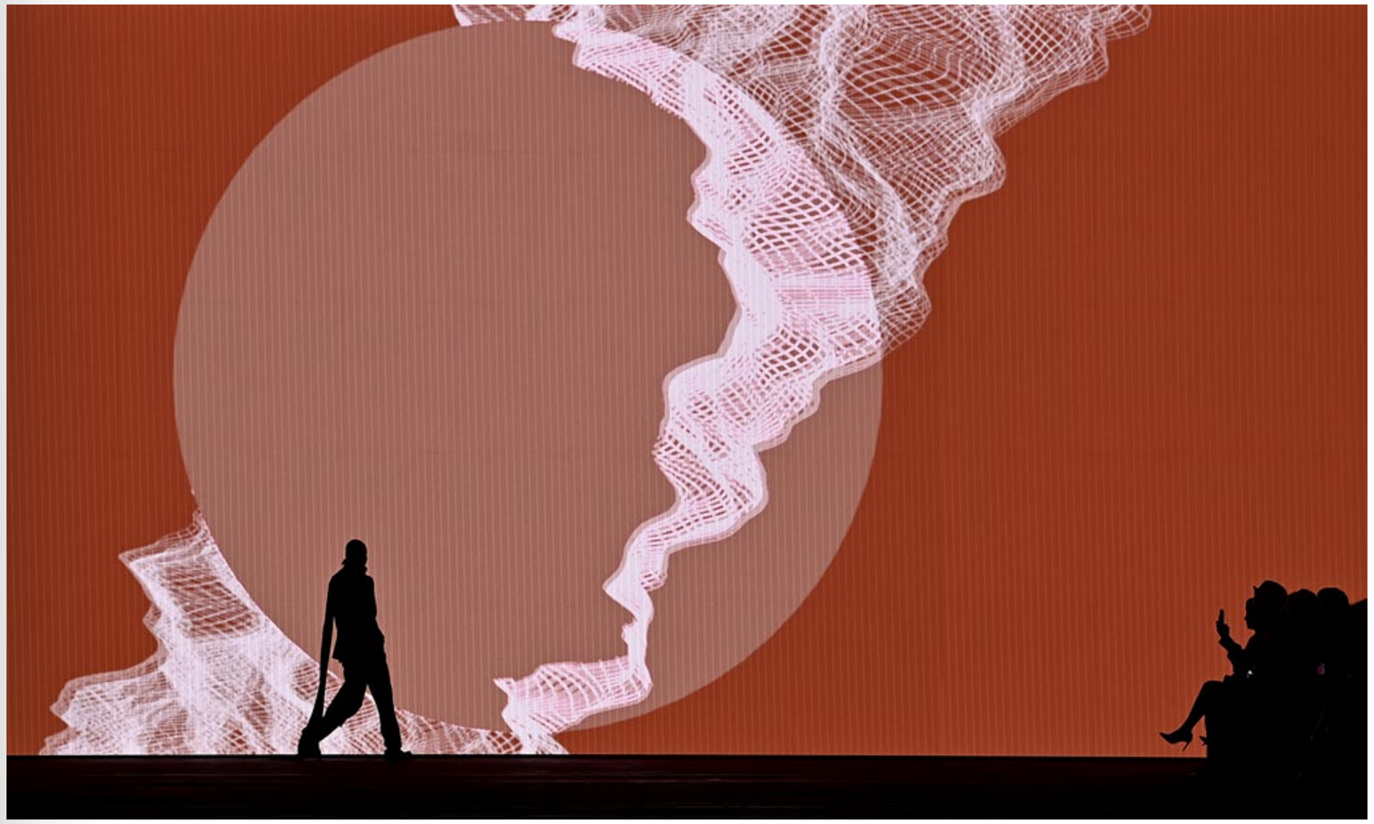
The Information Transparency and Personal Data Control Act, if passed into law, will become the USA's first country wide, comprehensive piece of privacy legislation. This follows California's, Colorado and Virginia's introduction of state-wide privacy legislation. The bill was introduced to the United States house of representatives in March 2021 and was supported by a number of consumer privacy and technology organisations.

Like the GDPR, the proposed bill will control how sensitive personal data is collected, processed, stored and shared, as well as give additional protections to consumers. It will also provide the Federal Trade Commission (FTC) with rulemaking powers so that they are able to develop further requirements for entities that collect, process, store, share or sell personal information. Most specifically, this includes a responsibility on the data collector/processor to obtain opt-in consent for the collection, sharing or other disclosure of personal information.

The definition of "sensitive personal information" is relatively wide and includes account numbers, genetic data and government issued identifiers (such as social security numbers). However, information that is publicly available as well as employee data will not fall under the definition.

The bill grants enforcement powers to the FTC and state attorneys general but does not include any private right of action. In the event of a violation, the FTC or the state attorney general is required to notify the relevant data controller of the alleged breach and give them 30 days to rectify the breach before commencing enforcement actions.

While retailers have had to ensure compliance with the relevant state regulations, if passed, they will now need to ensure they are compliant across the country. Even before passage, current best practices for retailers include ensuring that they are using plain English for privacy policies, properly documenting their privacy security and data use controls and keeping accurate records of any breaches and the steps taken to rectify them. Furthermore, retailers should make sure that they are obtaining affirmative opt-in consent from consumers allowing them the collect and process their sensitive information as well as disclosing to consumers to whom their information might be shared and for what purpose.



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# Insights and opinions

## Net Zero Supply Chains

by The Chancery Lane Project

**The Chancery Lane Project (TCLP) is a collaborative effort of lawyers and other key stakeholders from around the world to develop new contracts and clauses to help fight climate change.**

TCLP now have a bank of over 70 clauses that organisations can include into their contracts with the intention of holding respective parties to account in respect of their climate goals. With a focus on net zero emissions targets, organisations such as Salesforce and the Environment Agency have used TCLP's clauses to drive sustainability goals through their supply chain agreements, practices and procedures.

To date, there have been over 63,000 downloads of TCLP's free published clauses, and hundreds of lawyers and organisations globally are tailoring the clauses to suit their own climate requirements. By implementing internal contractual changes, organisations are driving their operations and business models to change and directly impacting their emissions. With the impending climate crisis, applicable and efficient solutions are indispensable; TCLP believes that by reviewing and updating supply chain agreements huge steps can be made by organisations in reaching their sustainability targets.

### Supply chains overview

There is a growing momentum from the business community to commit to net zero targets, for example by signing up to the UNFCCC Race to Zero, but the majority are finding Scope 3 emissions (indirect emissions, those associated with supply chains) the most difficult to measure and reduce due to lack of data and transparency (see Glossary definition of Scopes 1, 2 and 3 Emissions). Climate risks also affect critical supply chain issues of cost, quality, speed and responsiveness, and the uncertainty of disruption.

The UK's target to slash emissions by 75% by 2035 is due to be enshrined in law in the wake of the Climate Change Committee's Sixth Carbon Budget. Regulation is increasingly requiring emissions reporting, and customers and consumers alike are demanding more stringent ESG policies be put in place. But supply agreements can be decades old, locking in climate negative behaviour and preventing the innovation that's required for climate action. Supply agreements need to become enablers of rapid and transformative change, not barriers to it.

TCLP's Supply Chain climate clauses facilitate supply contracts becoming vehicles for setting environmental performance and helping drive the transition to net zero emissions.

The clauses do this by:

- offering mechanisms to create, measure and verify binding emissions commitments
- cascading emissions reductions through supply chain contracts, thus accelerating participation in carbon reduction, and
- ensuring climate change is a central issue across all companies' agendas, by incentivising greener suppliers.

TCLP believes every commercial actor can use their business activities and skills to facilitate the green transition, and use TCLP's climate clauses to make contracts enact tangible and powerful change.

### Clause overview

Take a look at three of TCLP's supply chain clauses, encouraging suppliers to reduce their emissions and providing accompanying tracking and monitoring tools.

**Green Supply Agreement – general supply agreement clauses and checklist for the supply chain**

Green procurement clauses and a checklist enable companies to focus on emissions across a value chain. To achieve net zero emissions, an organisation will have to work with their supply chain to align them with the same target. By encouraging other companies in a supply chain to improve their environmental performance, there is a cascading effect and the speed at which we can transition to net zero can significantly accelerate. A supplier measuring their emissions helps companies to measure and report on their Scope 3 emissions.

Highlights:

- requirement that the Supplier adopts the Carbon Footprint Standards
- opportunity for the organisation to choose a percentage by which the supplier must reduce its GHG emissions, and
- includes a green procurement checklist to include in contracts for measurement of emissions, reductions and reporting.

**Target Product Carbon Footprint Agreement – carbon budget for individual products**

This agreement includes a carbon footprint budget, which reduces over time for each product manufactured and supplied pursuant to the contract. By driving change from the bottom up, the budget allows companies to make holistic decisions that appropriately account for carbon emissions. Customers will measure a supplier's performance on how 'affordable' their products are in carbon terms.

**Highlights**:

- requires carbon adjustment dates, by which the carbon footprint target of products will reduce by agreed percentages
- includes an audited Carbon Footprint Report from the supplier, and
- provides the ability to adjust prices where the target is surpassed.

**Sustainability Clauses in Supply Chain Agreement – for companies to ensure cross-border climate measures**

With a focus on multi-jurisdiction companies, this supply chain agreement extends positive climate change measures from one country to parties in other countries that may have less of a legislative focus on climate. This is particularly important for those working with companies in jurisdictions who are lacking strong environmental laws. The clauses allow a company to address the imbalance in regulation between countries.

**Highlights**:

- includes an Environmer
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- allows parties to undert
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**What can you do?**

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- Explore the clauses on
- Create a roadmap to in
zero clauses in your co
- Tailor TCLP's clauses to
organisation's climate goals and insert into your contracts.

Explore the clauses here.

You can sign up to hear more about the release of the Net Zero Toolkit here.

*"The average organisation's supply chain emissions are estimated to be 5.5 times greater than those generated by their direct operations."*

Source: Forbes

CLICK TO REVEAL PAGE >

## Speed read

### Net Zero Supply Chains by The Chancery Lane Project

The Chancery Lane Project (TCLP) is a collaborative effort of lawyers and other key stakeholders from around the world to develop new contracts and clauses to help fight climate change. TCLP's free published clauses have been downloaded many thousands of times; they seek to drive change by:

- offering mechanisms to create, measure and verify binding emissions commitments
- cascading emissions reductions through supply chain contracts, thus accelerating participation in carbon reduction, and
- ensuring climate change is a central issue across companies' agendas, by incentivising greener suppliers.

INSIGHTS AND OPINIONS

# Insights and opinions cont

## BRC: key insights as Retail approaches the crucial fourth quarter



by Kyle Monk, Director of Insight, British Retail Consortium

**Following one of the most challenging years in living memory for the retail sector, the story in 2021 has been far more nuanced. As we approach the all too crucial fourth quarter there is both cause for celebration and cause for concern.**

The victories to celebrate are that retail sales have been in near double-digit growth in the six months to August, with many non-food categories, from computing to furniture, seeing growth compared to pre-pandemic levels. Even beleaguered fashion retailers have some cause for optimism, with a strong third quarter performance. The successful re-opening of the economy, with retail, leisure and hospitality opening mostly concurrently, made returning to our high streets and shops a more appealing prospect. This, combined with a largely successful vaccine rollout, has helped consumer confidence rise, and the perception of safety around social activities has begun to return.

The British publish amassed an unheard of £190bn in savings over the course of the pandemic, compared to £5bn in an average pre-pandemic year. Some pent-up demand has been released over the summer, but how long this will last and to what extent these savings will be spent is unclear.

The challenges for the sector are predominantly structural, and severe. In recent months driver shortages have made headlines, however there is significant tightness in the labour market across a variety of areas such as butchers, store staff and other logistics or fulfilment roles within retail. This has led to substantially increased labour costs across the supply chain. Wage inflation is a driver of longer-term inflation, as it is likely to be more persistent than other factors. Globally, input prices are rising, commodities like wood and semi-conductors have seen substantial price increases, while freight costs are nearly five times their pre-pandemic levels and still rising. There is no immediate solution to many of these challenges. It will take over a year in a best-case scenario to train enough British drivers to meet the shortfall, and unfortunately it is now likely too late for the implementation of short-term skilled worker visas for drivers to make a difference for retail's peak trading period. With the volumes of goods sold rising 30-40% during the so called 'Golden Quarter', this is likely to lead to reduced variety and availability of many products in the lead up to Christmas, with likely knock-on effects for the profitability and reputation of many retailers as supply struggles to meet demand.

Beyond these more immediate effects, the shape of the economy has fundamentality changed through Brexit and Covid – both in terms of how consumers engage and buy from businesses, but also in term of how retailers can fulfil these needs.

### The rise of hybrid working

The greatest question mark over the evolution of retail remains how the British public return to work. Many companies have earmarked September as the date their employees will return, coinciding with the last month of the furlough scheme and a month after the last of the government's restrictions have been lifted.

Footfall remained 21% below pre-pandemic levels in August, and September performance will largely dictate whether this level is the 'new normal' for high streets, shopping centres and retail parks or whether working patterns will help lift footfall closer to its 2019 levels.

The British public are far more comfortable shopping online than ever before, and home working even one day a week facilitates accepting these deliveries. Many retailers have reported a substantial rise in online shopping during working hours and expect this to continue in a possible hybrid future. The future of stores and high streets is less certain and will require action from the government to mitigate costs such as business rates, and ensure they remain vibrant and attractive destinations in coming years.

### A new generation of digital natives

The largest growth demographic for online shopping over the last 16 months has been in the over 45s, with many consumers who previously had been more comfortable shopping in stores being forced to do so online. As this friction has been removed, we expect the share of spend made online to be permanently higher. This is leading to new behaviours; previously during inclement weather, store sales would fall, but bounce back when the weather returned. These sales are now no longer delayed, and instead shift immediately to online channels. In August sales made online were up 20% on pre-pandemic levels, and we expect the share of spend made online to remain permanently and substantially higher.

### A sustainable and meanin[...] for retail

Sustainability covers a broa[...] of ethical behaviours, and [...] profoundly different mean[...] different demographics and [...] This past year, the rapid acceleration in the shift to online has resulted in consumers becoming much more aware of the provenance of what they buy, and more selective in both how and where they do so. This requires a considerable amount of thoughtfulness from retailers on how they implement and convey their sustainable credentials.

Nearly one in five UK consumers fall into what the BRC have defined as our 'Planet first' segment, however, there remains significant ambiguity in both how committed individuals are to living more sustainably, and their understanding of their own impact.

[...] galvanise collaborative efforts and reduce greenhouse gas emissions and get the industry to net zero. Sustainability means different things to different people, and encompasses more than just carbon emissions, however. Ending modern slavery in supply chains, protecting eco-systems, ensuring better diversity and inclusivity within retail workplaces and reducing plastics are all of significantly higher importance to the UK public than in previous years. The BRC are supporting the sector in shifting the dial on many of these issues.

We hope 2022 will see some of the tumult from the last two years stabilise into a better future for the sector and the consumers it serves. Retailers must continue to monitor changes in consumer behaviour closely and innovate to stand the best chance of meeting them head on.

The British publish amassed an unheard of

£190bn

in savings over the course of the pandemic, compared to £5bn in an average pre-pandemic year

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**Speed read**

**BRC: key insights as Retail approaches the crucial fourth quarter by Kyle Monk, Director of Insight, British Retail Consortium**

Kyle Monk, the Director of Insight at the British Retail Consortium (BRC), considers what lies ahead for retail as we head into the important run-up to Christmas – with both causes for concern and celebration. He also addresses three major issues facing retailers in the longer term: the move to hybrid working; the lasting increase in online shopping; and the move towards sustainability.

## Key UK consultations and inquiries tracker

There are numerous ongoing Government consultations and inquiries affecting retailers. You can view all of the up-to-date information here.

## Legislative bills tracker

We maintain a list of bills, currently in the UK Parliament, which are relevant to the retail sector. These bills are not yet in force as law, but they give a flavour of developments to come.




# RPC contacts

If you would like to get in touch, please contact our heads of Retail, Karen Hendy and Jeremy Drew, or your usual RPC contact.

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Contact details for RPC's contributors to Retail Compass, and our other Retail lawyers, can be found using this code:

# An overview of RPC and TerraLex

### Full service firm

RPC is an innovative law firm, providing a full service to UK and international clients. Retail is one of five key focus areas for RPC – and serviced by every single practice area of the firm. We have a fantastic retail practice – ranked Tier 1 for Retail & Consumer by Legal 500 – which provides expert sectoral focus and transparent and honest advice.

### Retail through and through

We have over 70 retail lawyers (30+ of those partners) engaged on retail issues across our four offices (London, Bristol, Singapore and Hong Kong). More broadly, with over 300 lawyers across offices – and as a founder-member of global network TerraLex and co-chair of its Retail Sector group – RPC offers a seamless service in more than 100 jurisdictions across the world.

### We are recognised as a leading voice on retail issues

20 of our lawyers have been quoted or mentioned across 55 publications, including the FT, Telegraph, The Times, The New York Times, The Business of Fashion, Luxury Law Alliance, The Grocer, Drapers and Retail Gazette in the last 12 months.

### What others say about us

**Retail clients quoted in Legal 500 2020**

*"An excellent team with a good strategic overview."*

*"Clever, hardworking and willing to roll up their sleeves to get things done."*

*"Extremely business orientated and extremely tactically astute. On top of that a real pleasure to work with."*

**Retail clients quoted in Chambers and Partners 2020**

*"They have been very good at stepping up to meet our demands and proactive at providing legal updates."*

*"They were brilliant and helpful at getting us what we wanted."*

*"They are practical, very personable and have a good work ethic."*

**Top ranked**
RANKED TIER 1 BY LEGAL 500 FOR RETAIL & CONSUMER

**Winner**
LUXURY DEAL OF THE YEAR (STELLA MCCARTNEY) THE LUXURY LAW AWARDS
2020

**Shortlisted**
CORPORATE TEAM OF THE YEAR FOR RETAIL RELATED WORK AT THE LAWYER AWARDS
2020

**Shortlisted**
DIVERSITY INNOVATION – LEGAL WEEK INNOVATION AWARDS
2019

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